

Legal Issues Arising from the Possible Inclusion of Private Military Companies in UN Peacekeeping

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I. Introduction

The main aim of this article 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 idea of private military contractors conducting combat-related activities traditionally reserved for public authorities, especially at the international level, is thought-provoking. Not only are the legal implications complicated, it also raises complex political questions, especially in the light of historical trends toward the national and international regulation of military activities

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, 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 both today and during the 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. A situation 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 the lack of enthusiasm for this idea are that the UN might gain autonomy, the increased costs such developments would entail, 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 only way to improve UN peacekeeping in the wider role of the UN's contribution to world 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 the states as contributors of troops.¹ This is a time-consuming process, which sometimes results in late reactions to situations which would 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

¹ C. Rochester, *White Paper: A Private Alternative to a Standing United Nations Peacekeeping Force*, Washington Peace Operations Institute, 2007.

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 dissuades governments from committing themselves to UN engagement, namely the threat of casualties when they send troops. 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 example of this. In short, adopting this policy might increase the capacity of the UN to accomplish its peacekeeping work.

This article explores therefore the legal implications, consequences and limitations of such a policy option. 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, often in an undefined manner. Lastly, it is a situation without a clear-cut legal precedent, calling for the application of peacekeeping-related practice and allowing for some analogies, but leaving room for innovative thinking.

The work is organised as follows: first, the concepts of peacekeeping and PMCs will be clarified. The second part then outlines the legal framework applicable to PMC peacekeeping in detail: two scenarios for PMC inclusion are described, the legal subjects involved are identified and the applicable substantive rules of international law are surveyed. Emphasis is placed on the rules relating to UN peacekeeping and they are applied in analogy at the end of each section regarding either private contractors or the two outlined hypothetical scenarios. Next, the two scenarios are tested against rules of international responsibility for wrongful acts. The conclusion outlines the major findings 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 UN peacekeeping force and a PMC. 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 essential since the 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 recognised definition which would easily serve legal purposes, although one could perhaps claim that peacekeeping is characterised 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 importance as it points to the underlying issues causing doctrinally divergent international law debates, although limited space demands a concise analysis of the issue.

1. A UN Peacekeeping Force

It is preferable to turn first to the understanding of the terms peacekeeping and peacekeeping force. The concepts are not new, they operate within a clear and well-established legal framework, and they serve as a basis for the theoretical incorporation of PMCs, defined later in this paper. A maximalist understanding of peacekeeping, 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 and material transformations that are essential to make peace sustainable.”² The term nowadays, often used interchangeably with peace support operations or even with peacebuilding, has undergone considerable development since it was first used in 1956.³ This is characterised by its partial detachment from the

² M. Doyle/ N. Sambanis, “Peacekeeping Operations”, in: T. Weis/ S. Daws (eds), *The Oxford Handbook on the United Nations*, 2007, 323 et seq. (332); K. Rudolph, “Peace-Keeping Forces”, in: R. Wolfrum (ed.), *United Nations: Law, Policies and Practice*, 1995, 957 et seq.

³ The then UN Secretary-General Hammarskjöld and the former Canadian foreign minister Pearson invented the term for the purpose of the establishment of UNEF I (United Nations Emergency Force); M. Bothe, “Peacekeeping”, in: B. Simma (ed.), *The Charter of the United Nations: A Commentary*, 2002, 648 et seq. (681).

UN and the differentiation of three generational paradigms of peacekeeping.⁴

The so-called first generation of peacekeeping encompasses a consent-based interposition of lightly-armed forces under 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.⁵ 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 also includes, in a more complex way, an element of crisis management.⁶ The third generation of peacekeeping mainly encompasses enforcement operations under Chapter VII,⁷ blurring the line between peacekeeping and peace enforcement.⁸ An extended comprehensive operational strategy involving the authoritative assistance in administering and re-building states with the aim of assuring sustainable

⁴ This paragraph draws from Doyle/ Sambanis, see note 2. For a comprehensive description of UN peacekeeping generations see also M. Katayanaagi, *Human Rights Functions of United Nations Peacekeeping Operations*, 2002, 42-54.

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

⁶ Examples are: UNAVEM (UN Angola Verification Missions I, II and III), various UN Missions in Haiti UNMIH (UN Mission in Haiti) and its successors. See in respect of Haiti J. Leininger, "Democracy and UN Peacekeeping – Conflict Resolution through State-Building and Democracy Promotion in Haiti", *Max Planck UNYB* 10 (2006), 465 et seq., and UNAMIC (UN Advance Mission in Cambodia) and UNTAC (UN Transitional Authority in Cambodia), see Bothe, see note 3, 682.

⁷ 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, Doyle/ Sambanis, see note 2, 327 et al.

⁸ 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 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", *Hastings Law Journal* 58 (2007), 479 et seq. (481).

peace is required.⁹ The role of military functions and personnel in this contemporary understanding of peacekeeping, which 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 must be recognised. 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.”¹⁰ 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 creation and engagement. 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.¹¹ The need to separate UN authorised peacekeeping from Article 42 enforcement measures¹² or Chapter VI measures for peaceful settlement of disputes¹³ results in reference to peacekeeping, which is sometimes referred to as the Chapter VI and a half action.¹⁴ Through

⁹ The doctrinal strategy was provided by the UN Secretary-General in his report *An Agenda for Peace*, Doc. A/47/277-S/24111 of 17 June 1992.

¹⁰ M.N. Shaw, *International Law*, 5th edition, 2003, 1108.

¹¹ The reference here is, of course, to the 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 UN 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.

¹² Taken by the UN or its members on behalf of the UN in their role of restorer of international peace and security.

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

¹⁴ The action is an 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 the attention of the Security Council or General Assembly (Article 35 (1)), and the latter may “recommend appropriate procedures or methods of adjustment” (Article 36 (1)), which can, at least on paper, include also action (Article 37 (2)). It is, however, Chapter VII which provides the Security Council with powers to take decisions that

the authorisation of peacekeeping operations the UN Security Council,¹⁵ (or exceptionally the General Assembly¹⁶) *de facto* mandates an action to aid the warring parties in their dispute settlement. Often the peacekeepers are mandated to use force in order to carry out their mandate. This is essentially a situation-specific characteristic of a mission, therefore making generalisations difficult. One could claim, however, that recent practice has gone beyond the pure “self-defence” character of peacekeeping in the direction of peacekeepers being authorised “to use all necessary means to carry out its mandate.”¹⁷ 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 consent¹⁸ of the respective states and armed factions.¹⁹ Despite being standard practice expressing the *bona fide* of warring parties, such consent can have a very limited value in reality. In any case, it should not be seen as a blanket authorisa-

its members are bound to accept and carry out (Article 25), which include restrictive measures including the use of force.

- ¹⁵ This is a well-established practice now, confirming the Council’s primary responsibility for the maintenance of international peace and security. The Council has the power to create subsidiary organs under Article 29. Generally on UN subsidiary organs see D. Sarooshi, “The Legal Framework Governing United Nations Subsidiary Organs”, *BYIL* 67 (1997), 413 et seq. (416).
- ¹⁶ Such action can in theory be authorised by the UN General Assembly, according to the *Uniting for Peace* Resolution (A/RES/377 (V) of 3 November 1950), which, however, did not refer to 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 General Assembly, see for the latter D. Gruss, “UNTEA and West New Guinea”, *Max Planck UNYB* 9 (2005), 97 et seq.
- ¹⁷ Saura, see note 8, notes, that in 2007 out of the six operations based on Chapter VII, only UNMIL (UN Mission in Liberia) was not expressly authorised to use force along these lines.
- ¹⁸ C. Greenwood, “International Humanitarian Law and United Nations Military Operations”, *Yearbook of International Humanitarian Law* 1 (1998), 3 et seq. (10); B. Tittmore, “Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations”, *Stanford J. Int’l L.* 33 (1997), 61 et seq. (77); Saura, see note 8, 482.
- ¹⁹ U. Palwankar, “Applicability of International Humanitarian Law to United Nations Peacekeeping Forces”, *Int’l Rev. of the Red Cross* 294 (1993), 227 et seq. (228).

tion for the use of force, particularly as UN operations are deployed in order to keep or to assist in maintaining conditions for peace rather than to provide them.

Finally, one needs to explore the essential link between the peacekeeping force and the UN that has authorised its deployment. The Department of Peacekeeping Operations (DPKO) is charged with planning, preparing, managing and directing UN peacekeeping operations so that they can effectively fulfil their mandates under the command vested in the UN Secretary-General, who reports to the Security Council on their progress.²⁰ The mandates provided are often vague and complex in their transformation into practice. This said, one may propose the following understanding of the term as it will be used here: a UN peacekeeping force is a formation of a mainly military character, which is legally established and mandated to conduct its activities by the UN Security Council and operates under the command vested in the UN Secretary-General, to whom it is ultimately responsible.

2. A Private Military Company (PMC)

The integration of private contractors in military-related activities at national and international level has proliferated considerably since the late 1990s,²¹ 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,²² resulting in an agreement that “there is no commonly agreed definition of what constitutes a ‘private military company’ or a ‘private security company.’”²³ A distinction between the two, built

²⁰ See below. See also S. Gordon, “Icarus Rising and Falling: The Evolution of UN Command and Control Structures”, in: D.S. Gordon/ F.H. Toase (eds), *Aspects of Peacekeeping*, 2001, 19-41.

²¹ See J. Messner/ Y. Gracielli, *State of the Peace and Stability Operations Industry: Survey 2007*, for an overview of the industry.

²² S. Chesterman/ C. Lehnardt, “Introduction”, in: S. Chesterman/ C. Lehnardt (eds), *From Mercenaries to Markets: The Rise and Regulation of Private Military Companies*, 2007, 1 et seq. (3).

