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Private Military and Security Companies (PMSCs) in UN-led Peacekeeping Operations:
The UN’s Role as an Employer and a Regulator
Megumi OCHI*

Abstract

This article attempts to uncover the possible roles of the United Nations (UN) in regulating the activities of private military and security companies (PMSCs), which are utilized by the UN in the context of UN-led peacekeeping operations. Assessing the legal status and the cases that highlight the unique but problematic features of PMSCs primarily from a legal point of view, this article discusses the issues of the attribution of conduct, namely the UN’s responsibility in cases of abuse committed by PMSC members, and the UN’s role as an effective regulator, such as providing a new set of rules and responding to cases of international concern.

Keywords: private military and security companies (PMSCs), individual criminal responsibility, the United Nations, peacekeeping operations, responsibility of international organizations

* Research Fellow of Japan Society for the Promotion of Science, Doctoral Candidate (Graduate School of Law and Politics, Osaka University), LL.M. (Leiden University), MA (OSIPP, Osaka University). E-mail: m-ochi@law.osaka-u.ac.jp.
Introduction

Private military and security companies (PMSCs), or ‘contractors’, have replaced soldiers and members of the armed forces in a variety of situations, including armed conflict, prolonged military occupation, peacekeeping, and territorial administration in post-conflict institutional building.\(^1\) The variety of functions and cost-performance of PMSCs to perform some peacekeeping functions are attractive to the decision makers of not only states but also international organizations such as the United Nations (UN). The outsourcing of UN-led peacekeeping operations is now widely observed. Whereas arguments of whether the use of PMSCs in peacekeeping operations are effective/appropriate have been actively debated,\(^2\) this article focuses instead on the \textit{ex ante} and \textit{ex post} safeguarding, taking into account the circumstances in which PMSCs need to be used and are used in UN-led peacekeeping. As one of the legal scholarships examining the ways and means of holding PMSC members accountable for their roles in the reported human rights abuses,\(^3\) this article focuses on the issue of responsibility from the perspective of the employer, particularly when the employer is the UN, the largest international organization responsible for the maintenance of world peace. As the norms of attribution of wrongful acts\(^4\) to not only states but also international organizations are developed in international law, as a frequent user of PMSCs, the UN must be aware of its possible international responsibility. At the same time, as an international organization seeking international peace and full protection of human rights, the UN is in a position to regulate the activities of PMSCs.

This article attempts to conduct a legal analysis of the roles of the UN as an employer and a regulator of PMSCs utilized by the UN in the context of UN-led peacekeeping operations, focusing on the recent developments in international legislation and practice. This article first examines what types of problems have to be solved in cases of wrongful acts by PMSCs. Secondly, in response to these problems and with respect to the role of the UN as an employer, this article examines the possibility of attributing wrongful acts committed by PMSC members to the UN. With respect to the UN’s role as a regulator, this article then focuses on what types of functions the UN provides in general regulation of PMSCs, such as providing a forum for rule setting, establishing rules and supervisory systems, cooperating to prosecute individuals and imposing


\(^2\) For opinions in favour of the use of PMSCs in peacekeeping operations: e.g. Scott Fitzsimmons, ‘Dogs of Peace: A Potential Role for Private Military Companies in Peace Implementation’ (2005) 8(1) Journal of Military and Strategic Studies 1. For those against: e.g. Sarah V. Percy, Mercenaries: The History of a Norm in International Relations (OUP 2007); Christopher Spearin, ‘UN Peacekeeping and the International Private Military and Security Industry’ (2011) 18(2) International Peacekeeping 196.


\(^4\) The legal term ‘wrongful act’ means here any act that will damage the rights of another, unless it is done in the exercise of another equal or superior right. For that reason, the scope of wrongful acts is not limited to illegal acts and includes acts that are immoral, anti-social, or libel resulting in a civil suit. See e.g. Jonathan Wallace and Susan F. Wild, Webster’s New World Law Dictionary (Webster’s New World, 2006).
sanctions by way of Security Council Resolutions.

The first chapter overviews the practice of using PMSCs in UN-led peacekeeping operations. The second chapter highlights the past problematic cases in which the vague legal status of PMSCs and the immunity potentially granted to PMSCs contracted with the UN were additional obstacles with respect to accountability. In the third chapter, the role of the UN as an employer is discussed, assessing the issue of responsibility of international organization. Finally, the forth chapter analyzes the UN's role as a regulator.

