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# The Legal Status of Employees of Private Military/Security Companies Participating in U.N. Peacekeeping Operations

### Mohamad Ghazi Janaby\*

#### Introduction

The United Nations has hired private military/security companies (PMSCs)<sup>1</sup> to provide security services since at least the Somalian Civil War, when it deployed 7,000 Ghurka guards from Defense Systems Limited to protect relief convoys.<sup>2</sup> According to a Global Policy Forum report, U.N. spending on outsourcing security services rose from \$44 million in 2009 to \$76 million in 2010.<sup>3</sup> PMSCs may be used in peacekeeping operations in a variety of roles, including "police and military training and capacity building, security training and consultancy, [and] strategic information gathering."<sup>4</sup> In

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<sup>&</sup>lt;sup>1</sup> While terminology varies, this paper follows the Montreux document in defining PMSCs as private business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel. Int'l Comm. of the Red Cross, Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict (Sept. 17, 2008). For more information on state practices with PMSCs, see generally Swiss Fed. Dep't of Foreign Affairs, The Montreux Document on Private Military and Security Companies: Proceedings of the Regional Workshop for North East and Central Asia, Geneva Centre for the Democratic Control of Armed Forces, available at http://www.dcaf.ch/Publications/The-Montreux-Document-on-Private-Military-and-Security-Companies-Proceedings-of-the-Regional-Workshop-for-North-East-and-Central-Asia. This definition is meant to encompass what other scholars call private security companies, private military firms, the private security industry, private contractors, private armies, privatized armies, private military corporation or firms, private military contractors, military service providers, non-lethal service providers, corporate security firms, and in some cases, mercenaries. See, e.g., CHRISTOPHER KINSEY, CORPORATE SOLDIERS AND INTERNATIONAL SECURITY: THE RISE OF PRIVATE MILITARY COMPANIES (2006); Renée De Nevers, Private Security Companies and the Laws of War, 40 SECURITY DIALOGUE 169, 173 (2009); Todd S. Milliard, Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies, 176 MIL. L. REV. 1, 8 (2003). As will be made clear, it is improper to call PMSCs used in peacekeeping operations "mercenaries."

 $<sup>^2</sup>$  Lou Pingeot, Dangerous Partnership: Private Military & Security Companies and the UN 22 (2012), available at

http://www.globalpolicy.org/images/pdfs/GPF\_Dangerous\_Partnership\_Full\_report.pdf.

<sup>&</sup>lt;sup>3</sup> Id. at 23 and 45.

<sup>&</sup>lt;sup>4</sup> U.N. Human Rights Office of the High Comm'r for Human Rights [hereinafter OHCHR], Working Group

2012, the U.N. Department of Safety and Security issued a set of formal guidelines through which PMSCs may be hired to provide security services to the U.N.<sup>5</sup> Nonetheless, the U.N. Working Group on the Use of Mercenaries, originally formed in 2005 to study "the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination," warned that "there is a risk that, without proper standards and oversight, the outsourcing of security functions by the United Nations to private companies could have a negative effect on the image and effectiveness of the United Nations in the field."

Other scholars have discussed the practical issues involved in using PMSCs in U.N. peace operations. While some attempted to highlight the benefits of using PMSCs as part of U.N. operations in comparison with the voluntary system of troop contribution by U.N. Member States.<sup>8</sup> Still others highlighted the effectiveness of these companies in assisting with U.N. operations.<sup>9</sup> The increased reliance by the U.N. on PMSCs has

on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination, *Summary Report of the Expert Panel on the Use of Private Military and Security Companies by the United Nations*, ¶ 25, U.N. Doc. A/68/455 (July 31, 2013).

<sup>5</sup> See U.N. Dep't of Safety and Security, Guidelines on the Use of Armed Security Services from Private Security Companies (2012), available at

http://www.ohchr.org/Documents/Issues/Mercenaries/WG/StudyPMSC/GuidelinesOnUseOfArmedSecurit yServices.pdf. According to these guidelines, in order for a PMSC to be hired by the U.N., it must:

- a. Be a member of International Code of Conduct for Private Security Service Providers (ICoC);
- b. Have been in the business of providing armed security services for at least five years;
- c. Be licensed to provide security services by the state in which it is registered or incorporated;
- d. Be licensed to provide security services and to carry and use firearms and ammunition by the state in which it will operate;
- e. Have started the registration process to be a registered United Nations Procurement Division vendor; and
- f. Be able to substantially comply with the scope of work.

#### Id at 6

<sup>6</sup> OHCHR Res. 2005/2, U.N. Doc. E/CN.4/RES/2005/2, at 1 (Apr. 7, 2005). In 2008, the U.N. Human Rights Council extended its mandate for three years and instructed it, among other things, "to monitor and study the effects on the enjoyment of human rights, particularly the right of peoples to self-determination, of the activities of private companies offering military assistance, consultancy and security services on the international market and to prepare a draft of international basic principles that encourage respect for human rights by those companies in their activities." Human Rights Council Res. 7/21, Mandate of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Rights of Peoples to Self-Determination, 7th Sess., March 28, 2008, U.N. Doc. A/HRC/RES/7/21 (Mar. 28, 2008).

<sup>7</sup> U.N. Doc. A/68/339 (20 August 2013). *See also* Concept Note, Expert Panel Event on the Use of Private Military and Security Companies (PMSCs) by the United Nations, (July 31, 2013), *available at* http://www.ohchr.org/documents/issues/mercenaries/wg/studypmsc/expertpanelconceptnote.pdf. <sup>8</sup> *See* Oldrich Bures, *Private Military Companies: A Second Best Peacekeeping Option?*, 12 INT'L PEACEKEEPING 533 (2005). *See also* Peter H Gantz, *The Private Sector's Role in Peacekeeping and Peace Enforcement*, REFUGEES INT'L (Nov. 18, 2003),

http://www.sandline.com/hotlinks/Refugees\_InternationalC3FF13.html; PETER W. SINGER, CORPORATE WARRIORS: THE RISE OF THE PRIVATIZED MILITARY INDUSTRY (2008).

<sup>9</sup> See Ian Murphy, Private Military Companies, Peacekeeping, and African States: A Critical Analysis of PMCs in Peacekeeping Operations in Africa, (July 2010) (Ph.D. thesis, University of Plymouth). See also James Pattison, Outsourcing the Responsibility to Protect: Humanitarian Intervention and Private Military and Security Companies, 2 INT'L THEORY 1, 2010,

http://journals.cambridge.org/abstract\_S1752971909990224; PINGEOT, supra note 2.

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encouraged some to suggest using them as front-line peacekeepers.<sup>10</sup> However, others question this view and argue that PMSCs cannot be hired by the U.N. as peacekeepers.<sup>11</sup>

What has received less attention, however, is the legal status of the employees of PMSCs hired by the U.N. This paper analyzes the legal status of PMSC personnel participating in U.N. peacekeeping. In other words, how can the personnel of private companies be categorized when they are used as peacekeepers?

The outsourcing of military and security services used in U.N. peacekeeping operations to PMSCs creates a gray area in international law. Under international humanitarian law, sometimes called the law of war, peacekeepers who engage in military operations are either civilians engaged in lawful self-defense or unlawful combatants. Conversely, the various international conventions that govern peacekeeping and peace enforcement operations grant peacekeepers the rights of combatants. This tension becomes more acute when PMSCs are utilized, both when they are employed by a Member State and seconded to the U.N., and when they are employed directly by the U.N. itself. The secondment of PMSCs means that a State hires a PMSC and send it to the U.N. to be under its disposal. PMSCs seconded to the U.N. would likely not qualify as peacekeepers under the U.N.'s peacekeeping conventions, while the protections afforded to peacekeepers (such as immunity from local prosecution) seem inappropriate regarding PMSCs hired directly by the U.N. In particular, while PMSCs employed in peacekeeping operations would not satisfy the technical criteria of mercenaries under the law of war, the protections afforded to peacekeepers assume that peacekeeping forces are subject to the domestic justice system of a Member State, which would not be the case with those employed directly by the U.N. This tension seems ineluctable given the current structure of international humanitarian law and U.N. peacekeeping rules.

#### I. THE INCREASING ROLE OF PMSCs IN U.N. PEACEKEEPING OPERATIONS

While PMSCs are not currently used as front-line peacekeepers, they are used in various support capacities on peacekeeping missions. Before addressing the legal consequences that would follow should their role evolve to include actual peacekeeping, this paper will describe their current role and arguments in favor of giving them greater responsibilities.

<sup>10</sup> See Bures, supra note 8, at 540-543. See also Christopher M. Rochester, A Private Alternative to A Standing United Nations Peacekeeping Force (2007); Malcolm Patterson, A Corporate Alternative to United Nations ad hoc Military Deployments, 13 J. Conflict Security Law 215, 221 (2008).