²³ E.C. Gillard, “Business Goes to War: Private Military/Security Companies and International Humanitarian Law”, *Int’l Rev. of the Red Cross* 863 (2006), 525 et seq. (529).

upon the different nature of their engagement,²⁴ seems to prevail. It is, however, of limited value as the reality on the ground appears to be that many companies offer a broad spectrum of services.²⁵ Furthermore, associating PMCs solely with offensive activity and security companies only with defensive activity makes little sense, as the line is extremely blurred²⁶ 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.²⁷

PMCs can and do perform a wide variety of activities on behalf of virtually all active participants in international relations.²⁸ This functional diversity makes classification difficult and stimulates a definition of the activities rather than of the entity itself.²⁹ They are first distinguished by their impact, either between those aiming to alter the strate-

²⁴ 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/ Lehnardt, see note 22, 2; F. Schreier/ M. Caparani, “Privatising Security: Law, Practice and Governance of Private Military and Security Companies”, *DCAF Occasional Paper No. 6* (2005), 26; B. Perrin, “Promoting Compliance of Private Security and Military Companies with International Humanitarian Law”, *Int’l Rev. of the Red Cross* 863 (2006), 613 et seq. (614); D. Brooks, “Protecting People: The PMC Potential. *Comments and Suggestions for the UK Green Paper on Regulating Private Military Services*”, 25 July 2002, 2-3, available at: <<http://www.hoosier84.com/0725brookspmcregs.pdf>>.

²⁵ Gillard, see note 23.

²⁶ The typical examples are the hot pursuit and offensive defence situations: an attack on a military entity by another can lead to a counterattack of the former for defence purposes, in order to chase away the original attacker. Whether the reacting entity (or its activity) should be seen as offensive or defensive remains unclear.

²⁷ L. Doswald-Beck, “Private Military Companies under International Humanitarian Law”, in: Chesterman/ Lehnardt, see note 22, 115 et seq. (115); also Protocol I Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts, adopted on 8 June 1977, 1125 UNTS 3.

²⁸ States being their primary clients followed by multinational corporations and increasingly also international organisations, non-governmental humanitarian or development agencies, communities and individuals.

²⁹ This classification draws from K.A. O’Brian, “What Should and What Should Not Be Regulated?”, in: Chesterman/ Lehnardt, see note 22, 29-48 (40-41).

gic 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 by private actors;³⁰ military-support operations, with strategic impact but not altering the environment alone;³¹ defensive/protective security operations;³² and non-lethal security operations.³³ Although far from being perfect, bringing some order into this classification gives at least some overview of the scope of activities the PMCs may provide. Similar to peacekeeping forces, multifunctionality may be and often is their characteristic.

After briefly acknowledging what activities a PMC can perform (at least in theory), one should 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 activity on the ground – rather the exception than the rule – the conduct of combat activities has, unsurprisingly, been perceived as the most contentious development reflected in the debates surrounding PMCs.³⁴ As is often repeated, combat activities have traditionally been the exclusive domain of a state, which enjoys a monopoly over the lawful use of force.³⁵ From an international system-wide perspective, the

³⁰ 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.

³¹ Professionalisation or integration training and logistics.

³² Protection of both large-scale installation and asset protection and small-scale personnel protection.

³³ 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.

³⁴ O'Brian, see note 29, 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).

³⁵ Chesterman/ Lehnardt, see note 22, 1, referring to internal (inferred from Weber's theory), but also external aspects (UN Charter). These arguments

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 a government (which traditionally exercises 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”³⁶ of many armed forces were outsourced to these entities in two decades.

The final step in the exercise of defining a PMC 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. 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.³⁷ 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 relations³⁸ with these public au-

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: Chesterman/ Lehnardt, see note 22, 49 et al. (56-58).

³⁶ Schreier/ Caparani, see note 24, 4.

³⁷ Similarly to peacekeepers 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.

³⁸ 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

thorities, national or international, and should not be equated with individual private actors, usually referred to as mercenaries.³⁹ A PMC therefore is a private corporate entity, capable of undertaking a wide range of military activities in a national or international setting, including direct combat engagement, hired by a public authority on a contractual basis.

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, the normative framework applicable during their interaction must now be identified. This interaction is presumed according to the two possible scenarios (or modes of engagement) resulting from a potential inclusion of PMCs in the peacekeeping operations of international organisations (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),⁴⁰ but the latter, at least to this author's knowledge, has not.⁴¹ Identifying and, in particular, putting in order the applicable rules for both scenarios (which often overlap) is a challenge since sources are numerous.

employees) to respect certain standards and avoid unintended external effects. M. Cottier, "Elements for Contracting and Regulating Private Security and Military Companies", *Int'l Rev. of the Red Cross* 863 (2006), 637 et seq. (638). For guidelines on principles governing these contractual relations see resolution *Contracts Concluded by International Organizations with Private Persons*, adopted in 1977 in Oslo by the Institute of International Law.

³⁹ 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. The distinction is, however, again fluid and one can identify the cases when individuals working for a PMC might (although unlikely) fall within the definition of a mercenary under article 47 of Protocol I Additional to the Geneva Conventions.

⁴⁰ In 1998 the United States contracted the company DynCorp to the OSCE Verification Mission in Kosovo.

⁴¹ This does not mean, however, that IOs have not been working with private contractors, particularly security firms.

To deal with this difficulty, this part is organised in the following manner:⁴² first, the basic inquiry of the legal subjects in question and their ability to assume rights and duties from the perspective of international law will be examined. 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. These rules form a system within which the specificities of potential PMC inclusion in peacekeeping are considered. The two scenarios for such an inclusion are treated separately within these subgroups only when such differentiation is necessary. The Chapter will provide the necessary background for the responsibility-related discussions below, although it avoids a detailed discussion of substantive rules.

1. Scenarios and Modes of Engagement

Before answering the question from which sources the law is 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 the UN. This secondment could theoretically be performed jointly by two or more states 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 UN, therefore *de jure* becoming an 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

⁴² It builds on M. Bothe/ T. Dörschal, “The UN Peacekeeping Experience”, in: D. Fleck (ed), *The Handbook of the Law of Visiting Forces*, 2001, 487 et seq.

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 IO, forming an integral part.

Notwithstanding this, the two approaches do differ in many ways. The applicable law is not necessarily the same nor is it 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 the 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.

2. Subjects of International Law Relating to PMC Peacekeeping Engagement

The past six decades have seen a remarkable shift from the traditional public international law perspective in recognising that entities other than states can bear rights and duties under international law. The international legal personality, although derived,⁴³ now seems indisputable for IOs.⁴⁴ Traditional peacekeeping forces composed of national

⁴³ H.G. Schermers/ N.M. Blokker, *International Institutional Law: Unity within Diversity*, 4th revised edition, 2003, 989.

⁴⁴ *Reparation for Injuries Suffered in the Service of the United Nations*, ICJ Reports 1949, 174 et seq. (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 the 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".

contingents are considered to be a part of the institutional apparatus of the UN and therefore form its subsidiary organs.⁴⁵ These national contingents, which are considered to be a part of the troop-sending state prior to integration, are put under the control and command of the UN to act within a mandate provided by the UN principal organ, almost exclusively the Security Council.⁴⁶ 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 UN. Although, as will be seen below, this transformation does not completely divest the state of responsibility for acts committed by these forces. 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 respective UN principal organ. In any case, the PMC although a private entity, would be considered a subsidiary organ presumably under effective control of the UN, and therefore being bound by 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, as well as the state where the peacekeeping operation takes place); all these can 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.⁴⁷

⁴⁵ 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, Sarooshi, see note 15, 416.

⁴⁶ It is imperative to separate peacekeeping and military operations undertaken by states or groups of states from those undertaken under a mandate of the UN. Somehow ironically, that “UN action” is privatised in a different way. See J. Quigley, “The ‘Privatization’ of Security Council Enforcement Action: a Threat to Multilateralism?”, *Mich. J. Int’l L.* 17 (1996), 249 et seq.

⁴⁷ If, hypothetically, the peacekeeping force is deployed into a 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

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 international law.⁴⁸ 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 recognised by international law and endowed with similar (but fewer) capacities than states,⁴⁹ they cannot 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 two categories of these non-state actors in particular – individuals and corporations⁵⁰ – possess the capacity to act. Therefore, the question is whether 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 very quickly answered in the affirmative with a survey of relevant bodies of international law such as international human rights or IHL,⁵¹ introducing the concept of individual criminal responsibility that supplements the international responsibility of states and IOs. The views of

capacity 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*, 2000, 122; P. Minnerop, “The Classification of States and the Creation of Status within the International Community”, *Max Planck UNYB* 7 (2003), 79 et seq.

⁴⁸ For example *de facto* regimes and peoples that represent national liberation movements, non-state armed actors, multinational companies, or even individuals. The debate here often becomes dogmatic and dysfunctional. For an overview of insights on the topic see A. Clapham, *Human Rights Obligations of Non-State Actors*, 2006, 59 et seq.

⁴⁹ Such approach is particularly feasible in order to overcome the doctrinal capacity-subjectivity debate. See D.P. O’Connell, *International Law*, 2nd edition, 1970, 81-82.

⁵⁰ One cannot deny corporations the capacity to act since joint action is one of the reasons for which they are established by individual persons.

⁵¹ See below.

analogous limited international legal personality of national or transnational corporations are, for the time being, rather isolated.⁵²

3. 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 another by outlining the framework. The UN Charter forms the basis of this framework, under which the peacekeeping operation 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 receiving 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 receiving state. Further agreements (in terms of functions) are concluded between the force contributing states and the UN, establishing a legal link between them.

The function of a SOFA and forces-contributing agreement 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 UN's staff. In the latter function, a SOFA is to be read together with the two relevant multilateral Conventions (see below) relevant in this context. The protection against maltreatment is, however, a wider concept which includes the obligations of subjects involved particularly under international human rights law (IHRL) and IHL. These two bodies of law 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. Finally, UN internal rules, national legislation (of the host state, the

⁵² See for example Clapham, see note 48, 79.