I. The use of PMSCs in UN-led peacekeeping operations

In the post-Cold War world, PMSCs involvement in peacekeeping operations rapidly increased. Three primary factors fueled the growth of the private military industry: a large-scale reduction of military forces after the Cold War, which created a surplus of trained military personnel without jobs; the policy shift to privatizing government services whenever possible; and an increase in regional conflicts.\(^5\) The private military industry is now a booming sector of the global economy, and most PMSCs offer a wide range of services, including peacekeeping and peacebuilding.\(^6\) A comparison between the functions that have usually been performed by PMSCs and the functions that the UN peacekeepers are often expected to perform indicates a degree of overlap. Although the blue helmets are not supposed to perform any combat or combat support actions according to the traditional principles of UN peacekeeping, now UN peacekeeping missions frequently include training and/or reforming national military units, providing security for vital infrastructure, protecting aid convoys and providing security for relief delivery workers, assisting with demining, and preventing various types of infiltrations.\(^7\) All these functions appear to be similar to a number of activities that have been performed by PMSCs in the past decade, which suggests that PMSCs have the capability to perform a wide range of peacekeeping functions.\(^8\)

The UN has employed PMSCs despite the comment by Enrique Bernales Ballesteros, former UN Special Rapporteur on Mercenaries, that the activities of mercenaries are criminal and “must be severely punished.”\(^9\)

In practice, during the 1990s, the vast majority of PMSCs actually provided almost all of their services in combat support, logistics, procurement, training, and security services.\(^10\) Several PMSCs are registered with

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7) Bures, ibid, 536.
8) ibid.
the UN Common Supply Database (UNCSD),\(^{11}\) and private expertise has often been used to support UN peacekeeping in activities such as demining and water purification.\(^{12}\) Transportation, logistics, personnel security and training are services that are outsourced by the UN as well.\(^{13}\)

One of the most attractive features of PMSCs is their flexibility. Against the backdrop of ‘third-generation peacekeeping’, Angola and Sierra Leone are the most popular cases, Executive Outcomes (EO), the now-defunct South African-based PMSC, offered this flexibility through its willingness to apply violence in an offensive manner.\(^{14}\) Analysts supportive of the use of PMSCs claim that international efforts to stabilize the country would have been much more successful had EO’s threat of enforcement remained because violence quickly returned to Sierra Leone after EO’s departure in 1997.\(^{15}\) The UN also takes advantage of the possibility of buying services that it has traditionally lacked because of national sensitivity among Member States.\(^{16}\) Particularly, it obtained intelligence information, satellite communications and imaging from private sources.\(^{17}\)

In addition to its substantial efficiency, the expeditiousness and cost-performance of PMSCs have been widely recognized. It has been claimed that PMSCs could have been used to prevent some of the worst shortcomings of UN peacekeeping in the past decade.\(^{18}\) In 1994, for example, EO concluded in its internal assessment report that it had had the capacity to intervene in the genocide in Rwanda at a lower cost and in a shorter time than the UN operation actually took.\(^{19}\) A similar proposal was also provided by the International Peace Operations Association (IPOA), a group of 14 PMSCs, which submitted an operational concept paper for the UN Common Supply Database (UNCSD),\(^{11}\) and private expertise has often been used to support UN peacekeeping in activities such as demining and water purification.\(^{12}\) Transportation, logistics, personnel security and training are services that are outsourced by the UN as well.\(^{13}\)

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13) Bures (n 6) 538. International Charter Incorporated (ICI) from Oregon, for example, was engaged at various times by the UN, the US and the Economic Community of West African States (ECOWAS) to ferry personnel, troops and supplies into and within Liberia, Sierra Leone and Nigeria to support regional peacekeeping operations. Jim Fisher-Thompson, ‘Work of Private Military Contractors Discussed at Congress Hearing’ (IIP Digital, 15 October 2004) <http://preprod.iipdigital.getusinfo.com/st/english/article/2004/10/200410151730131ejrehsif0.1410028.html#axzz2JXFliEBE> accessed 31 January 2013.