<sup>11</sup> See The Geneva Centre for the Democratic Control of Armed Forces, UN Use of Private Military and Security Companies: Practices and Policies (2011) (by Åse G Østensen), available at http://www.dcaf.ch/Publications/UN-Use-of-Private-Military-and-Security-Companies-Practices-and-Policies. See also Christopher Spearin, UN Peacekeeping and the International Private Military and Security Industry, 18 Int'l Peacekeeping 196, 198 (2011).

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#### A. The Structure of Peacekeeping Operations in General

Peacekeeping<sup>12</sup> is one way in which the U.N. Security Council and the U.N. General Assembly maintain and restore international peace and security.<sup>13</sup> Peacekeeping forces are voluntarily provided by U.N. Member States.<sup>14</sup> When the Security Council decides to create a peacekeeping mission, the Secretary-General of the U.N. asks Member States to participate by seconding national troops to act as U.N. forces. The relationship between the Member State seconding its troops and the U.N. is governed by a formal agreement, an example of which would be the Model Agreement between the U.N. and Member States Contributing Personnel and Equipment to United Nations Peacekeeping Operations.<sup>15</sup>

U.N. peacekeeping forces are considered to be subsidiary organs of the U.N. <sup>16</sup> They thus enjoy the status, privileges, and immunities set forth in Article 105 of the U.N. Charter and the Convention on the Privileges and Immunities of the United Nations. <sup>17</sup> Although these troops serve under the U.N. flag, they wear their countries' military uniform and are identified as U.N. peacekeepers only by a blue helmet or beret and a badge. <sup>18</sup> The main nature of U.N. peacekeeping forces is military, although civilians and police are also part of them. <sup>19</sup> These forces are under the command of the Secretary-General, who has the responsibility of directing and exerting day-to-day control over the U.N. forces and selecting force commanders. <sup>20</sup> In addition to instructions from U.N. force commanders, peacekeeping forces may receive orders from the heads of their national contingents, which have the ultimate responsibility for disciplining their forces. <sup>21</sup>

#### B. The Current Role of PMSCs in Peacekeeping

The majority of those who promote the participation of PMSCs in U.N. missions highlight the inadequate coordination, training, and equipment of traditional U.N. forces

<sup>&</sup>lt;sup>12</sup> This paper will not address the distinction between peacekeeping and peace enforcement operations thematically, as that distinction is largely irrelevant to its primary purpose. The distinction will be noted where relevant.

<sup>&</sup>lt;sup>13</sup> Marrack Goulding, *The Evolution of United Nations Peacekeeping*, 69 INT'L AFFAIRS 451, 451-452 (1993).

<sup>&</sup>lt;sup>14</sup> U.N. Dep't of Peacekeeping Operations & Dep't of Field Support, *United Nations Peacekeeping Operations Principles and Guidelines* 52 (2008), *available at* http://pbpu.unlb.org/pbps/Library/Capstone\_Doctrine\_ENG.pdf.

<sup>&</sup>lt;sup>15</sup> U.N. Secretary-General, *Model Agreement between the United Nations and Member States Contributing Personnel and Equipment to United Nations Peace-Keeping Operation*, U.N. Doc. A/46/185 (May 23, 1991).

<sup>&</sup>lt;sup>16</sup> Ray Murphy, *United Nations Military Operations and International Humanitarian Law: What Rules Apply to Peacekeepers?*, 14 CRIM. L.F. 153, 159 (2003).

<sup>&</sup>lt;sup>17</sup> Convention on the Privileges and Immunities of the United Nations, Feb. 13, 1946, 1 U.N.T.S. 15 (entered into force 17 September 1946).

<sup>&</sup>lt;sup>18</sup> U.N. Secretary-General, *supra* note 15; *See also* U.N. Secretary-General, *Model Status of Force Agreement for Peacekeeping Operations*, 47(b), U.N. Doc. A/45/594 (Oct. 9, 1990). There have been 67 peacekeeping operations since 1948; as of March 31, 2013, there were 14 peacekeeping operations throughout the world. U.N. Peacekeeping Operations Fact Sheet (March 31, 2013), https://www.un.org/en/peacekeeping/documents/bnote0313.pdf.

<sup>&</sup>lt;sup>19</sup> Jaume Saura, *Lawful Peacekeeping: Applicability of International Humanitarian Law to United Nations Peacekeeping Operations*, 58 HASTINGS L. J. 479, 486 (2007).

 <sup>&</sup>lt;sup>20</sup> Brian D. Tittemore, Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations 33 STAN. J. INT'L L. 61, 79 (1997).
 <sup>21</sup> Id. at 80.

and claim that these weaknesses can be overcome by the use of PMSCs.<sup>22</sup> Even apart from the calls for PMSCs, international aid organizations assert that the current U.N. peacekeeping and peace enforcement system is weak and does not fulfill its mandated purpose.<sup>23</sup>

One of the important reasons for the weakness of U.N. forces is the reluctance of Western countries to second their troops to the U.N.<sup>24</sup> At times, countries such as the U.S. and France have refused to participate in particular U.N. missions altogether, as happened, for example, when the U.S. declined to participate in the Liberia mission.<sup>25</sup> Even when developed states do contribute personnel to U.N. missions, they do so to a markedly lower degree than developing countries. In February 2014, for instance, the U.S. had assigned only 121 troops to peacekeeping missions, Germany, 263 troops, and the U.K., 283 troops.<sup>26</sup>

The majority of U.N. peacekeeping operations consist of troops that are not provided with sufficient training or equipment. According to statistics provided by the U.N. Peacekeeping Department, the majority of peacekeeping forces are provided by developing countries. During the period mentioned above, February 2014, the participation of troops from developing countries greatly outweighed that of developed countries. For example, Bangladesh provided 7,929 troops, Ethiopia, 6,615, and Pakistan, 8,266.<sup>27</sup> Most developing countries are motivated by the desire to give their troops income and experience when sending their troops to participate in U.N. operations.<sup>28</sup> As a result, U.N. troops are not qualified to stop even routine violence. This is clearly exemplified by the weakness of U.N. forces in Sierra Leone, where international forces were unable to face the rebels.<sup>29</sup>

The U.N. consequently believes that its peacekeeping operations face serious challenges relating to the supply of necessary troops. Ban Ki-Moon, the U.N. Secretary-General, has stated that "[t]oday we face mounting difficulties in getting enough troops, the right equipment and adequate logistical support," and that "[s]upply has not kept pace with demand."<sup>30</sup>

In response to these deficiencies, various scholars hold PMSCs to be the best alternative to classical U.N. forces. These companies are more efficient than multinational forces in terms of organization, training, equipment, willingness, and overall readiness.<sup>31</sup> Others emphasize the financial aspect of PMSC participation in U.N. operations. By some estimates, comparable missions using PMSCs could cost 10 percent less than those currently staffed with multinational forces.<sup>32</sup>

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<sup>&</sup>lt;sup>22</sup> See ROCHESTER, supra note 10; see also Patterson, supra note 10.

<sup>&</sup>lt;sup>23</sup> Gantz, *supra* note 8, at 1.

<sup>&</sup>lt;sup>24</sup> Pattison, *supra* note 9, at 2.

<sup>&</sup>lt;sup>25</sup> Gantz, *supra* note 8, at 1.

<sup>&</sup>lt;sup>26</sup> U.N. Dep't of Peacekeeping Operations, *Contributors to United Nations Peacekeeping Operations* (Feb. 28, 2014), http://www.un.org/en/peacekeeping/contributors/2014/feb14\_1.pdf. <sup>27</sup> *Id.* 

<sup>&</sup>lt;sup>28</sup> Bures, *supra* note 8 at 542; *see* Gantz, *supra* note 8.

<sup>&</sup>lt;sup>29</sup> See Gantz, supra note 8, at 1.

<sup>&</sup>lt;sup>30</sup> U.N. News Centre, UN to Strengthen Peacekeeping Efforts Amid Rising Demand, Says Ban (July 7, 2009), http://www.un.org/apps/news/story.asp?NewsID=31383&amp;Cr=Secretarygeneral&amp;Cr1=peacekeeping.

<sup>&</sup>lt;sup>31</sup> Spearin, *supra* note 11 at 197.