PMC-registration state and potentially personnel-origin state) and various contractual arrangements complete the relevant framework.

a. 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 traditional peacekeeping troops, foremost because the Charter is a constituting document of the international legal system⁵³ and the basis of the UN legal framework.⁵⁴ Bearing in mind these functions of the Charter and the fact that the Charter does not explicitly provide for peacekeeping forces, one can distinguish between two types of provisions: the general rules, defining the basic scope and modalities of peacekeeping activities, 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 peacekeeping. Furthermore, they also determine the scope within which the specific normative framework is then built. The starting points for these general rules are the purposes and principles of the UN. 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.⁵⁵ 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.⁵⁶ Specifically, when conducting peacekeeping action, the 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,

⁵³ S. Szurek, "La Charte des Nations Unies: constitution mondiale?", in: J.P. Cot/ A. Pellet (eds), *La Charte des Nations Unies: Commentaire article par article*, 3rd edition, 2005, 29 et seq.

⁵⁴ A note of caution is needed here. Like 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 has made some parts obsolete.

⁵⁵ Article 1 (1).

⁵⁶ 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 1991, 47 et seq., (96-97, para. 181).

among others, the basis for one of the most significant characteristics of peacekeeping operations – their consensual nature. Although practice shows that receiving states are from time to time 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.⁵⁷ Consent is of crucial importance as it establishes a *quasi* contractual relationship between the receiving state, the UN 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 more concrete can, in principle, distinguish between the following aspects: rules relating to the establishment of the peacekeeping operations,⁵⁸ to their mandate and the rights and obligations of capacity holders involved in these operations, either of public entities or of individuals.

The mandate rules distinguish between substantive powers (to deal with a certain situation), formal powers (to adopt decisions) and organisational powers (creation and functioning of the peacekeeping unit) derived from the Charter in relation to peacekeeping.⁵⁹ The Charter and subsequent practice have confirmed the Security Council's nearly exclusive role in the decision-making process leading to the establishment and mandating of peacekeeping operations.⁶⁰ Since the determination for Chapter VII situations 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 recommendations for action under Chapter VII,⁶¹ it seems plausible to conclude that the Charter supports the Council's

⁵⁷ The form of consent can vary.

⁵⁸ Partially dealt with above in the section on the working definition of a peacekeeping force.

⁵⁹ The analysis is rendered difficult as these aspects are often not clearly enough distinguished; Bothe, see note 3, 684.

⁶⁰ The power of action is enshrined in Article 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 these duties are laid down in Chapters VI, VII, VIII, and XII".

⁶¹ Which is also the sole organ of the UN in a position to make legally binding recommendations for action under Chapter VII. According to Article 25 the members of the UN agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

primacy in relation to peacekeeping.⁶² 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.⁶³ Therefore 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 relation to it, such as its time limit.⁶⁴ On a technical level it can be enriched by reference to other documents, the Secretary-General's report being a standard example, which describes the proposed action in more detail.⁶⁵ Concerning peacekeeping-related organisational powers other than the force's establishment and mandate, the Charter presumes the involvement of the Secretariat and the Secretary-General who performs "such other functions as are entrusted to him by these organs", according to Article 98.⁶⁶ In the case of peacekeeping operations this includes, as mentioned above, their administration. 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.

Acquiring sufficient troops and resources is, at least for Chapter VII actions, partially acknowledged by the Charter, which obliges states to actively participate in UN action.⁶⁷ This is poorly applied in peacekeeping practice, as the UN has always been struggling to acquire sufficient

⁶² See also limitations to General Assembly 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", Article 11 (2), second sentence.

⁶³ The recent authorisation for re-mandating the UN operation in Sudan took place only after support was given by all permanent members of the Security Council.

⁶⁴ This has become practice in order to prevent self-perpetuation of operations that lost the backing of the relevant majority of the Security Council.

⁶⁵ Bothe/ Dörschal, see note 42, 488.

⁶⁶ The Secretary-General acts in this capacity as enshrined in Article 98 UN Charter.

⁶⁷ See Arts 25 and 43 (1).

resources. The mobilisation role of the Secretary-General is crucial in resolving this problem and expands his Charter-based function to that of an advocate for the UN's peacekeeping. To complete the Charter's reference relevant to peacekeeping operations, one must consider 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.⁶⁸ The Charter generically concentrates on its staff and confers "special status" upon it, deriving from the functional approach of the law of diplomatic privileges and immunities.⁶⁹ This leads to the recognition that the special status of international staff is imperative for the exercise of the UN's functions, subject to limitations by the functional necessity test. The UN shall, according to Article 105, enjoy in the territory of each of its members only "such privileges and immunities as are necessary for the fulfilment of its purposes."

The Charter, as indicated, contains a wide range of principles applicable to various aspects of peacekeeping. Most importantly it 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 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 are only indirectly applicable. It should therefore be read together with relevant provisions derived from multilateral agreements, international custom including UN's practice and its internal regulations.

⁶⁸ The reference to human rights is a classic example. The Charter establishes the UN as a promoter of fundamental human rights, see Arts 13 (b), 55 (c) and 62 (2) and reaffirms its faith in them.

⁶⁹ 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 the 1961 Vienna Convention on Diplomatic Relations concluded 18 April 1961, 500 UNTS 95. The latter, although based on the principles of the former, 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 Law*, 2007, 120-132.

b. Specific Rules Relating to Peacekeeping Forces on the Ground

The need for the special status of UN 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 personnel on the ground due to the very nature of the peacekeeping operations, which are usually conducted in a dangerous environment. This implies that personnel, particularly peacekeepers as part of a military component, are likely to become 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 receiving 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 Nations⁷⁰ and the Convention on the Safety of United Nations and Associated Personnel (UN Safety Convention).⁷¹

aa. Convention on the Privileges and Immunities of the United Nations

The Convention of 13 February 1946 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.⁷² Notwithstanding its limitations,⁷³ it is directly appli-

⁷⁰ Hereafter referred to as the Convention, adopted by A/RES/22 (I) of 13 February 1946, 1 UNTS 15. The Convention confirms the juridical personality of the UN and defines its capacities (article I); extends protection over the UN property, funds and assets (article II); confers certain immunities and privileges to members' representatives (article IV); exempts UN officials from legal process, taxation, immigration duties (article V) and UN experts on missions from arrest, legal process etc. for acts performed in the official capacity (article VI); and provides UN *laissez-passer* (article VII).

⁷¹ Convention on the Safety of United Nations and Associated Personnel of 1994, Doc. A/49/49 (1994), 299.

⁷² UN Model Status of Forces Agreement, Doc. A/45/594 of 9 October 1990, para. 3, footnote 4; see also paras 25-26.

⁷³ There are several practical issues that limit the Convention's application. It is, first, subject to ratification by the state on whose territory the peace-

cable to UN staff (officials and experts on missions), subject to the decision by the UN Secretary-General confirmed by the General Assembly.⁷⁴ The latter granted privileges and immunities according to article V and VII “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.”⁷⁵ This category, however, excludes the members of national contingents of peacekeeping forces. Although these are under the command and control of the UN, the SOFA of the first peacekeeping operation in 1956 established the practice of placing those troops under the individual SOFA regime. The specificities in relation to the military staff, most notably the exclusive criminal jurisdiction of the sending state for acts committed, are discussed later.

Exclusion of national contingents from the Convention’s scope of application would clearly encompass the nationally seconded PMCs. But it would not hinder the applicability for the PMC staff hired directly by the UN, 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 General Assembly limiting provisions – excluding locally recruited personnel on an hourly basis – are narrow. Although one can imagine reasons for which a PMC might consider recruiting its staff locally,⁷⁶ 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 would not be 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 occurred 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 preferable for operations. One reason why such practice might cause certain problems is the occasional reluctance of the

keeping forces have been deployed. Second, even if the receiving state gives its consent to be bound, it can still express its reservations to apply the Convention partially only.

⁷⁴ Article V, Section 17.

⁷⁵ Privileges and Immunities of the Staff of the Secretariat of the United Nations, A/RES/76 (I) of 7 December 1946.

⁷⁶ Most notably the knowledge of and familiarity with the local environment, culture and language. These conditions often are the requirement for employment in the field.

receiving state to recognise privileges and immunities to UN staff of its own nationality.⁷⁷

Furthermore, the Convention is unclear about how one should treat the private contractors and their personnel contracted by the UN. As its applicability is subject to the UN'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 of utmost importance. When it addressed the question of whether these can be understood as "experts on missions", UNOLA referred to the ICJ Advisory Opinion,⁷⁸ which provided the basis for its understanding of private contractors. Its negative decision was reasoned primarily on the commercial nature of the functions performed by these contractors⁷⁹ 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."⁸⁰ One must note though, that the analogous application of this reasoning is inaccurate. The function performed by the PMC contractor falling within the definition would be fundamentally different, closer to that of a UN security guard, which is regarded as an expert on mission.⁸¹ However, some are of the opinion that international immunities

⁷⁷ 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, a recent example being UNMEE (UN Mission in Ethiopia and Eritrea). It has been the constant position of the UN, however, to uphold the privileges and immunities of all officials so categorised by the General Assembly.

⁷⁸ In the applicability of article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, the ICJ, *inter alia*, indicated that: "[experts on mission] ... have been entrusted with mediation, with preparing studies, investigations or finding and establishing facts", ICJ Reports 1989, 177 et seq. (194, para. 48).

⁷⁹ See the Memorandum from the Legal Counsel to the Assistant Secretary-General for Peacekeeping Operations, 23 June 1995, UNJYB 1995, 407.

⁸⁰ 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) <http://untreaty.un.org/cod/UNJuridicalYearbook/texts/1998_extracts_legalopinions.pdf> of 23 March 1998.

⁸¹ In the Memorandum of the Director of the Field Operations Division, Office for General Services, 4 September 1992, UNJYB 1992, 479, the UN guards, having special service agreements with the UN, should according to the opinion of the UNOLA, be regarded as experts on mission.

never apply to a contractor as a matter of right, except in special arrangements.⁸² This, nevertheless, does not provide a final answer since it does not determine if an agreement between the PMC and the UN is sufficient for the establishment of such an arrangement. Although the receiving 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 a special status.⁸³ It is safe to conclude, therefore, that in the case of the PMC peacekeeping inclusion, the status of PMC personnel would have to be regulated and clarified by the provisions of a further agreement between the UN and the receiving state.⁸⁴

bb. Status of Forces Agreements

Individual SOFAs 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 1956,⁸⁵ which was supplemented by the 1990 issuance of a UN Model SOFA by the Secretary-General.⁸⁶ 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 person-

⁸² C.W. Jenks, *International Immunities*, 1961, 143-144.