14) The ‘classic find, fix, and destroy’ operations against the National Union for the Total Independence of Angola (UNITA) was conducted by EO. Peter W. Singer, Corporate Warriors: The Rise of the Privatized Military Industry (Cornell University Press, 2003) 109. In addition, in Sierra Leone, the same company was contracted to destroy the ‘terrorist enemies of the state’, restore internal security and facilitate a positive economic environment open to international investment. The company conducted its mission between the late spring of 1995 and the autumn of 1996. See Elizabeth Rubin, ‘An Army of One’s Own’ (Harper’s Magazine, February 1997) <http://harpers.org/archive/1997/02/an-army-of-ones-own/> accessed 31 January 2013.


16) Bures (n 6) 538.

17) ibid. Defence Systems Limited provided both logistical and intelligence support for national contingencies participating in the UN-sanctioned International Force in East Timor (INTERFET), and DynCorp provided helicopter transport and satellite network communications. In Angola, a private firm provided intelligence on UNITA’s guns-for-gems trade. Singer (n 14) 182.

18) Bures (n 6) 539.

19) ibid. It claimed that it could have had its first armed troops on the ground in 14 days and have fully deployed 1,500 personnel, supported by its own air and fire support, within six weeks. EO also estimated that it could conduct a six-month operation to create ‘security islands’ and refugee safe havens in Rwanda for $US600,000 per day ($150 million in total). On the contrary, the UN peacekeeping operation United Nations Assistance Mission for Rwanda (UNAMIR) II was deployed only belatedly after the genocide and cost more than five times EO’s estimate for its own operation.
outlining an offer by its members to provide services to the UN Organization Mission in the Democratic Republic of the Congo (MONUC) in January 2003.\(^{20} \) The great advantages of hiring PMSCs supports the argument that the option to exclude the use of PMSCs is no longer realistic.

II. The features of the use of PMSCs in the UN-led peacekeeping operations

1. Problematic cases involving PMSCs

   In contrast to the above-mentioned advantages that PMSCs have over state-provided militaries, the critical problems include the lack of effective legal regulation, adjudication and access to remedy in cases of wrongful acts committed by such private employees in peacekeeping missions. The insufficiency is not only theoretical; in fact, some problematic behavior by PMSC members has been reported. It is argued that because PMSCs are not obligated to act in their home government's interest, they are free to work with any group regardless of the moral or strategic ramifications.\(^{21} \) Although the demands of a competitive market should create a disincentive to work for an unpalatable government or organization, PMSCs operate outside of regular market forces and with inadequate oversight.\(^{22} \) DynCorp in Bosnia is an example of a government behaving as an irrational consumer, hiring PMSCs despite serious allegations of abuse of power. During the Balkan Wars, the United States (US) contracted with DynCorp to assist the UN Police Task Force in Bosnia.\(^{23} \) Reports emerged that DynCorp employees were buying and trading young women and girls.\(^{24} \) On 2 June 2000, the US military police raided DynCorp's facilities, and the US Army confirmed several of the allegations.\(^{25} \) The information was turned over to the Bosnian police, but none of the people involved were charged criminally.\(^{26} \) Despite the incident, DynCorp operated as a government-contracted PMSC in Iraq.\(^{27} \)

   As of 2006, more than sixty firms operate in Iraq, with more than 20,000 private contractors carrying out military services in Iraq.\(^{28} \) The now-infamous incident at Abu Ghraib revealed that detainees were being

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\(^{20} \) IPOA, ‘Supporting the MONUC Mandate with Private Services in the Democratic Republic of Congo’ ([IPOA Operational Concept Paper, 2003](http://www.hoosier84.com/030201ipoa-drc.pdf)) accessed 15 October 2012. The consortium claimed that PMSCs would have deployed within 30–90 days, providing services and specializations not normally available from the troop-contributing states, including high-tech aerial surveillance, rapid police reaction and humanitarian rescue capabilities. The IPOA estimated that costs would not exceed 20 percent of the annual total cost of the UN mission and proposed that the US could cover these as part of its normal 27 percent contributions for MONUC.

\(^{21} \) Kemp (n 3) 500.

\(^{22} \) ibid.


\(^{24} \) Kemp (n 3) 500.


\(^{26} \) Kemp (n 3) 500.