<sup>&</sup>lt;sup>32</sup> E.g., Ian Bruce, UN Should Pay Mercenaries to Keep Peace (Dec. 3, 2006), HERALD,

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The U.N. has already contracted with many PMSCs to supply services such as advice, training, de-mining, logistics, etc.<sup>33</sup> For example, the U.N. contracted with Pacific Architects and Engineers to provide the U.N. missions in Haiti and Liberia with military and security services.<sup>34</sup> The U.N. has already hired PMSCs to provide services concerning humanitarian assistance and relief, transport, and infrastructure developments.<sup>35</sup> It is suggested that there must be no difference regarding the outsourcing of security-enforcement requirements, including peacekeeping, to PMSCs.<sup>36</sup>

Peter W. Singer suggests three situations in which PMSCs might be used in the context of peacekeeping operations. The first involves hiring private companies to secure relief operations. The second situation is the use of PMSCs as a "rapid reaction force" when U.N. "blue helmets" are unable or unwilling to provide the necessary muscle to fulfill the peacekeeping mandate. The third possibility would be to outsource the entire peacekeeping operation to private companies. The last option in particular was considered by the U.N. Department of Peacekeeping and the U.S. National Security Council during the refugee crisis in what was then Zaire in 1996.<sup>37</sup>

To sum up, it is clear that there is a considerable increase in the use of PMSCs to provide security services to the U.N. Although the U.N. has not yet delegated peacekeeping missions directly to PMSCs, they have been used to provide military and security services to peacekeeping forces. Additionally, as will be elaborated later,<sup>38</sup> the U.S. explicitly uses them in place of its own forces in U.N. peacekeeping operations. Thus, an inquiry into the legal status of PMSC personnel is in order.

#### II. THE LEGAL STATUS OF PEACEKEEPERS

The complicated legal status of PMSCs utilized in peacekeeping operations is in part a reflection of the complicated status of peacekeepers in general. Peacekeepers are classified differently depending on whether one consults international humanitarian law or the various international conventions that govern peacekeeping operations.

As a preliminary matter, one might contest whether international humanitarian law is applicable to the U.N. at all. This question was confronted to some extent during early U.N. operations, such as in Korea.<sup>39</sup> The International Court of Justice (ICJ)

http://platform.blogs.com/passionofthepresent/2006/12/un should pay m.html.

<sup>&</sup>lt;sup>33</sup> Østensen, *supra* note 11, at 11.

 $<sup>^{34}</sup>$  Foreign and Commonwealth Office, Private Military Companies: Options for Regulation, 2001-2, H.C. 557, at 19 (U.K.).

<sup>&</sup>lt;sup>35</sup> Kevin A. O'Brien, *Military-Advisory Groups and African Security: Privatized Peacekeeping?*, 5 INT'L PEACEKEEPING 78, 99 (1998).

 $<sup>^{36}</sup>$  *Id*.

<sup>&</sup>lt;sup>37</sup> Peter W. *Singer, Peacekeepers, Inc.*, POLICY REVIEW (June 2003), *available at* http://www.globalpolicy.org/pmscs/51272-peacekeeping-inc-.html?itemid=id. <sup>38</sup> *Infra* Part IV R

<sup>&</sup>lt;sup>39</sup> Christopher Greenwood, *International Humanitarian Law and United Nations Military Operations*, 1 Y.B. OF INT'L HUMANITARIAN LAW 3 (1998); Walter G. Sharp, *Protecting the Avatars of International Peace and Security*, 7 DUKE J. COMP. & INT'L L. 93 (1996); Umesh Palwankar, *Applicability of International Humanitarian Law to United Nations Peace-keeping Forces*, 33 I.R.R.C. 227 (1993); Torsten S. Saarbrücken, *Arts 36-38*, in The Charter of the United Nations: A Commentary 694 (Bruno Simma et al. eds., 2nd ed. 2002); R. SIMMONDS, LEGAL PROBLEMS ARISING FROM THE UNITED NATIONS MILITARY OPERATIONS IN THE CONGO 168 (1968).

has considered the U.N. to be "a subject of international law and capable of possessing international rights and duties." This refers to all the rules of international law, including international humanitarian law. Respect for international humanitarian law by U.N. forces is also mandated by the status of forces agreements entered into between the U.N. and the State receiving a peacekeeping mission. Both the Secretary-General's Bulletin on Observance by United Nations Forces of International Humanitarian Law and the Report of the Panel on the U.N. Peace Operations declare that international humanitarian law applies to U.N. forces.

Aside from some technicalities,<sup>45</sup> the main argument against applying international humanitarian law to U.N. peacekeeping forces stems from the fact that the U.N. does not have any criminal justice system; thus, it cannot fulfill the obligations of a state to prosecute those of its armed forces who commit violations of international humanitarian law.<sup>46</sup> Members of U.N. peacekeeping forces have committed considerable violations of human rights and international humanitarian law, including torture, sexual violence, and attacks on civilians in Somalia, Congo, Haiti, Mozambique, East Timor, Bosnia, Kosovo, and Cambodia.<sup>47</sup>

Yet this is not a problem when U.N. missions comprise traditional, multinational forces seconded by Member States—such violations can still be prosecuted by the contributing states.<sup>48</sup> Indeed, states have a duty to ensure that they respect the 1949 Geneva Conventions, according to Common Article 1, and this responsibility continues

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<sup>&</sup>lt;sup>40</sup> Reparation for Injuries Suffered in the Service of the United Nations, Advisory Opinion, 1949 I.C.J. 117.

<sup>&</sup>lt;sup>41</sup> Greenwood, *supra* note 39, at 17.

<sup>&</sup>lt;sup>42</sup> See, e.g., Agreement on the Status of the United Nations Assistance Mission for Rwanda, Nov. 5, 1993, 1748 U.N.T.S. 257 (the U.N. "shall conduct its operations in Rwanda with full respect for the principles and spirit of the general convention, applicable to the conduct of military personnel. These international conventions include the four Geneva Conventions of 12 August 1949 and their Additional Protocol of 8 June 1977."). See also The Status of Forces Agreement Between the United Nations and the Government of the Republic of South Sudan Concerning the United Nations Mission in South Sudan (SOFA), (adopted Aug. 8, 2011).

<sup>&</sup>lt;sup>43</sup> UN Secretary-General, *Observance by United Nations Forces of International Humanitarian Law*, U.N. Doc ST/SGB/1999/13 (Aug. 6, 1999). The Bulletin has been described as binding norms on U.N. personnel because of its nature as U.N. "internal law" and the obligations of U.N. stemming from customary international law. *See* Saura, *supra* note 19, at 497.

<sup>&</sup>lt;sup>44</sup> Rep. of the Panel on U.N. Peace Operations, U.N. Doc A/55/305; GAOR 55th Sess. (2000).

<sup>&</sup>lt;sup>45</sup> See 31st Round Table on Current Problems of International Humanitarian Law, Sanremo, Sept. 4-6, 2008, The Applicability of International Humanitarian Law to Peace Operations, from Rejection to Acceptance, at 91 (by Daphna Shraga).

<sup>&</sup>lt;sup>46</sup> Greenwood, *supra* note 39, at 15.

<sup>&</sup>lt;sup>47</sup> See Peter F. Chapman, Ensuring Respect: United Nations Compliance with International Humanitarian Law, HUMAN RIGHTS BRIEF 17, no. 1, 3-11 (2009), http://www.wcl.american.edu/hrbrief/17/1chapman.pdf. See also U.N. Secretary-General, Rep. of the Secretary-General on the Activities of the Office of Internal Oversight Services, 59th Session, U.N. Doc A/59/661 (2005); UNIFEM, Women, War and Peace: The Independent Experts' Assessment on the Impact of Armed Conflict on Women and Women's Role in Peace Building (2002) (by Elisabeth Rehn & Ellen Johnson-Sirleaf,); Sex and the UN: when Peacemakers Become Predators, The Independent (Jan. 11, 2005),

http://www.independent.co.uk/news/world/africa/sex-and-the-un-when-peacemakers-become-predators-6155183.html; Int'l Peace Research Inst., *Sexual Exploitation and Abuse by UN Peacekeepers*, Policy Brief 10/2009 (2009) (by Suk Chun).

<sup>&</sup>lt;sup>48</sup> Saarbrücken, *supra* note 39, at 695.

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even if they second their forces to the U.N.<sup>49</sup> A member of peacekeeping forces would be, therefore, prosecuted before the courts of his state if he commits a violation of international humanitarian law.<sup>50</sup> As a result, there is no problem in applying international humanitarian law in determining the legal status of traditional U.N. peacekeepers.

#### A. Peacekeepers Under International Humanitarian Law

International humanitarian law provides a classification for all persons on the battlefield. Individuals in combat environments are either civilians or combatants. According to Article 50 of the Additional Protocol I to the Geneva Conventions (AP I), a civilian is a person who belongs neither to the category of prisoners of war nor that of a member of the armed forces of a party to the conflict.<sup>51</sup> Based on this definition, international humanitarian law may classify peacekeepers as civilians.<sup>52</sup>

The status of peacekeepers as civilians under international humanitarian law carries with it certain protections. The prohibition against "feigning . . . protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other states not parties to the conflict" represents one kind of that protection. In addition, the parties to an international armed conflict have a duty to respect and protect peacekeepers engaged in relief operations. In general, peacekeepers are civilians who deserve protection afforded by Articles 48, 50, 51, and 52 of the AP I. This means that any attack on them would be unlawful, and they would have to be granted the fundamental guarantees provided in Article 75 of the AP I if captured. Peacekeepers would also be protected in the context of non-international armed conflicts. Under Common Article 3 of the Geneva Conventions, they would be regarded as "persons taking no active part in hostilities." Such a status would make any attack on them illegal.