⁸³ The immunities and privileges can and should be waived by the UN Secretary-General article 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".

⁸⁴ This is supported by scepticism as to whether the Convention has gained the status of customary international law. Solely its provisions would be insufficient to provide the basis for the status of peacekeeping forces on the ground, Engdahl, see note 69, 147-149.

⁸⁵ *Summary Study of the Experience Derived from the Establishment and Operation of the Force: Report of the Secretary-General*, 9 October 1958, Doc. A/3943, see para. 134.

⁸⁶ See note 72. This presents the main reference here, if not otherwise indicated.

nel⁸⁷ and recently the inclusion of provisions relating to employment and the status of contractors.⁸⁸

A SOFA is a bilateral legal arrangement between the UN and the receiving 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 receiving state.⁸⁹ Whether it presents a necessary requirement 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 speak in favour of its customary status, at least until a *lex specialis* SOFA is concluded and derogates from the general SOFA rules.⁹⁰

SOFAs offer a multi-layered approach to the status of peacekeeping personnel, referring to the above mentioned Convention and providing for special provisions in these agreements. Special diplomatic protection is conferred upon the high-ranking members of the operation.⁹¹ 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,⁹² military observers, UN civilian police and civilian personnel other than UN personnel⁹³ is covered by functional

⁸⁷ Including the key provisions of the Safety Convention, see for example UNMISSET (UN Mission in Support of East Timor), SOFA of 20 May 2002, 2185 UNTS 367.

⁸⁸ Engdahl, see note 69, 202.

⁸⁹ It affirms, defines responsibilities and is able to address specific issues.

⁹⁰ For example, when calling upon the receiving 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”, S/RES/1509 (2003) of 19 September 2003; S/RES/1545 (2004) of 21 May 2004.

⁹¹ Article 24.

⁹² Article 25 of the UN Model SOFA, falling under Convention article V and VII, considered as “officials”.

⁹³ Article 26, falling under Convention article VI, considered as “experts on mission”.

immunities comparable to those of the Convention.⁹⁴ 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.⁹⁵ The “military personnel of national contingents,” on the contrary, is subject to privileges and immunities only as provided in the agreement⁹⁶ 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 receiving state to the troop-sending states,⁹⁷ is somehow controversial, but probably “the most important principle in the status agreement.”⁹⁸

It is important also due to the fact that it does not allow the Secretary-General to waive the special rights of military personnel.⁹⁹ Apart from the 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 its functions, it paves the way for addressing the jurisdictional vacuum in which criminal offenders would escape prosecution by both the receiving state and the troop providing state. It is important, however, not to abuse this exceptional rule of immunity to escape the jurisdiction of local courts¹⁰⁰

⁹⁴ Article 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.

⁹⁵ Most notably arts 40, 47 (a), 49, 51, 52, 53, 54 etc.

⁹⁶ Article 27.

⁹⁷ Article 47 (b). See for example MINURCA (UN Mission in the Central African Republic), SOFA of 8 May 1998, 2015 UNTS 734, para. 50 (b); or UNAMSIL (UN Mission in Sierra Leone), SOFA of 4 August 2000, 2118 UNTS 190, para. 51 (b) etc.

⁹⁸ *Summary Study*, see note 85, para. 163.

⁹⁹ The waiver right of the Secretary-General is usually not explicitly stated in SOFAs (or UN Model SOFA), but it is inferred from the incorporation of the Privileges Convention.

¹⁰⁰ 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*, 1964, 437-438, especially if the crime committed in the receiving state was not an offence in the contributing state.

and not to extend it unnecessarily.¹⁰¹ There exists a requirement for the Secretary-General to obtain such assurances from the sending states,¹⁰² either in the form of troop-contributing agreements or memoranda in the form of exchange of letters.¹⁰³ This creates a positive obligation of the sending state, which otherwise might be hindered in its implementation by factors such as variety of legal systems,¹⁰⁴ insufficiency of sending states' domestic legislation¹⁰⁵ or by the potential decision of the receiving state to withhold its consent for the operation. If arrangements between the receiving and sending state for implementation of jurisdictional provisions are made, they should take into consideration the relevant SOFA provisions.

SOFAs are a tool offering 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

¹⁰¹ Only in the Congo was such jurisdiction extended to civilian members of the military component, see ONUC (UN Operation in the Congo), SOFA of 27 November 1961, para. 9, 414 UNTS 229. However, the recent practice of non UN command operations such as the 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, 4 January 2002, *ILM* 41 (2002), 1032, arts 1-4.

¹⁰² Article 48 and note h to this article of the UN Model SOFA.

¹⁰³ 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*, Doc. A/50/995 of 9 July 1996, Annex.

¹⁰⁴ Different offences treated differently in different legal systems can have the consequence that one member of the peacekeeping force is subject to different laws and sanctions than another in the same situation for the same acts.

¹⁰⁵ As raised by the Secretary-General in 1958 already, "national laws may differ to 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*, see note 85, para. 137.

employees of their respective international service agencies and companies (therefore not staff members, employees or agents of the United Nations), but perform functions of UN operations, which were previously conducted by personnel regarded as being agents of the UN. However, providing functions for the UN 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 receiving state, is required. According to UNOLA, the inclusion of international contractual personnel under a SOFA would require additional support by the General Assembly urging the government concerned to grant such personnel functional immunity¹⁰⁶ and legal protection.¹⁰⁷ The latter should, according to the Secretary-General and UNOLA, be included in SOFAs, but this has been accepted with reluctance by receiving states, which seemed to be given ultimate discretion in the matter,¹⁰⁸ 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.

cc. Convention on the Safety of United Nations and Associated Personnel

SOFAs of a later date included some, but limited, beneficial provisions regarding contractors,¹⁰⁹ 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 Associ-

¹⁰⁶ Engdahl, see note 69, 165.

¹⁰⁷ This should extend to immunity in respect of words spoken and written and all acts performed by them in their official capacity, as well as entitlement to repatriation, *Report of the Secretary-General: Use of Civilian Personnel in Peacekeeping Operations*, para. 32, Doc. A/48/707 (1993).

¹⁰⁸ See note 79.

¹⁰⁹ Freedom of movement, the provisions of supplies and services and permits and licenses, see UNMISSET SOFA, see note 87, MINURCA and UNAMISIL SOFA, see note 97, para. 12.

ated Personnel and its Optional Protocol.¹¹⁰ Besides the additional¹¹¹ safety assurance provisions¹¹² 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 receiving state and to refrain from action incompatible with it.¹¹³ UN personnel¹¹⁴ and associated personnel¹¹⁵ 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 in respect of the existence of exceptional risks for the personnel included in the operation.¹¹⁶ This broad definition is narrowed by the partial exclusion of Chapter VII 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.”¹¹⁷ Besides the IHL related problems, particularly the overlap of

¹¹⁰ Optional Protocol to the Convention on the Safety of United Nations and Associated Personnel, A/RES/60/42 of 8 December 2005 and A/RES/49/59 of 9 December 1994, Annex.

¹¹¹ Bothe/ Dörschal, see note 42, 499 are of the opinion that it only makes more explicit what is already contained in instruments such as the General Convention or SOFAs, O. Engdahl, “Protection of Personnel in Peace Operations”, *International Peacekeeping* 10 (2006), 53 et seq. (54), emphasises its contribution as a criminal law and enforcement instrument.

¹¹² States Parties have negative and positive obligations to assure safety and security of the UN personnel (article 7), criminalise disrespect and enforce this obligation in their national law (article 9) and establish jurisdiction for punishment of such acts (article 10), supplemented by measures implementing the *aut dedere aut prosequi* principle (arts 13, 14 and 15).

¹¹³ Article 6, which in para. 2 obliges the Secretary-General to take all appropriate measures to ensure the observance of these obligations.

¹¹⁴ 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”, article 1 (a).

¹¹⁵ 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, article 1 (b).

¹¹⁶ Article 1 (c).

¹¹⁷ Article 2 (2).

the Convention regime and non-international armed conflict IHL arising from this provision, the Convention is only partially applicable for newer generations of peacekeeping operations. As indicated above, they are almost always authorized under Chapter VII and blur the line between traditional peacekeeping and peace enforcement due to the inclusion of enforcement elements. It is self-evident that these limitations of the Convention would apply to PMC peacekeeping regardless of the scenario of inclusion. Still, the Convention may 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 also expressed in the provision which obliges the receiving state and the UN to conclude the SOFA as soon as possible, which should include “*inter alia*, provisions on privileges and immunities for military and police components of the operation.”¹¹⁸ The Convention also turns to two other important bodies of international law governing peacekeeping, namely international humanitarian law and international human rights law, to which it recognises primacy.¹¹⁹

c. General Rules Relating to Peacekeeping Forces on the Ground

What is referred to as general rules relating to peacekeeping is primarily limited to two bodies of international law, IHL and IHRL, which operate independently of the 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 of human beings affected by the peacekeeping activity, although one should im-

¹¹⁸ Article 4.

¹¹⁹ Article 20 (a).

mediately recognise their distinct modes of application.¹²⁰ Although IHRL can be subject to limitations during times of public emergency in respect of the application of certain obligations,¹²¹ it remains in force during times of armed conflict or occupation. The modalities of the applicability of IHL are dependant on the actual involvement of peacekeeping forces in hostilities and help determine its status. As a result the two bodies of law can operate simultaneously,¹²² keeping in mind that the more widely applicable IHRL must take into consideration the *lex specialis* standards of IHL.¹²³ 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 they are privately contracted will now be examined.

aa. International Human Rights Law

The embedding 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,¹²⁴ has resulted in the state-centric view that IHRL is mainly about “the way a state treats those within its domain.”¹²⁵ This quickly proves inadequate to comprehend human rights obligations in relation to UN peacekeeping. Speaking

¹²⁰ J. Cerone, “Human Dignity in the Line of Fire: The Application of International Human Rights Law During Armed Conflict, Occupation, and Peace Operations,” *Vand. J. Transnat’l L.* 39 (2006), 1447 et seq. (1453), identifies distinctions between the two also with regard to 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.