\(^{28} \) ibid.
subjected to various forms of torture and humiliation.\textsuperscript{29} Investigations have revealed that employees of CACI International and Titan Cooperation (now L-3 Services) were involved in this abuse.\textsuperscript{30} However, despite the prosecution of military members as of January 2006, no indictments or prosecutions of PMSC contractors have been filed. In the same vein, in 2007, it was reported that employees of the US firm Blackwater were involved in the fatal shootings of civilians. Subsequent investigations revealed that Blackwater had been involved in at least 195 ‘escalation of force’ incidents in Iraq since 2005 involving the firing of shots by Blackwater forces.\textsuperscript{31}

These cases do not mean that PMSC members are more likely to commit human rights violations, but regulation of such activities \textit{ex ante} and \textit{ex post} has become a serious issue. In the regulation of PMSCs, three inherent difficulties are observed: the lack of effective prevention/suppression, sanction, and restitution. Effective prevention requires pervasive acknowledgement of suppression against wrongful acts, and such knowledge works only if the realization of sanction is guaranteed. In addition, access to effective remedy, including satisfaction, contribution and rehabilitation, needs to be available for the people harmed by the wrongful acts of PMSCs. Although such general law enforcement mechanisms are soon to be well constructed at a national level, the real questions with respect to PMSCs are whether and by whom will the acts of PMSCs be put into such mechanisms.

2. Problematic legal status of PMSCs

\textbf{(1) Still-undefined legal status of PMSCs in international law}

The answer to the first question of whether the members of PMSCs can be treated in the course of legal regulation depends on their legal status. As a precondition for considering this question, new players have not been a significant part of the current equation because international humanitarian law took its shape and form prior to and during the Cold War.\textsuperscript{32} The vague status of PMSCs, which evolved just after the Cold War, has been one of the most appreciated features of the use of PMSCs. Normally, mass extensive resources for war require the scrutiny, approval and accountability of the government and, indirectly, the populace. PMSCs, however, allow use of extensive resources without accountability.\textsuperscript{33} The rights and duties between military actors and the government are clear, whereas those between governments or international organizations and PMSCs constitute a legal gray zone.

With respect to the international law regarding such contractors, first, there is still no legal tool in force to


\textsuperscript{30} ibid.


Private Military and Security Companies (PMSCs) in UN-led Peacekeeping Operations
define the category ‘PMSCs’. Only the Geneva Convention and the International Convention Against the Recruitment, Use, Financing, and Training of Mercenaries (Mercenary Convention) directly sets hard law regulation on profit soldiers.\(^{34}\) Article 47 of Additional Protocol I to the Geneva Convention (API) outlaws mercenaries, as does the Mercenary Convention, but their narrow definitions do not adequately encompass today’s climate of the PMSC world.\(^{35}\) By the Protocol definition, a mercenary is neither a national of a party to the conflict nor a resident of the territory controlled by a party to the conflict, and it plays a direct part in the conflict.\(^{36}\) Under what circumstances would the activities of private contractors transporting petrol or ammunition to supply militaries constitute ‘direct participation’?\(^{37}\) Thus, such definitions do not adequately address the changed nature of privatized contractors and consequently do not adequately regulate them.\(^{38}\) The UN Special Rapporteur on the Use of Mercenaries has even stressed the option of leaving PMSCs untouched in the updated definition and Convention.\(^{39}\)

Kidane conducts a remarkable analysis putting PMSCs into defined categories of lawful status, such as combatants and civilians accompanying them, and unlawful status, such as spies, mercenaries and civilians who engage in combat activities without authorization by an analogy- and function-based definition.\(^{40}\) He concludes that although private military contractors perform legitimate activities most of the time and, in times of war, their legal status fits nicely into the non-combatant designation of international humanitarian law, the definition of their status inevitably begins to focus on the functions they perform in a given time and place because of their wide range of activities.\(^{41}\)

**(2) Immunity Protection**

In addition to the vague status of PMSC members in armed conflicts, in the case that they are deployed as peacekeepers, UN immunity can grant them exclusion from national legal constraints.\(^{42}\) The whistle blowing by Kathryn Bolkovac, an International Police Task Force (IPTF) human rights officer hired by DynCorp on

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\(^{34}\) Currently, however, only 32 nations have ratified the Mercenary Convention, and none of them are permanent members of the Security Council. International Commission of Red Cross, ‘International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989’ <http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=530&ps=P#ratif> accessed 17 October 2012; Carney (n 3) 334.


\(^{36}\) International Convention against the Recruitment, Use, Financing and Training of Mercenaries (entered into force 20 October 2001) 2163 UNTS 75, art 1(1)(b), (c); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (entered into force 7 December 1978) 1125 UNTS 3 (Additional Protocol I) art 7(2)(b), (d).