The status of peacekeepers as protected civilians may be regarded as a rule of customary international law. For example, Rule 33 of the Customary International Humanitarian Law Database prohibits attacking "personnel and objects involved in a peace-keeping mission . . . as long as they are entitled to the protection given to civilians and civilian objects under international humanitarian law[.]"<sup>58</sup> The military manuals of many States also regard peacekeepers as civilians, such as those of the Netherlands<sup>59</sup> and

<sup>&</sup>lt;sup>49</sup> Greenwood, *supra* note 39, at 17.

<sup>&</sup>lt;sup>50</sup> MINISTRY OF DEFENCE, THE MANUAL OF THE LAW OF ARMED CONFLICT 397 (2004).

<sup>&</sup>lt;sup>51</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts art. 50, *adopted* 8 June 1977, 1125 U.N.T.S 609 (entered into force Dec. 7,1978) [hereinafter Additional Protocol I].

<sup>&</sup>lt;sup>52</sup> Alice Gadler, *The Protection of Peacekeepers and International Criminal Law: Legal Challenges and Broader Protection*, 11 GERMAN L.J. 585, 589 (2010).

<sup>&</sup>lt;sup>53</sup> Additional Protocol I, *supra* note 51, at art. 37(1)(d).

<sup>&</sup>lt;sup>54</sup> Greenwood, *supra* note 39, at 30.

<sup>&</sup>lt;sup>55</sup> *Id.* at 31; *See also* Additional Protocol I, *supra* note 51, at arts. 69-71.

<sup>&</sup>lt;sup>56</sup> Greenwood, *supra* note 39, at 31.

<sup>&</sup>lt;sup>57</sup> *Id* 

<sup>&</sup>lt;sup>58</sup> Int'l Comm. of the Red Cross [hereinafter ICRC], *Customary IHL - Rule 33. Personnel and Objects Involved in a Peacekeeping Mission* (2005), *available at* http://www.icrc.org/customary-ihl/eng/docs/v1\_rul\_rule33.

<sup>&</sup>lt;sup>59</sup> ICRC, Customary IHL - Practice Relating to Rule 33. Personnel and Objects Involved in a Peacekeeping

the U.K.<sup>60</sup> Attacks against peacekeeping forces are crimes under legislation passed in the U.K.,<sup>61</sup> the Netherlands,<sup>62</sup> and Iraq.<sup>63</sup>

In general, U.N. Member States do not readily accept categorizing members of their armed forces assigned to U.N. missions as combatants,<sup>64</sup> since this would make their personnel legitimate military targets.<sup>65</sup> For example, NATO Member States insisted that their pilots who bombed Bosnian Serb positions were U.N. experts, not combatants.<sup>66</sup> This would mean that these experts had the right to attack Bosnian Serbs, while the latter did not have the right to return fire.<sup>67</sup> Going by this logic regarding the status of the pilots, retaliation on the part of the Bosnian Serb would in fact constitute an international crime under the Convention on the Safety of United Nations and Associated Personnel.<sup>68</sup> Perhaps unsurprisingly, however, France changed its position when two of its pilots were shot down by Bosnian Serb forces, claiming that they should be given the protections of prisoners of war under the Third Geneva Convention, a status not afforded to civilians.<sup>69</sup>

Civilian status is a two-sided coin under international humanitarian law. On one hand, civilians are protected from attacks during armed conflict. On the other, they are obligated not to directly participate in hostilities. Thus, treating peacekeepers as civilians entails an obligation not to directly participate in hostilities; otherwise they lose their protected status.<sup>70</sup> However, this rule of international humanitarian law is in tension with the rules crafted specially for peacekeeping operations, as will be highlighted next.

#### B. Peacekeepers Under U.N. Documents

As mentioned foregoing, there is debate on the applicability of international humanitarian law to U.N. peacekeeping forces when they are engaged in armed conflicts.<sup>71</sup> However, it is not clear whether international humanitarian law's definitions of civilian and combatant are applicable to peacekeeping forces. In other words, while international humanitarian law is specific in categorizing persons on the battlefield as civilians or combatants, various U.N. documents suggest a different categorization for peacekeepers. Thus, it is an open question whether international humanitarian law assigns the appropriate status concerning peacekeepers and PMSC personnel in peacekeeping

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Mission (2005), available at https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule33.
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https://www.gov.uk/governmen/upioads/system/upioads/attachment\_data/me/2/8/4/JSF3832004Edition.pdf.

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<sup>&</sup>lt;sup>60</sup> MINISTRY OF DEFENCE, THE JOINT DOCTRINE & CONCEPTS CENTRE, JSP 383: THE JOINT SERVICE MANUAL OF THE LAW OF ARMED CONFLICT 14, 377-82 (2004), *available at* https://www.gov.uk/government/uploads/system/uploads/attachment\_data/file/27874/JSP3832004Edition.p

<sup>&</sup>lt;sup>61</sup> U.N. Personnel Act, 1997, c. 13, art. 1 (U.K.).

<sup>62</sup> International Crimes Act, Stb. 2003, p. 230, art. 5(5) (Neth.).

<sup>63</sup> Iraqi High Criminal Court Law of 2005, art. 13(2)(C), 13(4)(C) (Iraq).

<sup>&</sup>lt;sup>64</sup> Some try to classify U.N. forces as combatants due to their uniform, weapons, and driving in around personnel carriers. *See* 31st Round Table on Current Problems of International Humanitarian Law, Sanremo, Sept. 4-6, 2008, *International Humanitarian Law and Peace Operations, Scope of Application Ratione Materiae*, at 100-06 (by Marco Sassoli).

<sup>&</sup>lt;sup>65</sup> *Id*. at 105.

<sup>&</sup>lt;sup>66</sup> *Id*.

<sup>&</sup>lt;sup>67</sup> *Id*.

<sup>&</sup>lt;sup>68</sup> *Id*.

<sup>&</sup>lt;sup>69</sup> *Id*.

<sup>&</sup>lt;sup>70</sup> Additional protocol I, *supra* note 51, at art. 51.

<sup>&</sup>lt;sup>71</sup> Greenwood, *supra* note 39; *see also* Sharp, *supra* note 39; Palwankar, *supra* note 39.

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operations. This part of the paper will now investigate peacekeeping rules established by the U.N. in order to compare them with the provisions of international humanitarian law.

Two key U.N. documents concerning the legal status of peacekeepers are the Convention on Safety of United Nations and Associated Personnel and the Secretary-General's Bulletin. The Convention establishes that those who take part in U.N. peace enforcement operations in accordance with Chapter VII of the U.N. Charter are combatants. The Bulletin provides that members of both peace enforcement and peacekeeping operations are combatants when actively engaged in armed conflict. The Bulletin classifies peacekeepers as combatants only when they directly participate in hostilities, whereas members of peace enforcement operations are classified as combatants even if they do not participate in hostilities. Thus, the distinction between civilian and combatant status for the members of U.N. peacekeeping forces hinges on their active engagement in armed conflict.

Peacekeepers can actively engage in armed conflict in two situations. The first is personal self-defense, the second, defense of the mandate.

Refraining from the use of force except in self-defense is one of the core principles of peacekeeping. The rules of engagement for every peacekeeping mission expressly state that the use of force is allowed only in self-defense.<sup>75</sup>

The permission to use force in self-defense has been stretched, however, to include the use of force to defend the mandate.<sup>76</sup> Self-defense, in this view, is interpreted broadly to include defense of others, and thus covers such third parties as civilians, convoys of humanitarian assistance,<sup>77</sup> and safe areas.<sup>78</sup>

As a result of this expanded conception of self-defense, peacekeeping forces have been deployed to many conflict areas where there were no operational cease-fires. For example, the mandate of the U.N. Mission in the Congo (ONUC) permitted the use of force, albeit as a last resort, to prevent civil war by arranging for a cease-fire, bringing all military operations to a halt, and preventing clashes.<sup>79</sup> The U.N. Security Council's authorizing ONUC to use force was controversial, raising questions about whether the

<sup>&</sup>lt;sup>72</sup> Convention on the Safety of United Nations and Associated Personnel art. 2, ¶2, *adopted* Dec. 9, 1994, 2051 U.N.T.S. 363. While most peacekeeping operations are established by U.N. Security Council mandate under Chapter VI of the Charter, increasing use has been made of the provisions in Chapter VII, especially when a recipient state is unable to maintain security and order. TREVOR FINDLAY, THE USE OF FORCE IN UN PEACE OPERATIONS (SIPRI ed., 1st ed. 2002).

<sup>&</sup>lt;sup>73</sup> UN Secretary-General, *supra* note 43.

<sup>&</sup>lt;sup>74</sup> *Id*.

<sup>&</sup>lt;sup>75</sup> Katherine E. Cox, *Beyond Self-Defense: United Nations Peacekeeping Operations & the Use of Force*, 27 DENV. J. INT'L L. & POL'Y 239, 249 (1999).