¹²¹ For derogation clauses see the IHRL section below.

¹²² *Legal Consequences of the Construction of a Wall in Occupied Palestinian Territory*, ICJ Reports 2004, 136 et seq. (178, para. 106).

¹²³ *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports 1996, 226 et seq. (240, para. 25).

¹²⁴ 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 enters into force.

¹²⁵ Cerone, see note 120, 1453.

strictly legally and being subject to attribution rules, complications arise as the obligations in place are also those of a separate legal entity on behalf of which the peacekeeping troops act, the UN. These must be combined with the contributing state's obligations arising from its retention of a certain degree of control and jurisdiction over the acts of its troops. Furthermore, to prevent the detachment of human rights guarantees from the individual whom they were originally supposed to serve, one needs to go beyond the inter-entity approach.

To overcome the problem of the lacuna of sources for UN human rights obligations there are several paths to follow. In particular one may turn to the binding nature of customary international law,¹²⁶ even some *jus cogens* obligations,¹²⁷ and the practice arising foremost in the context of UN peacekeeping operations. As for customary international law, the usual argument for the almost customary nature of some widely endorsed or ratified IHRL instruments is made, in particular the Universal Declaration of Human Rights and the two human rights covenants.¹²⁸ Obligations such as the prohibition of torture or inhuman or degrading treatment or punishment, 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.

The respect of human rights and fundamental freedoms is enshrined in the UN Charter.¹²⁹ Furthermore, the practice-based reference to hu-

¹²⁶ 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, see note 48, 109. Moreover, the sole debate over the capacity of IOs (above) 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.

¹²⁷ 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," *European Journal of International Law* 17 (2006), 881 et seq. (913, 915); or see also Human Rights Committee, Doc. CCPR/C/21/Rev.1/Add.11 of 31 August 2001, General Comment No. 29, *States of Emergency (article 4)*.

¹²⁸ Namely ICCPR and ICESCR, but also more specific instruments such as the Convention on the Rights of the Child or the International Convention on the Elimination of All Forms of Racial Discrimination.

¹²⁹ See Charter Article 1 (3). Additionally, the preamble as a normative basis reaffirms "faith in fundamental human rights".

man rights obligations of the UN is inferred from the constant manifestations of the UN and its institutions¹³⁰ of the need for respect of human rights or their active acknowledgement in UN training materials and internal rules.¹³¹ The latter are currently under review in order to ensure their standardisation and applicability to all categories of peacekeeping personnel.¹³² It seems obvious that this would call for a stringent approach by the UN to guarantee the implementation of 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 their application. The first specificity arises from the fact that peacekeeping missions are conducted abroad, being therefore exclusively extraterritorial. This calls for recourse to the effective control principle in order to trigger the obligations arising from the major hu-

¹³⁰ 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, Doc. E/2002/68/Add.1 of 20 May 2002; see also *Secretary-General's Bulletin: Special Measures for Protection from Sexual Exploitation and Sexual Abuse*, Doc. ST/SGB/2003/13 of 9 October 2003.

¹³¹ For an overview and guiding principles see the “Capstone Doctrine” as formulated in *UN Peacekeeping Operations: Principles and Guidelines*, DPKO, Department of Field Support: 2008; for operational rules see “Ten Rules – Code of Personal Conduct for Blue Helmets”, particularly Rule 5 referring to respect and regard of human rights for all, DPKO Training Unit, 1997; and “We Are United Nations Peacekeeping Personnel”, referring to the Universal Declaration of Human Rights, IHL and some specific human rights obligations, DPKO, Training Unit, 2006.

¹³² Following the recommendations of the Group of Legal Experts, see *Report of the Group of Legal Experts on Making the Standards contained in the Secretary-General's Bulletin binding on Contingent Members and Standardizing the Norms of Conduct so that they are applicable to all Categories of Peacekeeping Personnel*, Doc. A/61/645 of 18 December 2006, that reviewed standards of conduct for United Nations peacekeeping personnel, *ibid.*, Annex II and proposed the Code of Personal Conduct for United Nations Peacekeeping Personnel, *ibid.*, Annex IV. For subsequent developments see A/RES/61/291 of 24 July 2007 and A/RES/62/273 of 11 September 2008, and the reports of the Special Committee on Peacekeeping Operations, requesting the DPKO “to generate such a guide and to present the result of its work”, see Report of the Special Committee on Peacekeeping Operations and its Working Group Doc. A/61/19/Rev.1, paras 76-78; also Doc. A/62/19, para. 59.

man 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 the extraterritorial application of states' human rights obligations abroad, particularly in the context of peacekeeping,¹³³ but subject to differences in regimes established by various instruments,¹³⁴ particularly regional.¹³⁵ However, support for a single standard for all human rights treaties may also be found.¹³⁶ After recognising that human rights obligations of states

¹³³ The Human Rights Committee held in its General Comment No. 31 (*Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, Doc. CCPR/C/21/Rev. 1/Add.13 of 26 May 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 peacekeeping or peace-enforcement operation”.

¹³⁴ The ICJ, see note 122, 180, para. 111 endorsed the logic of extraterritorial application, however under different thresholds. While the ICCPR “is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory”, the ICESCR extraterritorial application requires territorial control (180, para. 112); but the Court was unclear which of the two standards it applied for the Convention on the Rights of the Child.

¹³⁵ The jurisprudence of the European Commission and European Court of Human Rights (ECtHR) has been particularly rich in this respect see for example *Loizidou v. Turkey* (preliminary objections), No. 15318/89, 310 ECtHR (Series A), 62 although somehow inconsistent, especially when referring to the regional application (*espace juridique*) principle. See the *Banković* case (*Banković et al. v. Belgium and others*, No. 52207/99, [2001] ECHR 970 of 19 December 2001, 80), afterwards *de facto* overturned by the *Issa* case (*Issa v. Turkey*, No. 31821/96 [2004] ECHR 629 of 16 November 2004, 74).

¹³⁶ See *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v. Uganda), ICJ Reports 2005, 116 et seq. (243, para. 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 the African Charter on Human and Peoples' Rights or the Convention on the Rights of the Child.

abroad do not vanish, the question of their range and level arises, which is again, to a certain extent, shaped by the fact that the 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,”¹³⁷ although bearing 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.

Under certain conditions, namely during times of public emergency threatening the life of the nation, the range of some human rights obligations¹³⁸ of a state are subject to the derogation regime, although only “to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law.”¹³⁹ 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.¹⁴⁰ The engagement in an 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 of-

¹³⁷ Cerone, see note 120, 1498.

¹³⁸ Some obligations are non-derogable, cf. e.g. ICCPR, article 4 (2), referring to the following rights from which derogation cannot be made: article 6, 7, 8 (paras 1 and 2), 11, 15, 16 and 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 No. 29, see note 127, 136, paras 13-17.

¹³⁹ ICCPR article 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*, 2003, 729 et seq. (730).

¹⁴⁰ P. Rowe, *The Impact of Human Rights Law on Armed Forces*, 2006, 248-249.

fers a relatively clear and broad framework of human rights obligations that regulate PMC conduct even in the absence of specific further rules as these PMCs become quasi state entities which need to abide by both the sending state's international obligations, and its national rules. These would together oblige a sending state to assure that the conduct of a seconded peacekeeping PMC is in accordance with the state's international obligations and standards. Disrespect of these is, in accordance with established practice of status of forces agreements, which presupposes its exclusive criminal jurisdiction, properly dealt with.

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 – PMCs 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 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.

For these reasons, one is compelled to identify a functional substitute for the “sending state” concept,¹⁴¹ 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, especially if these infringements are exercised abroad, outside the scope of their effective control. Although some states might possess the legislation and machinery to prosecute individuals and companies for wrongdoings abroad, this is often limited to acts committed in an official capacity.¹⁴²

¹⁴¹ This detachment appears in a similar manner in the following section on IHL.

¹⁴² 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 US PATRIOT Act (18 U.S.C. § 7 (9)) provide options for prosecution of contractors abroad, only the first two are extendable to acts outside

However, even if such an option exists, it is insufficient due to the unsatisfactory guarantees that such an action will actually be undertaken,¹⁴³ or that it will be comprehensive in terms of *ratione personae* or *ratione materiae*.¹⁴⁴ If one views the positive obligations of states to ensure respect for human rights in a very broad manner, an indirect source of human rights obligations may be linked to the introduction and enforcement of an appropriate national licensing or export regime.¹⁴⁵ This is currently not usually the case as the existing licensing regimes are more concerned with overseeing respect for human rights than the accountability of PMCs.¹⁴⁶

Two further options exist to engage IHRL concerns into the discourse and which are relevant for both scenarios. First, the PMC peacekeeping entity should take into consideration the laws of the receiving state; second, it should also be aware of its corporate obligations under international law.¹⁴⁷ The implication of the receiving 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 receiving state. The fact that the activity of a peacekeeping PMC will be conducted on the territory of the receiving state offers a well-established basis to define law, on the condition that it meets the minimum international standards. This, in effect, may be supplemented by international obligations of corporate entities. In particular IHRL developed the idea

of the official capacity. See also under <<http://www.amnestyusa.org/annualreport/2006/provisions.html>>.

¹⁴³ Even if this is the case a PMC might off-shore its activity or simply dissolve and reconstitute itself as in the case of South Africa-based Executive Outcomes in the 1990s. See P.W. Singer, *Corporate Warriors: The Rise of the Privatized Military Industry*, 2004, 3-4.

¹⁴⁴ For example the question of covering the nationals of other states in the first case and the question of which are the applicable human rights in the second.

¹⁴⁵ For a recent overview see M. Caparini, "Domestic Regulation: Licensing Regimes for the Export of Military Goods and Services", *Chesterman/Lehnardt*, see note 22, 158-179.

¹⁴⁶ South Africa, for example, does not grant an approval to PMCs if this could "result in the infringement of human rights and fundamental freedoms in the territory" where the firm would operate.