\(^{38}\) Carney (n 3).


\(^{40}\) Kidane (n 32) 375-390.

\(^{41}\) ibid, 375-419.

another UN-related contract (UN Mission in Bosnia and Herzegovina (UNMIBH)), was a quite shocking incident.\(^{43}\) Despite her claim that DynCorp police trainers in Bosnia were paying for prostitutes and participating in sex trafficking, none of the DynCorp employees were prosecuted because of their immunity.\(^{44}\)

The special feature of the UN as an international organization blocks the national jurisdiction from dealing with claims of violations committed by PMSC members. The UN normally conducts a Status of Forces Agreement (SOFA) with the host state in which a peace operation is deployed.\(^{45}\) This agreement regulates the legal status of operation in the host state, and certain privileges and immunities are accorded to the operation and its personnel. One of the immunities that are normally accorded is that all members of an operation are immune from the civil jurisdiction of the host state for acts performed by them in their official capacity.\(^{46}\) Article 51 of the Model SOFA also provides that all claims that are private law in character to which the operation or a member thereof is a party and over which the courts of the host state do not have jurisdiction will be settled by a standing claims commission to be established for that purpose.

Even if the PMSC members are not regarded as a ‘member’ of UN operations, it may still be possible to argue the immunity of PMSCs by analogy from the immunity of peacekeepers in the absence of a SOFA. Article 105 of the UN Charter provides immunities “as are necessary for the fulfillment of its purposes,” and the “officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connexion with the Organization.” It has been noted that this level of immunity was specifically limited to functional necessity and to better balance the interests of host states and the organization.\(^{47}\) Important for this discussion, because peacekeeping activities may take place in a failed or non-recognized state, it is alleged that such functional immunity even applies to states that are not Member States of the UN.\(^{48}\)

Additionally, the immunity of PMSCs can be set by sending states. In the case of Iraq, for example, Order 17 of the Provisional Coalition Authority immunized contractors from Iraqi law. Under the provisions of the Order, “[c]ontractors shall be immune from Iraqi legal process with respect to acts performed by them pursuant to the terms and conditions of a Contract or any sub-contract thereto.” Additionally, the Order specifies “[a]ll MNF, CPA and Foreign Liaison Mission Personnel, and International Consultants shall be subject to the exclusive jurisdiction of their Sending States. They shall be immune from any form of arrest or

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\(^{44}\) ibid.


\(^{46}\) ibid.


\(^{48}\) ibid. As another example of international law ruling the immunity, see also Article VI, section 22, of the Convention on the Privileges and Immunities of the United Nations.
detention other than by persons acting on behalf of their Sending States.”

What is worse is that the protection by UN immunity is one of the attractive aspects of working for UN peacekeeping operations, with the UN able to ensure full deployment of staff. Therefore, the waving of immunity is not a popular option. The comment by Julian Harston, deputy special representative of the Secretary-General in Bosnia and Herzegovina, indicates the general hesitant attitude toward waving immunity: “[w]aiving immunity is a very difficult thing to do. We are hard pressed to get police to serve here. The facility for it [waiving immunity] exists…. I don’t know of any occasion where they were prosecuted at home.”

To balance the requirement to maintain immunity protection and respond properly to the misconduct of staff members, it is necessary to ensure that the UN as an employer takes full responsibility for the activities of their private contractors.

III. Responsibility of the UN as an employer

1. Two types of relationship between the UN and the PMSCs

By whom can the wrongful acts of private contractors be legally prevented/suppressed, sanctioned or restituted? In the cases of PMSCs utilized by the UN, the first candidate would be the UN itself. Although some reports have been published focusing on the appropriateness of outsourcing some international peacekeeping operations, they provide no guarantees or remedies for violations of human rights by the individuals working for those companies. Therefore, the most urgent point is to confirm who is responsible for the misbehavior of PMSCs and to whom can victims bring a claim for remedies.