<sup>&</sup>lt;sup>76</sup> Yasushi Akashi, *The Use of Force in a United Nations Peace-Keeping Operation: Lessons Learnt from the Safe Areas Mandate*, 19 FORDHAM INT'L L.J. 312, 320 (1995); *Accord* Ray Murphy, *United Nations Peacekeeping in Lebanon and Somalia, and The Use of Force*, 8 J. CONFLICT SECURITY LAW 71 (2003). <sup>77</sup> For example, *see* the mandates concerning some U.N. missions: United Nations Operation in Somalia I (UNOSOM I), S.C. Res. 751, U.N. Doc. S/RES/751 (Apr. 24, 1992); United Nations Protection Force in Croatia (UNPROFOR), S.C. Res. 743, U.N. Doc. S/RES/743 (Feb. 21, 1992); United Nations Assistance Mission for Rwanda (UNAMIR), S.C. Res. 872, U.N. Doc. S/RES/872 (Oct. 5, 1993).

<sup>&</sup>lt;sup>78</sup> See, e.g., S.C. Res. 836, U.N. Doc. S/RES/836 (June 4, 1993) (instructing multinational forces to secure six safe areas in Bosnia and Herzegovina); S.C. Res. 918, U.N. Doc S/RES/918 (May 7, 1994) (instructing U.N. forces in Rwanda to, among others things, "take action in self-defense against persons or groups who threaten protected sites and populations.").

<sup>&</sup>lt;sup>79</sup> See, e.g., S.C. Res 4741, U.N. Doc S/RES/4741 (February 21, 1961).

mission was peacekeeping or was instead the sort of peace enforcement operation traditionally authorized under Chapter VII of the U.N. Charter.<sup>80</sup> The ICJ stated, however, that the ONUC mandate's use-of-force provisions did not make it a peace enforcement measure.<sup>81</sup> Similarly, the reinforced U.N. mission in Sierra Leone represented a considerable turn toward what is called "robust peacekeeping."<sup>82</sup> This mission started in 1998 with 70 observers.<sup>83</sup> When armed groups breached the peace agreement, the Security Council decided to deploy over 11,000 troops authorized to use force both to defend its mandate and to protect civilians.<sup>84</sup> The majority of U.N. peacekeeping missions since 2000 have included similar provisions.<sup>85</sup> The U.N. Task Force in Somalia, established according to Chapter VII of the U.N. Charter, was authorized to use all necessary means to create a secure environment for humanitarian operations.<sup>86</sup>

The content of these mandates makes it impossible to reconcile the status of peacekeepers under U.N. rules to the status accorded them under international humanitarian law. Under international humanitarian law, they are protected as civilians and consequently do not have the right to take participate in hostilities. Yet under peacekeeping rules, they are civilians who become combatants if they are actively engaged in armed conflict. Under international humanitarian law, self-defense does not constitute direct participation in hostilities and so does not result in losing the protected status of a civilian.<sup>87</sup> Under peacekeeping rules, however, self-defense does transform peacekeepers from civilians into combatants. Finally, the main criterion for determining peacekeepers' combatant status under peacekeeping rules is a "direct participation in hostilities," while such a criterion is not decisive under international humanitarian law.<sup>88</sup>

It is not necessary for the Court to express an opinion as to which article or articles of the Charter were the basis for the resolutions of the Security Council, but it can be said that the operations of ONUC did not include a use of armed force against a State which the Security Council, under Article 39, determined to have committed an act of aggression or to have breached the peace. The armed forces which were utilized in the Congo were not authorized to take military action against any State. The operation did not involve "preventive or enforcement measures" against any State under Chapter VI1 and therefore did not constitute "action" as that term is used in Article II.

Certain Expenses of the United Nations, Advisory Opinion, 1962 I.C.J. 177.

<sup>&</sup>lt;sup>80</sup> DAVID W. BOWETT, UNITED NATIONS FORCES: A LEGAL STUDY OF UNITED NATIONS PRACTICE 176 (1964). *See also* Cox, *supra* note 75, at 252.

<sup>81</sup> The ICJ stated

<sup>&</sup>lt;sup>82</sup> 31st Round Table on Current Problems of International Humanitarian Law, Sanremo, Sept. 4-6 2008, *The Evolution of Peace Operations, from Interposition to Integrated Missions* (by Corinna Kuhl).

<sup>83</sup> S.C. Res 1181, U.N. Doc. S/RES/1181 (July 13, 1998).

<sup>84</sup> S.C. Res 1289, U.N. Doc. S/RES/1289, (Feb. 7, 2000).

<sup>85</sup> Kuhl, supra note 82.

<sup>86</sup> S.C. Res. 794, U.N. Doc. S/RES/794 (Dec. 3, 1992).

 $<sup>^{87}</sup>$  Nils Melzer, Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law 61 (2009).

<sup>&</sup>lt;sup>88</sup> Additional Protocol I, *supra* note 51, at art. 43; Geneva Convention III Relative to the Treatment of Prisoners of War art. 4, *adopted* 12 August 1949, 75 U.N.T.S. 135 [hereinafter Geneva Convention III].

#### III. LEGAL STATUS OF EMPLOYEES OF PMSCS

From the foregoing, it is clear that there is a difference between rules of international humanitarian law and peacekeeping in relation to the status of peacekeepers. Such differences may lead to even more ambiguity when PMSCs are used as peacekeepers. Generally speaking, PMSC personnel not directly participating in hostilities qualify as civilians.<sup>89</sup> This part will flesh out how this status would be affected if they became involved in peacekeeping operations. Ultimately, the status of PMSC personnel may depend on the manner of their involvement in peacekeeping, that is, upon whether they are hired by a Member State and seconded to the U.N. or instead hired directly by the U.N.

#### A. Applicability of Mercenary Status

As a preliminary matter, it is necessary to address the belief that PMSCs are nothing more than modern-day mercenaries. 90 At a minimum, however, this view cannot be applied to PMSCs hired for use in U.N. peacekeeping operation. This is due to the narrowness of the internationally accepted definition of a "mercenary" as evidenced by both Article 47 of the Additional Protocol I to the Geneva Conventions of 1949 (AP I) and the U.N. Convention against Recruitment, Use, Financing and Training of Mercenaries (U.N. Mercenary Convention).

Article 47 of AP I defines a mercenary in terms of six criteria, all of which must be met before a person can be classified as a mercenary. Such a person must: 1) be recruited locally or abroad in order to fight in an armed conflict; 2) actually take part directly in the hostilities; 3) be motivated essentially by the desire for private gain and in fact be promised material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of the party to the conflict by or on behalf of which that promise is made; 4) be neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict; 5) not be a member of the armed forces of a party to the conflict; and 6) have not been sent by a state which is not a party to the conflict on official duty as a member of its armed forces.<sup>91</sup> The

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<sup>&</sup>lt;sup>89</sup> See Won Kidane, The Status of Private Military Contractors under International Humanitarian Law, 38 DEN. J. INT'L L. & POL'Y 361, 390-99 (2010); Michael N. Schmitt, Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees, 5 CHI. J. INT'L L., 511, 523-31 (2004); J. Ricou Heaton, Civilians at War: Reexamining the Status of Civilians Accompanying the Armed Forces 57 A.F. L. REV. 155, 174 (2005).

<sup>&</sup>lt;sup>90</sup> See, e.g., Peter W Singer, War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law, 42 COLUM. J. TRANSNAT'L LAW 521, 532 (2004) (arguing that international law does not cover private military forces, and as a result they cannot be considered mercenaries under international law.); de Nevers, supra note 1, at 174, n. 6 (citing SINGER, supra note 8, at 44-48); SARAH PERCY, REGULATING THE PRIVATE SECURITY INDUSTRY 14 (2006); Sarah Percy, Morality and Regulation, in FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES 11-14 (Simon Chesterman & Chia Lehnardt eds.,

<sup>2007);</sup> Doug Brooks, *In Search of Adequate Legal and Regulatory Frameworks*, 2 J. INT'L PEACE OPERATIONS 4 (2007); Simon Chesterman, *Leashing the Dogs of War*, 5 CARNEGIE REPORTER 37-45 (2008)) (compiling sources to show that "[m]any observers have argued that [Private Security Companies] closely resemble mercenaries . . . ."); Zoe Salzman, *Private Military Contractors and the Taint of a Mercenaries Reputation*, 40 INT'L L. & POL. 853, 874 (2008) ("While private contractors seem, in many respects, to have succeeded in 'repackaging' themselves as distinct from mercenaries, it is less clear that they are *actually* any different.") (emphasis in original).

<sup>&</sup>lt;sup>91</sup> Additional Protocol I, *supra* note 51, at art. 47.