¹⁴⁷ See E. Mongelard, "Corporate Civil Liability for Violations of International Humanitarian Law", *Int'l Rev. of the Red Cross* 863 (2006), 665 et seq. (668-673).

of obligations of non-state actors such as individuals and corporations, incorporated in the main IHRL treaties¹⁴⁸ or expressed as soft law or voluntary provisions making reference to IHRL standards.¹⁴⁹ As noted above, this will not give rise to the same level of international responsibility as in the case of established subjects of international law, such as states and IO. Nevertheless, these obligations 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 obligations are enforced this is most likely to happen at the domestic level of the PMC registration state.

bb. International Humanitarian Law

The application of IHL is a somewhat controversial point. As the UN is not a party to any convention relating to the law of war, the question which arises is, whether customary international law is applicable. The UN is bound by general international law, the law of war being no exception. Therefore it is uncontested that peacekeeping forces are subject

¹⁴⁸ The UDHR reminds in its Preamble “that every individual and every organ of society” should keep it constantly in mind, making it applicable to non-state actors such as companies, L. Henkin, *Beyond Voluntarism Human Rights and the Developing International Legal Obligations of Companies*, 2002, 52; in a similar manner the ICCPR and ICESCR in their joint article 5 (1) deprive any State, 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.

¹⁴⁹ 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, Doc. E/CN.4/Sub.2/2003/12 Rev. 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 ILO *Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy*, 3rd edition, 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.

to IHL if the conditions for its applicability are met. To what extent, however, remains controversial.¹⁵⁰ The issuance of the Secretary-General's bulletin in 1999¹⁵¹ introduced some clarity, but rightly pointed out that the document itself is not exhaustive. It furthermore noted that "[T]he fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence."¹⁵² The UN, inter alia, 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 SOFAs are not concluded.¹⁵³ Furthermore, it noted that, without prejudice to the rules mentioned above, military personnel remains bound by national law throughout the operation.¹⁵⁴

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.¹⁵⁵ This image of lawlessness portrays PMCs in a negative light, amounting to a legal anomaly and a publicly unattractive option. This negative image, which also results from their limited regulation, may therefore be transformed into the automatic rejection of an appropriate status for PMC personnel for inherently the same reasons as for a recently vastly growing number of

¹⁵⁰ Bothe/ Dörschal, see note 42, 499.

¹⁵¹ *Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law*, Doc. ST/SGB/1999/13 of 6 August 1999.

¹⁵² *Ibid.*, Section 1. (1.1.). This also correctly assumes the applicability of IHL relating to international armed conflict (IAC). Even if recent UN peacekeeping engagement is conducted mainly in non-international armed conflict (NIAC) situations, UN involvement provides an element that internationalises these situations, at least with respect to the UN itself, and renders applicable the more comprehensive set of IAC rules.

¹⁵³ *Ibid.*, Section 3.

¹⁵⁴ *Ibid.*, Section 2.

¹⁵⁵ Doswald-Beck, see note 27, 115.

“unlawful or unprivileged combatants”,¹⁵⁶ i.e. failing to distinguish between *jus ad bellum* and *jus in bello* rules. One needs to avoid normative judgements and recall the *raison d’être* of IHL, which recognises that what counts is a *de facto* link or belonging of PMCs to public entities that initiate their involvement in situations where IHL is applicable.¹⁵⁷ Given that original¹⁵⁸ or softened¹⁵⁹ 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 a 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.¹⁶⁰ The less stringent understanding follows the rationale of loosening the provision of the first Additional Protocol, which broadens the combatant category and takes into consideration the factual linkage to

¹⁵⁶ See for example K. Doermann, “The Legal Situation of ‘unlawful/unprivileged combatants’”, *International Review of the Red Cross* 849 (2003), 45 et seq.

¹⁵⁷ J. Pictet, *Commentary: Geneva Convention Relative to the Treatment of Prisoners of War*, Vol. III, 1960, 57; or *Expert Meeting on Private Military Contractors: Status and State Responsibility for Their Actions*, Geneva, 2005, 30; but see Gillard, see note 23, 533, for opposite view.

¹⁵⁸ In our case either formally incorporated into the army (Geneva Convention III article 4 A. (1)) or being members of other militias belonging to a Party to the 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 in accordance with the laws and customs of war (Geneva Convention III, article 4 A. (2)).

¹⁵⁹ 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 in order to obtain the POW status.

¹⁶⁰ 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”, *Chicago Journal of International Law* 5 (2005), 511 et seq.

the public entity, determined also by the contractual nature of the PMC entity relation.¹⁶¹

Regardless of the approach taken, IHL confers on the belligerent the obligation to ensure respect of its rules, which includes its enforcement as well as jurisdictional measures. Stringent demands for such supervision might prove difficult in the case of PMCs though, if they do not amount to grave breaches.¹⁶² 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 aggravated if the hiring entity is the UN itself. In line with established peacekeeping practice, the jurisdictional requirements need to be retained by states in order to achieve the effective enforcement of IHL, even where an operation is conducted entirely under UN's command and control.¹⁶³ 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.¹⁶⁴ 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 enforcement proves particularly difficult in relation to the second scenario of direct PMC hiring by the UN.

¹⁶¹ Doswald-Beck, see note 27, 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".

¹⁶² See, for example, Geneva Convention I (arts 49-52), Geneva Convention II (arts 51-53), Geneva Convention III (arts 129-132), Geneva Convention IV (arts 146-149). These imply not only universal jurisdiction, but also *erga omnes* obligation. For Additional Protocol Provisions see arts 11, 85, 86.

¹⁶³ Saura, see note 8, 503.

¹⁶⁴ One of course has in mind the US opposition and the hostile approach to undermine the functioning of the ICC 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 ICC.

d. 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 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 criminalises at the international level, whether these amount to international crimes¹⁶⁵ or international delicts.¹⁶⁶ 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 troops, the role of national laws is all but trivial, particularly the laws of armed forces. On the one hand, they build on and incorporate the established principles of international law mentioned above. On the other hand, their role is complementary, since they introduce rules of engagement

¹⁶⁵ One of the first definitions by the Nuremberg Tribunal 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).

¹⁶⁶ Distinction based on C. Bassiouni, *Introduction to International Criminal Law*, 2003, 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*.

(RoE) for troops, rules governing the internal disciplinary systems and further substantial rules to which these troops need to adhere. 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.¹⁶⁷ 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, although sole reliance on these may also detract from the international character of the force.¹⁶⁸ To this end, some joint core rules governing UN involvement are the requirement for the conduct of a 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 operations¹⁶⁹ elaborated force regulations were issued by the Secretary-General. However, recent practice distinguishes between the operations plan as a precise military interpretation of the mandate given to forces by the UN organs,¹⁷⁰ which is issued by the commander, and RoE, which set the rules under which weapons and force may be used.¹⁷¹ The latter represent one of the most

¹⁶⁷ Rowe, see note 140, 228.

¹⁶⁸ Bothe/ Dörschal, see note 42, 495.

¹⁶⁹ For example UNEF I, ONUC, UNSF or UNFICYP (UN Peacekeeping Force in Cyprus).

¹⁷⁰ 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 receiving state, 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/ Dörschal, see note 42, 494-495.

¹⁷¹ These cover the rules for carrying and restoring weapons and definitions of the possibilities and rules for the justifiable 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 conditions of demilitarised and buffer zones, and prevention of

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 flexibility and legal certainty.¹⁷² They should be “sufficiently robust and not force United Nations contingents to cede the initiative to their attackers.”¹⁷³ 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 organisational practice. Furthermore, this practice is to be examined in connection with the internal rules of the UN. These potentially cover a vast array of substantive questions (see above).¹⁷⁴

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,¹⁷⁵ although the difficulty with effective monitoring and actual enforcement, depending on the public entity (government or, in our case, also an IO) persists.¹⁷⁶ For this reason, the idea of contractual enforcement by third-parties, these being any other public or private entity or individuals, would pre-

violent flare-ups that threaten the life and health of the population, *ibid.*, 495.

¹⁷² A.P.V. Rodgers, “Visiting Forces in an Operational Context”, in: Fleck, see note 42, 533-560 (548).

¹⁷³ *Report of the Panel on United Nations Peace Operations* of 21 August 2000, Doc. A/55/305-S/2000/809, at x.

¹⁷⁴ 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”, *International Peacekeeping* 10 (2006), 33 et seq. (50-51).

¹⁷⁵ See L.A. Dickinson, “Contracts as a Tool for Regulating Private Military Companies”, in: Chesterman/ Lehnardt, see note 22, 217-238.

¹⁷⁶ One of the often cited negative examples is the US non-enforcement practice with regard to US contractors in Iraq involved in Abu-Ghraib prison interrogations or other cases of possible excessive use of force by private contractors.

sent a viable and welcome option, subject to sufficient clarity of dispute settlement provisions in the contract. A brief overview of the current UN general contractual conditions leads to the presumption that this is more likely to be the case when the contractual relation includes a governmental actor.¹⁷⁷ The inclusion of specific claim settlement rules in a SOFA also seems possible.

IV. Responsibility Issues Arising from Acts of the PMC Peacekeeping Force

The notion of responsibility in international law, which was traditionally confined to state responsibility¹⁷⁸ but later expanded (at least) to the responsibility of IOs¹⁷⁹ and individual responsibility for certain acts deemed criminal under international law,¹⁸⁰ 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 this article. 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 ra-

¹⁷⁷ *United Nations General Conditions of Contract*, Section 16, refers only to the UN Commission on International Trade Law (UNCITRAL) Conciliation Rules.

¹⁷⁸ “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 of an international obligation gives rise to a requirement for reparation,” Shaw, see note 10, 694; see also ILC, Report of the International Law Commission, Fifty-third Session 2001, GAOR, Fifty-sixth Session, Suppl. No. 10, Doc. A/56/10, hereafter referred to as ILC Draft Articles on State Responsibility.

¹⁷⁹ 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 Report on Responsibility of International Organizations: Report of the International Law Commission on the Work of its Fifty-ninth Session, Doc. A/62/10, 2007, hereafter referred to as Draft Articles on IO Responsibility.