U.N. Mercenary Convention expands these criteria to require that a mercenary be "... [r]ecruited locally or abroad for the purpose of participating in a concerted act of violence aimed at: . . . [o] verthrowing a Government or otherwise undermining the constitutional order of a State; or . . . [u]ndermining the territorial integrity of a State."92

There are clearly provisions that cannot be applied to employees of PMSCs hired by the U.N. For example, when PMSCs are hired by the U.N., they cannot be said to be hired by a party to the conflict or to have been asked to take part in the conflict. As discussed, peacekeepers are not sent to participate in an armed conflict. A combatant must take direct part in hostilities in order to qualify as a mercenary, moreover. Yet what constitutes "direct participation in hostilities" lacks any internationally accepted definition, and cannot be applied to parties hired directly by the U.N. to take part in peacekeeping in any event: far from directly participating in hostilities, peacekeepers are not permitted to use force except in self-defense. Therefore, employees of PMSCs taking part in U.N. peacekeeping operations cannot be categorized as mercenaries under international law.

#### B. PMSCs Seconded to the U.N. by Member States

The U.N. does not have a standing army or a police force. 93 As such, U.N. missions ¶36 are composed of armed forces seconded by Member States based on Security Council request. There is no obligation on Member States to respond to such requests, let alone to provide armed contingents of a specific number or kind. A Member State has the freedom to choose which kind of armed forces it can provide.

A state may decide to participate in U.N. peacekeeping operations by contracting with PMSCs either to represent its armed forces or to support a mission. The latter option is frequently employed by the U.S., for example. After the decision not to second federal police forces to international missions, the U.S. State Department hired PMSCs to provide police services to international peacekeeping operations. 94 It has been suggested that, prior to 2004, "every US police officer taking part in U.N. Civilian Police . . . was in fact a DynCorp employee," referring to DynCorp International, a private U.S. company. 95 In 2003, the same company contracted with the State Department to perform services required for peacekeeping in Africa. 96 During the 2004 U.N. peacekeeping mission in Haiti, the State Department contracted with PAE Government Services, Inc., and the Homeland Security Corporation to support and

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<sup>92</sup> International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, art. 1, Dec. 4, 1989, 2163 U.N.T.S. 98.

<sup>&</sup>lt;sup>93</sup> There was an attempt to create the U.N. standing army based on Denmark's proposal to institute the U.N. Standing High-Readiness Brigade. This Brigade would be used for peacekeeping missions according to the U.N. Charter. These forces were created in 2000 under the name "Multinational United Nations Standby Forces High-Readiness Brigade." Many States participated in this Brigade such as Austria, Canada, Denmark, The Netherlands, Norway, Poland, and Sweden. These forces were sent as peacekeepers to many countries such as Ethiopia & Eritrea, Côte d'Ivoire, Liberia, and Sudan. The Brigade was disbanded in 2009. For more information, see UNTERM, Multinational United Nations Standby Forces High-Readiness Brigade (Apr. 3 2014), available at http://unterm.un.org/DGAACS/unterm.nsf; Murphy, supra note 9, at 287.

<sup>&</sup>lt;sup>94</sup> Østensen, *supra* note 11, at 12-13.

<sup>&</sup>lt;sup>95</sup>*Id*. at 12.

<sup>&</sup>lt;sup>96</sup> *Id*. at 13.

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maintain the U.S. Civilian Police contribution to that mission.<sup>97</sup> The question, therefore, is whether such use of private companies in peacekeeping changes the status of their employees as civilians. That is, would they be regarded as combatants belonging to the national armed forces of the seconding state?

To answer this question, it must first be noted that a state may second private companies to participate in peacekeeping operations if these companies are incorporated into its national armed forces. For such companies to be regarded as part of national armed forces, however, a number of legal requirements, established by international humanitarian law, must be fulfilled. A private company may be incorporated into the armed forces of a nation either on a *de facto* or *de jure* basis, in accordance with Article 4 of the Third Geneva Convention and Article 43 of AP I.98

A *de facto* incorporation into a nation's armed forces can occur where a private company is treated as a "group" or "unit" in accordance with Article 43. This requires, *inter alia*, that the PMSC be subject to internal disciplinary controls that enforce compliance with the rules of international law applicable to armed conflict.<sup>99</sup>

Treating a PMSC as a *de facto* representative of a state in U.N. peacekeeping operations is problematic, however. As adopted in the Third Geneva Convention, the de facto relationship is applicable only to international armed conflicts: under Article 43 of AP I and Article 4 of the Third Geneva Convention, a *de facto* relationship arises only when an armed group carries out combat functions to support one of the parties to an international armed conflict.<sup>100</sup> At the same time, only states and national movements may be parties to an international armed conflict.<sup>101</sup> The second article of each of the four Geneva conventions limits their applicability to "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." Yet as been noted repeatedly in this paper, peacekeepers are not sent to take part in an armed conflict. One of the most important principles of peacekeeping operations is that the use of force is prohibited except in cases of self-defense and defense of the mandate. Therefore, peacekeeping operations do not qualify as armed conflicts within the meaning of Article 4(A)(2) of the Third Geneva Convention. Moreover, the *de facto* relationship can arise only between an armed group and a party to the international armed conflict, i.e., either a state or a national movement. In peacekeeping, by contrast, a PMSC is seconded by a state to the U.N., which means that the relevant relationship is between a seconding state and an international organization. It is clear that this relationship does not satisfy what is required under international humanitarian law for it to be labeled as a de facto relationship.

An additional problem arises from the fact that Article 4(A) (2) requires that such an armed group "belong to a party to the conflict." This expression is interpreted to mean

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<sup>&</sup>lt;sup>97</sup> PAE-HSC Joint Venture Partnership Civilian Peacekeeping Missions Overseas, 14, Aug. 4, 2004, Contract No (S-LMAQM-04-C-0033), *available at* 

 $http://psm.du.edu/media/documents/industry\_initiatives/contracts/dos\_contract\_pae-hsc\_peacekeeping\_s-lmaqm-04-c-0033\_scope-of-work.pdf.$ 

<sup>&</sup>lt;sup>98</sup> Emanuela-Chiara Gillard, *Business Goes to War: Private Military/Security Companies and International Humanitarian Law*, 88 I.R.R.C. 55 (2006); HANNAH TONKIN, STATE CONTROL OVER PRIVATE MILITARY AND SECURITY COMPANIES IN ARMED CONFLICT 85-86 (2011).

<sup>&</sup>lt;sup>99</sup> Additional Protocol I, *supra* note 51, at art. 43.

<sup>&</sup>lt;sup>100</sup> TONKIN, supra note 98, at 86.

<sup>&</sup>lt;sup>101</sup> Additional Protocol I, *supra* note 51, at art. 1.

that there must be some kind of link between an irregular armed group and a state. <sup>102</sup> The International Criminal Tribunal for the Former Yugoslavia, for example, held that this link requires a state to exercise overall control over these groups. <sup>103</sup> The peacekeeping contingent, by contrast, is regarded as a subsidiary organ of the U.N., which means that it would be under the command and control of that organization. <sup>104</sup> Because the seconding state does not exercise command and control over a PMSC that accompanies its forces in a peacekeeping operation, that PMSC has not been incorporated into that state's national armed forces on a *de facto* basis, as defined by international humanitarian law.

Alternatively, there might be a *de jure* relationship between a PMSC and a state. Such a relationship comes about by the issuance of a domestic decree, statute, etc. that incorporates the PMSC into the national armed forces. <sup>105</sup> A contract between a state and a PMSC is not enough to transform the PMSC's staff into members of the national armed forces: there must be a more formal affiliation. <sup>106</sup> There are very few examples of such incorporation. The staff of a South African company, Executive Outcomes, was incorporated into the armed forces of Sierra Leone during the civil war in 1995-96, and the personnel of a U.K. company, Sandline, were incorporated into the Papua New Guinea national armed forces as "special constables" in 1997. <sup>107</sup>

This kind of *de jure* relationship is sanctioned by Article 4(A)(1) of the Third Geneva Convention. Under that article, prisoners of war can include "members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces." By the terms of the article, the only criterion for a volunteer corps is that they "form . . . [a] part" of the armed forces. There is no specific and clear guidance, however, that can be used to determine whether a member of an armed group can be considered to be a member of the armed forces. <sup>109</sup> Article 4(A)(1) sets out no requirements that a militia or volunteer corps must meet in order to be considered as "forming part" of the armed forces. <sup>110</sup> Since international humanitarian law does not provide any guidance in this regard, any such requirements would have to be supplied by domestic law, which determines the structure and size of a state's armed

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<sup>&</sup>lt;sup>102</sup> Hin-Yan Liu, Leasing the Corporate Dogs of War: The Legal Implications of the Modern Private Military Companies, 15 J. CONFLICT SECURITY LAW 141, 154 (2010).