¹⁸⁰ Based on S. Marks/ A. Clapham, *International Human Rights Lexicon*, 2005, 226.

tionale the PMCs, although not a classical subject of international law, bear some international legal obligations. Furthermore, as responsibility is “the necessary corollary of a right,”¹⁸¹ which a PMC is definitely able to infringe, direct PMC responsibility issues are not trivial. However, since this article is already building on a hypothetical scenario, the examination of responsibility issues arising from PMC peacekeeping will focus on aspects of state responsibility and of the responsibility of IOs.¹⁸² The issue of individual criminal responsibility of PMC peacekeepers will be touched upon only indirectly. 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, this is not the case with the rules on responsibility of IOs. 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 of PMC inclusion and then further elaborated if the need for adaptations is required by the second scenario.

1. General Issues of Attribution

Before approaching the two scenarios, a few general issues of international responsibility will be considered. First, the issue of responsibility for wrongful acts should be distinguished from attribution rules, which only establish that there is an act for the purposes of responsibility, but

¹⁸¹ Judge Huber in *Spanish Zone of Morocco Claims* (2 RIAA, p. 615 (1923), 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*, 2003, 78.

¹⁸² 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 ILC.

say nothing about the legality of the conduct.¹⁸³ Whether an international obligation has been breached is a separate question, treated by special rules.¹⁸⁴ Second, attribution rules are relatively clear when a state acts in its 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”,¹⁸⁵ the picture is more blurred in reality. It was demonstrated above that the sending state retains a significant degree of control over its national contingents, which are bound by its national laws and are 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, RoE, SOFA etc., of each operation.¹⁸⁶

Next, as PMCs were 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 in default of official authorities; or when the conduct is subsequently adopted by a state.¹⁸⁷ General rules on attribution of conduct to an IO, as they currently read,¹⁸⁸ allow for a non-state actor’s conduct to be attributed to an IO, being considered an organ or an agent of the IO.

As demonstrated above, formal PMC incorporation into a peacekeeping force, regardless of the scenario, would result in its being considered an organ of the UN, assuming its placement under command

¹⁸³ ILC Draft Articles on State Responsibility, see note 178, 81. See Chapter II, also in Draft Articles on IO Responsibility, see note 179, 200,

¹⁸⁴ Chapter III of both Draft articles.

¹⁸⁵ Draft Articles on IO Responsibility, see note 179, article 5.

¹⁸⁶ Cerone, see note 120, 1457.

¹⁸⁷ Draft Articles on State Responsibility, see note 178, arts 8, 9 and 11.

¹⁸⁸ “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,” Draft Articles on IO Responsibility, see note 179, article 4 (1).

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 respective organisation.¹⁸⁹ As in the case of state responsibility, the conduct acknowledged and adopted by an IO as its own is attributable to it.¹⁹⁰ Furthermore, conduct attribution rules for both states or IO, are without prejudice to the excess of authority or contravention of instructions.¹⁹¹ 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 may constitute a breach of an obligation by a state or IO.¹⁹² Consequently, in the cases of omission the distinction between the rules for attribution and the rules on responsibility for wrongful acts is less obvious and therefore analytically more challenging. An examination of this option is particularly relevant as was shown in the overview of substantial rules of international law applicable to possible PMC peacekeeping. Direct examples for this are the SOFA based obligations of receiving states to provide for the protection of peacekeepers on their territory, exercise of jurisdictional obligations and disciplinary measures of the sending states, as well as 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.

2. 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

¹⁸⁹ For the purposes of para. 1, the term “agent” includes officials and other persons or entities through whom the organization acts, *ibid.* article 4 (2).

¹⁹⁰ Draft Articles on IO Responsibility, see note 179, article 7.

¹⁹¹ Draft Articles on State Responsibility, see note 178, article 7; Draft Articles on IO Responsibility, see note 179, article 6.

¹⁹² Draft Articles on State Responsibility, see note 178, article 2 (a); Draft Articles on IO Responsibility, see note 179, article 3 (2) (a).

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,¹⁹³ 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.¹⁹⁴

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 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.¹⁹⁵ Although these conditions fall short of the classical conception of a sending state and imply 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.¹⁹⁶ 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

¹⁹³ See article 5 of Draft Articles on State Responsibility, see note 178: “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”.

¹⁹⁴ Expert Meeting, see note 157.

¹⁹⁵ *Ibid.*, 31. Western states often fund peacekeeping activities conducted by African states.

¹⁹⁶ Although in the Military and Paramilitary Activities in and against Nicaragua case, see note 56, 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 the state had *effective control* [emphasis added] of the military and paramilitary operation in the course of which alleged violations were committed”.

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.¹⁹⁷ 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 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 the 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: (a) to cease that act, if it is continuing;" even more, it should offer "appropriate assurances and guarantees of non-repetition, if circumstances so require."¹⁹⁸ 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.

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,¹⁹⁹ and the 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.²⁰⁰ If a state hires 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

¹⁹⁷ See next section for follow-up on the due diligence concept.

¹⁹⁸ Draft Articles on State Responsibility, see note 178, article 30.

¹⁹⁹ For discussion of its problems see C. Lehnardt, *Private Military Companies and State Responsibility*, International Law and Justice Working Papers 2007/02, 7-9.

²⁰⁰ Draft Articles on State Responsibility, see note 178, article 5 Commentary.

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 executing the commands or orders of a unit commander, that are discordant with the operation's RoE,²⁰¹ versus if action is conducted following faulty orders issued by the overall operation's commander – a UN high official. The latter case would incur the responsibility of the UN.²⁰² In the former case, however, the principles of excess of authority of an agent of the IO²⁰³ (in this case the PMC seconded by the 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.²⁰⁴

The answer to the question of responsibility for acts of the peacekeeping forces will therefore be answered simultaneously with the determination of who has effective control over the peacekeeping forces.²⁰⁵ This is determined by the division of powers between the hierarchical levels of the operation's overall structure,²⁰⁶ which shifted from precedential high competences of the UN's administrative chief in early peacekeeping operations²⁰⁷ 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

²⁰¹ Or if individual acts of peacekeepers are not in accordance with the internal disciplinary rules of the contingent. These acts will incur sending state responsibility.

²⁰² Draft Articles on IO Responsibility, see note 179, article 5.

²⁰³ *Ibid.*, article 6.

²⁰⁴ *Ibid.*, article 26.

²⁰⁵ Commentary on Draft article 5 on IO Responsibility, Report of the International Law Commission on the Work of its Fifty-sixth Session, Doc. A/56/10, 2004.

²⁰⁶ 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, see note 3, 687.

²⁰⁷ Who enjoyed a great degree of independence, even more due to the unanimity of the P5 Security Council members. In UNEF I the General Assembly appointed the commander-in-chief, but authorised the Secretary-General to issue all instructions and regulations for the functioning of the force (A/RES/1001 (ES-I) of 7 November 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 (S/RES/145 (1960) of 22 July 1960, para. 5; S/RES/146 (1960) of 9 August 1960, para. 6).

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 operation of its authority on the ground through these complex multidimensional operations,²⁰⁸ the retention of ultimate authority and control does not necessarily correspond entirely with 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 participating in operations,²⁰⁹ the Court did not distinguish between acts attributable to the UN (UNMIK) and mandated coalitions and alliances (KFOR), due to reliance on UN Security Council Resolution 1244, jointly providing a mandate for their action. The ECtHR's reasoning seems to neglect its own understanding 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".²¹⁰ This (retained) 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, for example 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.²¹¹

²⁰⁸ Particularly the non-execution of Article 43 of the Charter and the reliance on national contingents.

²⁰⁹ ECtHR in *Behrami and Behrami v. France* (No. 71412/01, [2007] 45 EHRR, 2 May 2007, 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.

²¹⁰ *Ibid.*, para. 138.

²¹¹ Even more so if the international courts apply this reasoning for the purpose of determining the lack of their jurisdiction, as was essentially the case

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, recruiting the members of his/her staff and has national contingent commanders and their units placed under his/her command; these national contingents presumably no longer serve a state, but the UN.²¹² The effective control drawn from this hierarchical chain of command is closer to reality, yet limited due to the reluctance of national contingents to recognise *de facto* exclusive control of the UN for legal, and also purely political, reasons.²¹³ “[T]here is always a national override on foreign command of national contingents,” often referred to as “parallel command”.²¹⁴ The problem of peacekeeping is therefore precisely “the frequency with which national command is invoked.”²¹⁵

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

with the *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, cannot be held liable for these acts.

²¹² Bothe, see note 3, 688, 691.

²¹³ 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/ Dörschal, see note 42, 504, footnotes 75-75.

²¹⁴ J.V. Arbuckle, *Military Forces in 21st Century Peace Operations*, 2006, 121-123, who gives an example of the NATO doctrine, which the UN utilises selectively precisely for the reason of the weakness of its joint command structure.

²¹⁵ *Ibid.*, 123.

factual criterion.”²¹⁶ The determination of legal responsibility for a wrongful act will depend heavily 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.”²¹⁷ In this manner any simplified interpretation of the rules on international responsibility, 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 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.²¹⁸

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 drafted²¹⁹ 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, ir-

²¹⁶ Second Report on Responsibility of International Organizations by Mr. Giorgio Gaja, Special Rapporteur, Doc. A/CN.4/541 of 2 April 2004, para. 41.

²¹⁷ Report of the Secretary-General, Administrative and Budgetary Aspects of the Financing of the United Nations Peacekeeping Operations, Doc. A/51/389 of 20 September 1996, para. 18.

²¹⁸ See *Behrami and Behrami v. France*, see note 209, 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 S/RES/1244 (1999) of 10 June 1999, jointly providing mandate for their action. The main fault of the ECtHR reasoning was the neglect of its own recognition 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 than peace operations of the mandated coalitions and alliances as in the case of KFOR.

²¹⁹ For ILC Draft Articles on State Responsibility, see note 178, article 42; for Draft Articles on IO Responsibility, see *Sixth Report on Responsibility of International Organizations*, Doc. A/CN.4/597 of 1 April 2008, Draft article 46.

respective of whether the responsibility for the breach of an 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.²²⁰ There is, in fact 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,²²¹ 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.”²²² A specific characteristic of this responsibility is that it is limited: assuming that a peacekeeping operation on the territory of a receiving state is carried out for its benefit, this state is consenting to bear, at least in part, the consequences of the organisation’s presence.²²³ The limitation is dropped, however, if damage is caused by gross negligence or wilful misconduct. However, the organisation, although assuming the responsibility *vis-à-vis* the third party, retains the right to seek reimbursement from the troop-contributing state.²²⁴ The responsibility and liability are also dropped when a breach satisfies the criteria of operational necessity.²²⁵

To conclude, the first scenario of PMC peacekeeping inclusion raises similar issues to those of traditional national contingent involvement in

²²⁰ Draft Articles on IO Responsibility, see note 179, arts 38, 39 and 40 and arts 35, 36 and 37 of Draft Articles on State Responsibility, see note 178.

²²¹ See note 217 and also Doc. A/51/903 (1997). See also A/RES/52/247 of 26 June 1998 *Third-party Liability: Temporal and Financial Limitations*. The issue is touched upon in detail in the next part.

²²² Schmalenbach, see note 174, 51.

²²³ D. Shraga, “UN Peace Keeping Operations: Applicability of International Humanitarian Law and Responsibility for Operations-related Damage”, *AJIL* 94 (200), 406 et seq. (410). These limitations are also temporal and financial.

²²⁴ See Model Contribution Agreement, see note 103: “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”.

²²⁵ See below.

UN peacekeeping. 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. Bearing 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 regard 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 as the state had to ensure to prosecute the violators.

3. PMC Hired for Peacekeeping Directly by the UN

The scenario for a direct hiring of a PMC by the UN would result in the shift of attribution for their acts to the UN 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 sending state to assure the 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 UN in order to achieve its alignment with other segments of the operation. They would, for this reason, be considered agents through which the organisation acts.²²⁶ Taking into consideration that they would perform identical functions compared 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,

²²⁶ Article 4, Draft Articles on IO Responsibility, see note 179.

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 organisation, without the state link as in the case of a national peacekeeping contingent.²²⁷ As such, it gives the UN some 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 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.²²⁸ 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 the respective law. Previous sections indicated a potentially broad body of international law that places the UN under an obligation, which may be owed to one or more IOs, states or to the international community as a whole,²²⁹ but also for the breach of rights that “accrue to any person or entity other than a State or an IO,”²³⁰ that undeniably covers the area of breaches committed by peacekeeping forces and affecting individuals.²³¹

The previous parts pointed to potential problems that might stem from the fact that the UN is not a party to most international agree-

²²⁷ It is at this stage less important, whether such an option is currently feasible or politically acceptable, but its occurrence would for certain give an additional leverage to the autonomy of the organization.

²²⁸ 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 receiving state. See above.

²²⁹ Draft Articles on IO Responsibility, see note 179, article 36 (1).

²³⁰ *Ibid.*, article 36 (2).

²³¹ See ILC Commentary on article 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 note 179, para. 344.

ments and conventions that are usually a source of substantive international human rights and humanitarian law obligations. In regular peace-keeping this problem is avoided (or at least minimized) due to the fact that military personnel remains 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 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 UN with the receiving state, the contributing states or IOs might help in pointing to the applicable obligations to which the UN would be bound. These are then transformed into the internal rules and regulations of the organisation, which by themselves do not provide the source of international obligations, but have a direct legal effect internally, in accordance with the internal legal system of the organisation. Considering the principle of the inferiority of rules of the organisation to its international obligations,²³² 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 organisation additional substantive international obligations. It has a significant value, however, as it aids the organisation 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 organisational 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 is its indicative role of the positive measures adopted by the organisation in order to meet its international obligations. As seen above, international responsibility may 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

²³² Article 35 of the Draft Articles on IO Responsibility, see note 179, which 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”.

can be inferred from the general rules on the responsibility of IOs,²³³ and is 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.²³⁴ 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.”²³⁵

Clear-cut articulation of what exactly due diligence means is, again, case specific, depending on circumstances²³⁶ and on the level of applicable norms,²³⁷ but should not be neglected in connection with 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.”²³⁸ 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. What is at stake here is the potential international responsibility of the state in which the PMC, which has violated existing international obligations through its conduct, is registered (the term “exporting state” is usually used). For the 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, apply extraterritorially.²³⁹ 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 an unlawful action of the PMC, in

²³³ Ibid., 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”.

²³⁴ Commentary on article 33, see note 179, para. 344, page 202 sub para. 2-4.

²³⁵ Ibid.

²³⁶ A.V. Freeman, “Responsibility of States for Unlawful Acts of Their Armed Forces”, *RdC* 88 (1955), 267 et seq. (278).

²³⁷ Lehnardt, see note 199, 18.

²³⁸ ECtHR, *Costello Roberts v. UK*, Judgement, 23 February 1993, No. 13134/87, para. 27.

²³⁹ Lehnardt, see note 199, referring to the UK Court of Appeal, *Al-Skeini and others v. Secretary of State for Defence*, Judgment, 21 December 2005.

particular if directed towards the territorial integrity of another state,²⁴⁰ it is rather unlikely that such an obligation would exist for a PMC integrated into a UN peacekeeping force, acting under a 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.”²⁴¹

Since the UN would evidently be held responsible for wrongful acts of the hired peacekeeping-PMCs in most cases, a more detailed look at the principles for the invocation of such responsibility seems necessary. According to the proposed IO responsibility rules this can be invoked by the injured state (or IO)²⁴² or even any other non-injured state (or an IO), provided that the obligation breached by the organisation is owed to the international community as a whole.²⁴³ Such invocation may be accompanied by the claim for cessation of such acts and the obligation to provide reparations.²⁴⁴

In addition to these theoretical considerations and similar to the PMC secondment scenario, the established peacekeeping practice would also provide the basis for third-party liability claims against the

²⁴⁰ The Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the UN, A/RES/2625 (XXV) of 24 October 1970.

²⁴¹ Lehnardt, see note 199, 19.

²⁴² Article 46, Articles on IO Responsibility, see note 179.

²⁴³ Article 51 (2) and (3), *ibid.*

²⁴⁴ Article 51 (4), *ibid.* This offers, at least in theory, a few possible scenarios for the invocation of an organisation’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 organisation could 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 of 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.

UN, 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 forces²⁴⁵ 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 receiving 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 UN 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.²⁴⁶ In this case the UN 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 cumulative conditions: 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 must 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.²⁴⁷

The last few points touch upon the issue of fora, either from the perspective of competence to adjudicate claims settlement involving third-parties and the UN, or from the perspective of assuring that violators, who act on behalf of the UN, 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 in the case of PMC peacekeeping integration, provided that they are properly incorporated in the relationship between the UN and the receiving state (through SOFAs liability clauses) but also included in the terms of reference of the local UN claims review boards. These local

²⁴⁵ See Report note 217 and Report note 221.

²⁴⁶ *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”, Doc. A/51/389, see note 217, para. 13, footnote 5.

²⁴⁷ *Ibid.*, 14; see also Schmalenbach, see note 174, 41-42.

administrative organs of the UN, operating in the country and reporting to the Secretary-General,²⁴⁸ would probably not differ between the two scenarios of PMC inclusion, although they would need to take into consideration the differences between the modalities of the two.

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 law 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 goes beyond the scope of this research. It is, however, important to touch upon this in the light of responsibility issues as the obligation of perpetrators for wrongful acts presents one of the most crucial obligations of public authorities (usually states) under international law giving effect to reparation measures. The problem, of course, derives from the fact that in the scenario in which the PMC is hired directly by the UN, the concept of the sending state is substituted by the sending international organisation, which, under current circumstances, is unable to guarantee the exercise of criminal jurisdiction over the individuals involved in its operations. The rights and duties of the UN, as well as its functions and structures, are not identical to those of a state.²⁴⁹ However, the peacekeeping record of the UN confirms that the organisation can be empowered to perform certain governmental functions. It is consequently under an 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 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 clarifying the law that would serve as a basis for such measures. The primary responsibility for this would lie in

²⁴⁸ The UN has undertaken (in SOFAs, based on 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, see note 223.

²⁴⁹ Or as the ICJ stated in 1949, see note 44, 179, when recognising the international personality of the UN: "That is not the same thing as saying that it is a State, which it certainly is not, or that its legal personality and rights and duties are the same as those of a State".

the hands of the UN as the main entity being responsible for the conduct of such a force.

It is unclear how the UN would tackle this issue, but it would, due to reasons similar to those that present the basis for functional immunities of the UN in receiving states, presumably wish to avoid the primary jurisdictional role of the receiving state.²⁵⁰ The alternative would require the consent of the receiving 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 personnel are nationals.²⁵¹

Some 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 fora of international criminal justice such as the ICC or to the internal justice-administration procedures of the UN. Both these options would first require the modification and adaptation of the existing procedures and institutional mechanisms. The ICC option would preferably refer for its jurisdiction to article 13 (b) of the Court's statute. 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 limited as these are not organs of criminal prosecution and lack adequate procedures, competence and resources. As the internal structures of the organisation are subject only to gradual and non-revolutionary change which is, if anything, very likely to take longer than the procedures to mandate 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 subse-

²⁵⁰ One must not forget that the role of the receiving state is not trivial as there exists a possibility for its exercise of jurisdiction under the contemporary system, subject to the concept of the contributing state and the UN, especially in off-duty issues.

²⁵¹ The latter case especially indicates the additional potential body of law that would be applicable, namely the law of consular protection.

quently lead to the development of effective disciplinary and criminal procedures applicable to all subjects involved in international peacekeeping.

V. Conclusion

This article has explored the most pertinent legal issues that would arise from the possible inclusion of PMCs as a military component of 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 a 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 use of these analogies was the only way to develop the topic, notwithstanding the need for occasional presumptions and inventions. In particular the following notable issues require attention or re-statement:

First, one may conclude 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 receiving 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 of international organisations and states, particularly of receiving 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 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 rather than 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 recognises that obligations of states are fewer (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 would 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 has 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. This has therefore been analysed in detail, coming to the conclusion that every such analysis must 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 should develop this approach and recognise that, in its essence, international wrongful acts are not committed by public authorities, but individuals. It is therefore important to emphasise 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 part in 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 may, 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.