<sup>&</sup>lt;sup>103</sup> The Prosecutor v Du'sko Tadic (Judgment in Sentencing Appeals) (July 15, 1999), IT-94-1-A. <sup>104</sup> Matija Kovac, Legal Issues Arising from the Possible Inclusion of Private Military Companies in UN, 2009, 13 Max Planck Y.B. of U.N. Law 307, 322. A national contingent's chain of command runs from the Security Council to the Secretary-General to the U.N. commander-in-chief, the last of which — a high-ranking officer — is appointed by the Secretary-General from among a state's national forces. The chain of command then continues down to include national commanders of national contingents who are under the command of the U.N., as specified by agreements with the participating states. See LINDSEY CAMERON & VINCENT CHETAIL, PRIVATIZING WAR: PRIVATE MILITARY AND SECURITY COMPANIES UNDER PUBLIC INTERNATIONAL LAW 39 (2013).

<sup>&</sup>lt;sup>105</sup> Lindsey Cameron, *Private Military Companies: Their Status under International Humanitarian Law and its Impact on their Regulation*, 88 I.R.R.C. 573, 582 (2006); TONKIN, *supra* note 98, at 85. <sup>106</sup> Gillard, *supra* note 98, at 533.

<sup>&</sup>lt;sup>107</sup> TONKIN, supra note 98, at 85; Juan C. Zarate, The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder, 34 STAN. J. INT'L LAW 75, 124 (1998).

<sup>&</sup>lt;sup>108</sup> Geneva Convention III, *supra* note 88, at art. 4(A)(1).

<sup>&</sup>lt;sup>109</sup> Gillard, supra note 98.

<sup>&</sup>lt;sup>110</sup> Id. at 532.

forces.<sup>111</sup> That is, the validity of a PMSC's incorporation into the state's armed forces sufficient to satisfy Article 4(A)(1) is determined solely by that state's domestic law. The rules governing the *de jure* relationship are more applicable to PMSCs participating in U.N. peacekeeping operations. If a state incorporated a PMSC into its armed forces, then the latter can represent a state concerned in U.N. peacekeeping operations. In that case, the PMSC would be dealt with as an agent of the state. Personnel of a private company seconded to U.N. peacekeeping missions would be regarded as combatants pursuant to the rules of international humanitarian law. Under the U.N. Secretary-General's Bulletin, however, they would be considered civilians if they did not participate in armed conflict directly and combatants if they did.<sup>112</sup> It does not seem that there would be a special legal issue in this regard, since personnel of a private company would be regarded as members of the armed forces of a state.

#### C. PMSCs Hired Directly by the U.N.

¶44 The U.N. has relied upon PMSCs in various peacekeeping missions. Hiring PMSCs to carry out peacekeeping functions instead of relying on traditional U.N. forces was suggested for the first time in 1996 during the Rwandan Genocide. In light of the failure of U.N. forces to protect civilians, the U.N. High Commission for Refugees suggested that PMSCs be relied upon to separate belligerents from civilians in the Goma camps. 113 In response to this suggestion, an offer was made by Executive Outcomes to create "security islands" by deploying 1500 of their personnel over a period of fourteen days — at a cost of \$150 million. The U.N. rejected this offer due to a lack of agreement as to who should pay, and Member States subsequently offered to provide personnel to participate in the operation. The weaknesses and considerable costs of the U.N. operations in Rwanda when compared with the offer made by Executive Outcomes have led some to support the use of PMSCs. 114 Since the Security Council has the power to delegate the conduct of peace operation to regional organizations such as NATO, 115 the European Union, 116 and the African Union, 117 Cameron and Chetail argued that it may also delegate this task to PMSCs.<sup>118</sup>

<sup>&</sup>lt;sup>111</sup> CHRISTIAN SCHALLER, PRIVATE SECURITY AND MILITARY COMPANIES UNDER THE INTERNATIONAL LAW OF ARMED CONFLICT, IN PRIVATE MILITARY AND SECURITY COMPANIES: CHANCES, PROBLEMS, PITFALLS AND PROSPECTS 345 (Thomas Jäger & Gerhard Kümmel eds., 2007); Louise Doswald-Beck, *Private Military Companies under International Humanitarian Law*, in FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES (Simon Chesterman & Chia Lehnardt eds., 2007).

<sup>&</sup>lt;sup>112</sup> UN Secretary-General, *supra* note 43.

<sup>&</sup>lt;sup>113</sup> Int'l Alert, *Humanitarian Action and Private Security Companies* (2002) at 11 (by Tony Vaux et al.), *available at* http://www.patronusanalytical.com/page12/assets/HUMANACT.pdf. <sup>114</sup> SINGER, *supra* note 8, at 185.

<sup>&</sup>lt;sup>115</sup> See, e.g., UNPROFOR, supra note 77; The Stabilization Force in Bosnia and Herzegovina (IFOR/SFOR), S.C. Res. 1088, U.N. Doc. S/RES/1088 (Dec. 12, 1996); and The Kosovo Force in the Balkans (KFOR), S.C. Res. 1244, U.N. Doc. S/RES/1244 (Jun. 10, 1999).

<sup>&</sup>lt;sup>116</sup> See, e.g., The United Nations Mission in the Central African Republic and Chad (MINURCAT), S.C. Res 1778, U.N. Doc S/RES/1373 (25 Sept. 2007).

<sup>&</sup>lt;sup>117</sup> See, e.g., The African Union – United Nations Hybrid Operation (UNAMID), S.C. Res. 1769, U.N. Doc S/RES/1769 (31 July 2007).

<sup>&</sup>lt;sup>118</sup> CAMERON & CHETAIL, *supra* note 104, at 29.

The question here is not whether the Security Council or General Assembly has the legal competence to delegate the conduct of peacekeeping mission to PMSCs. 119 It is rather about the status of personnel of PMSCs contracted directly by the U.N. to perform peacekeeping operations.

A PMSC used in peacekeeping may be regarded as an "agent" of the U.N. According to the ICJ in its advisory opinion in *Reparation for injuries suffered in the service of the United Nations*, the term "agent" can be used to refer to those who are used by the U.N. to carry out its functions. It stated that:

The Court understands the word "agent" in the most liberal sense, that is to say, any person who, whether a paid official or not, and whether permanently employed or not, has been charged by an organ of the organization with carrying out, or helping to carry out, one of its functions—in short, any person through whom it acts.<sup>120</sup>

Similarly, in its advisory opinion on the *Applicability of Article VI*, *Section 22*, *of the Convention on the Privileges and Immunities of the United Nations*, the ICJ stated that "[i]n practice, according to the information supplied by the Secretary-General, the United Nations has had occasion to entrust missions — increasingly varied in nature — to persons not having the status of United Nations officials." In the commentary on the Draft Articles on the Responsibility of International Organisations, the U.N. International Law Commission is explicit that the term "agent" does not refer only to "officials but also to other persons acting for the United Nations on the basis of functions conferred by an organ of the organisation." By these interpretations of what an "agent" is, a private company hired directly by the U.N. to participate in peacekeeping operations can be classified as an agent of the U.N. This would mean that the PMSC's personnel would assume the legal status of peacekeepers. In other words, they would be civilians and have the privileges and immunities of U.N. personnel if not actively involved in armed conflict. They would also be considered combatants if they took direct part in hostilities.

D. Implications of the Legal Status of PMSC Peacekeepers Hired By the United Nations

The conclusion that PMSC personnel hired by the U.N. to serve as peacekeepers would be civilians until they participated directly in hostilities, in which case they would be combatants, generates some legal issues worth considering. The majority of jurists believe that the personnel of PMSCs are civilians under the rules of international humanitarian law. And so long as PMSC personnel used in peacekeeping

<sup>&</sup>lt;sup>119</sup> For more details about such debate see id.

<sup>&</sup>lt;sup>120</sup> Reparation for Injuries Suffered, *supra* note 40, at 177.

<sup>&</sup>lt;sup>121</sup> Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the United Nations, Advisory Opinion, 1989 I.C.J. 8, ¶ 48; *see also* Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, Advisory Opinion, 1999 I.C.J. 100, ¶ 66.

<sup>&</sup>lt;sup>122</sup> Rep. of the Int'l Law Comm., on its 63th Sess., April 26–June 3, 2011, U.N. Doc. A/66/10 88 (July 4, 2011).

<sup>&</sup>lt;sup>123</sup> See, e.g., Won Kidane, supra note 89; Schmitt, supra note 89; Heaton, supra note 89; Cameron, supra

did not take part in hostilities directly, they would continue to enjoy that status. If they were to take part in hostilities, however, they would have to lose their protected status as civilians and be considered unlawful combatants.<sup>124</sup> Under the peacekeeping rules formed by various U.N. conventions and standard Status of Forces Agreements, however, the personnel of PMSCs used in peacekeeping would not face any of these consequences if they became actively involved in armed conflict: they would instead be regarded as combatants.<sup>125</sup> That is, there is a tension between international humanitarian law on one hand and the patchwork of rules specific to peacekeeping on the other in this regard.

It should be noted that the criterion for a peacekeeper's status as a combatant is "direct participation in hostilities," a criterion foreign to international humanitarian law. Combatant status under Article 43(2) of AP I and Article 4(A) of the Third Geneva Convention is determined by membership in the armed forces (other than medical personnel and chaplains) and membership in militias or volunteer corps forming part of such armed forces. The rights of combatants are conferred on members of *organized* armed groups that are commanded by a person responsible for his subordinates, have a fixed distinctive sign recognizable at a distance, carry arms openly, and respect the laws and customs of war. <sup>126</sup> Everyone else has the rights and protections of a civilian. <sup>127</sup> Direct participation in hostilities is irrelevant to combatant or civilian status. A member of the armed forces is a combatant even if he or she does not take direct part in hostilities. For example, the Appeal Chamber of the International Criminal Tribunal for the Former Yugoslavia is clear that "members of the armed forces resting in their homes in the area of the conflict . . . remain combatants whether or not they are in combat or for the time being armed." <sup>128</sup>

Consequently, classifying PMSC personnel as combatants depending on their direct participation in hostilities would be a departure from the rules of international humanitarian law relating to the definition of combatants. One must certainly wonder why the staff of private companies would be *unlawful combatants* when hired by states to take direct part in hostilities, yet be *lawful combatants* if they actively engage in armed conflicts as U.N.-hired peacekeepers. Such individuals are not members of a national army, after all, but are instead private citizens working for private firms.<sup>129</sup>

The only possible way for PMSC personnel to gain the status of combatants under international humanitarian law is through *de facto* or *de jure* association with a state's armed forces, as discussed above, yet neither of these routes is possible when the PMSC is hired by the U.N. The *de jure* route requires enacting a law incorporating a PMSC into the national armed forces. Yet the U.N. has neither its own armed forces nor a legal system analogous to those of States. The *de facto* route is based upon a relationship between a PMSC and a party to the armed conflict. Yet the PMSC's employer — the U.N. — is not a party to an armed conflict in peacekeeping operations.

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note 105.

<sup>&</sup>lt;sup>124</sup> Additional Protocol I, *supra* note 51, at art. 51(3).

<sup>&</sup>lt;sup>125</sup> U.N. Secretary-General, *supra* note 43 at 1.

<sup>&</sup>lt;sup>126</sup> Additional Protocol I, *supra* note 51, at art. 43(2). *See also* Geneva Convention III, *supra* note 88, at art. 4(A)

<sup>&</sup>lt;sup>127</sup> Additional Protocol I, *supra* note 51, at art. 50.

<sup>&</sup>lt;sup>128</sup> *Kordić and Čerkez* (Judgement) (2004) IT-95-14/2-A at ¶ 51.

<sup>&</sup>lt;sup>129</sup> SINGER, *supra* note 8, at 169.

¶52 These remarks concerning the legal status of PMSC personnel hired by the U.N. for peacekeeping operations has important practical corollaries. The Security Council authorizes peacekeepers, and thus PMSCs employed in peacekeeping, to use force either to defend themselves or to defend the mandate. In both of these situations, personnel of PMSCs would be regarded as combatants under peacekeeping rules. The use of force in other situations would affect their legal status. It was reported, for example, that DSL, a U.K.-based PMSC, used deadly force during its operation to support the U.N. Mission in Angola, and that DynCorp did the same in East Timor. 130 Where PMSC conduct is illegal, it is debatable whether the same rules of peacekeeping will apply. The legality of the use of force by PMSCs used in peacekeeping operation, after all, is the reason for classifying them as combatants rather than as civilians. By this same logic, however, the use of force not authorized by the Security Council should not entitle them to be regarded as lawful combatants. They would instead be civilians participating in hostilities, and under international humanitarian law such civilians may face a variety of legal consequences ranging from prosecution to loss of protection and categorization as legitimate military targets.

A further observation is necessary with regard to according the privileges and immunities of U.N. personnel to PMSC peacekeepers. The use of a PMSC in U.N. peacekeeping affords its employees the privileges and immunities of the agents and personnel of the U.N.<sup>131</sup> This can lead to a tension between the Secretary-General's Bulletin and the 1994 Convention on the Safety of United Nations and Associated Personnel.<sup>132</sup> Employees of PMSCs would be classified as combatants according to the Secretary-General's Bulletin, which acknowledges that U.N. forces actively engaged in armed conflict are combatants.<sup>133</sup> At the same time, Article 9 of the Convention on the Safety of United Nations and Associate Personnel makes it a crime to attack U.N. personnel and obliges Member States to exercise jurisdictions over such crimes.<sup>134</sup> This contrasts with principles of international humanitarian law, under which attacks committed by combatants against other combatants are not crimes.<sup>135</sup>

Crucially, while peacekeepers are immune from prosecution in the courts of the host state, this immunity is offset by requirement that the State sending peacekeepers itself "exercise jurisdiction with respect to crimes or offences which may be committed by its military personnel serving with [the United Nations peace-keeping operation]." The Model Status of Force Agreement for Peacekeeping Operations (SOFA) provides that the States contributing to the peacekeeping mission must prosecute members of their militaries for crimes committed in the territory of the host State. 137

In the case of a PMSC hired directly by the U.N., however, it is not easy to provide for the same sort of jurisdiction. The state where the PMSC is registered may not have jurisdiction over its employees: such companies recruit individuals from various

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<sup>&</sup>lt;sup>130</sup> Stephen Fidler, *U.N.: Proposal for Private Soldiers Gathers Steam*, Financial Times, Nov. 5, 2003, http://www.corpwatch.org/article.php?id=8989.

 $<sup>^{131}</sup>$  Convention on the Safety of United Nations and Associated Personnel, *supra* note 72 at art. 4.  $^{132}$  *Id.* 

<sup>&</sup>lt;sup>133</sup> U.N. Secretary-General, *supra* note 43, ¶1(1).

<sup>&</sup>lt;sup>134</sup> Convention on the Safety of United Nations and Associated Personnel, *supra* note 72, at arts. 9-10.

<sup>&</sup>lt;sup>135</sup> Sassoli, *supra* note 64, 102.

<sup>&</sup>lt;sup>136</sup> U.N. Secretary-General, *supra* note 15, at Part VIII.

<sup>&</sup>lt;sup>137</sup> U.N. Secretary-General, *supra* note 18.

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nationalities. For example, U.S.-based Blackwater employed 150 Chileans to work in Iraq.<sup>138</sup> At the same time, the U.N. cannot exercise jurisdiction over such crimes, since it does not have the same criminal justice system as other states. This jurisdictional challenge might be overcome by amending SOFA to cover this kind of situation. Such an amendment should either not extend the immunity granted to peacekeepers to PMSC personnel, in which case the receiving state would have jurisdiction over them, or confer that jurisdiction on the home state of the company or the state of which the perpetrator is a national.

The tension between international humanitarian law and the rules specific to peacekeeping therefore has a greater significance when dealing with PMSCs employed directly by the U.N. than when concerning traditional peacekeeping forces. The right to engage in hostilities without becoming a legitimate military target in turn and immunity from local prosecution enjoyed by peacekeepers — a constellation of privileges unknown to international humanitarian law — is counterbalanced by a seconding state's obligation to hold its peacekeeping forces to account. Yet PMSCs hired by the U.N. would enjoy privileges unknown to international humanitarian law without any such counterbalancing obligations. And in that case, one might wonder why the rules specific to peacekeeping should trump international humanitarian law.

#### IV. CONCLUSION

The legal status of the personnel of PMSCs used in U.N. peacekeeping operations under peacekeeping rules differs from their status under international humanitarian law. Under the latter, they are regarded as civilians, forbidden from taking part in hostilities lest they lose their protected status and face prosecution. However, their status would be completely different if they were used in U.N. peacekeeping operations. Initially, they would be considered civilians if they abstained from direct participation in hostilities. If they engaged actively in armed conflict, however, their protected status as civilians would be suspended for the time being and they would be regarded as combatants.

While many international documents have decided in favor of applying international humanitarian law to U.N. peacekeeping forces, it seems that the entire body of that law is not readily applied in the peacekeeping context. This would mean that the definitions of combatant and civilian under international humanitarian law would not be applicable to PMSCs used in peacekeeping. However, the specific rules applicable to peacekeepers — such as rules governing the means and methods of warfare — seem to represent the reaction of the U.N. to violations committed by these personnel. In this regard, the personnel of PMSCs used in peacekeeping may have two statuses. They are civilians if they are not involved directly in armed conflict and combatants if they are. However, they may be regarded as unlawful combatants if they use illegal force. This conclusion follows from a consideration of international humanitarian law regarding civilians, rather than the rules specific to peacekeepers. In this regard, the relationship between international humanitarian law and the rules specific to peacekeeping is one of

<sup>&</sup>lt;sup>138</sup> U.N.H.R.C., 'Report of the Working Group on the Question of the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination' Mission to Chile' ¶16, U.N. Doc. A/HRC/7/7/Add.4 (Feb. 4, 2008).

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compromise. This may mean that both laws can apply depending on the circumstances of the case or situation.