When is the UN internationally responsible for the activities of the PMSCs it hires? Whereas with military members, because they are an integral part of the organic structure and apparatus of state, some level of control is ensured with a chain of command, disciplinary oversight and mechanisms of enforcement that make them directly accountable to the state, private military ‘contractors’ are, by definition, only in a contractual relation with the hiring state. The problem of accountability becomes even more complex when PMSCs are used by international organizations. In practice, the UN directly procures PMSC services from its headquarters and in the field. A variety of agencies, programs, funds, departments and divisions within the UN family are regular PMSC customers, including the UN Children’s Fund (UNICEF), World Food Program

49) However, contractors are no longer immune from Iraqi liability following the expiration of the UN Mandate in December 2008. See Walter Pincus, ‘Fatal Shootings by Iraq Contractors Drop’ (Washington Post, 20 December 2008).
52) Francioni (n 1) 962.
(WFP) and UN Development Program (UNDP). PMSCs also frequently get involved in UN operations through Member State contingencies, which is a particularly common practice as far as the US contributions to the UN are concerned. Therefore, both types of relationship (direct and indirect contracts) must be examined separately.

2. Attribution of the conduct of PMSCs to the UN

(1) PMSCs contracted directly with the UN

Article 6 of Draft Articles on the Responsibility of International Organizations (ILC Draft Articles), which was submitted to the UN General Assembly in 2011, provides that “[t]he conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.” The discussion here is whether the PMSCs employed for the purpose of peacekeeping can be regarded as an organ/agent of the UN itself.

It is noteworthy that the International Court of Justice (ICJ), dealing with the status of persons acting for the UN, considered relevant only the fact that a person was conferred functions by an organ of the UN. The Court used the term ‘agent’ and did not consider whether the person in question had a relevant official status. In its advisory opinion on Reparation for injuries suffered in the service of the United Nations, the Court said, “[t]he 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.” Furthermore, in its advisory opinion on Difference Relating to Immunity from Legal Process of a Special Rapporteur of the Commission on Human Rights, the ICJ noted that for “[...] damages incurred as a result of acts performed by the United Nations or by its agents acting in their official capacity [...] [t]he United Nations may be required to bear responsibility for the damage arising from such acts.” According to the ICJ, the conduct of the UN includes, apart from the actions of its principal and subsidiary organs, the acts or omissions of its ‘agents’. This term is intended to refer not only to officials but also to other persons acting for the UN on the basis of functions conferred by an organ of the organization. The requirement in paragraph 1 of Article 6 of ILC Draft Articles, which states that the organ or agent acts “in the performance of
functions of that organ or agent,” is intended to make it clear that conduct is attributable to the international organization when an organ or agent exercises functions that have been given to that organ or agent and not attributable when the organ or agent acts in a private capacity.\footnote{60} Therefore, if the UN is the direct contractor and as long as the PMSCs exercised the UN’s function, the PMSCs’ acts are attributable to the UN according to the ILC Draft Articles.\footnote{61}

\textbf{(2) PMSCs contracted with a seconding state}

By contrast, when a PMSC makes a contract with a state taking part in UN peacekeeping operations, Article 7 of the ILC Draft Articles may be applicable. Article 7 of the ILC Draft Articles provides that “[t]he conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct.” Article 7 deals with situations such as an ‘organ’ (not the ‘agent’) of a seconding state being placed at the disposal of the UN for a peacekeeping operation. According to Article 7, the organ may be fully seconded to that organization, whereas the state retains disciplinary powers and criminal jurisdiction over the members of the national contingency.\footnote{62} Unlike a state’s military force, however, PMSCs may not be regarded as state organs. Whether PMSCs can be regarded as a de facto organ of the sending state requires further assessment. The Commentary states that even though the articles do not use the term ‘agent’, the term ‘organ’, with reference to a state, has to be understood in a wider sense as comprising those entities and persons whose conduct is attributable to a state according to Articles 5 and 8 on the Draft Articles on Responsibility of States for Internationally Wrongful Acts (ILC Draft on State Responsibility).\footnote{63} According to the Commentary to Article 5 of the ILC Draft on State Responsibility, an ‘organ of state’ may include private companies, given that the entity is empowered by the law of the State to exercise functions of a public character normally exercised by State organs and the conduct of the entity relates to the exercise of the governmental authority concerned. For example, private security firms contracted to act as prison guards and, in that capacity, exercise public powers, such as powers of detention and discipline pursuant to a judicial sentence or to prison regulations, may be considered an organ of state.\footnote{64} In contrast, according to the ICJ’s finding in the Application of the Genocide Convention case, a body can be regarded as a de facto state organ when the body is ‘completely dependent’ on the state.\footnote{65}

\footnote{60} UN peacekeeping operation has been declared to be one of the activities of the UN. ICJ, Certain Expenses of the United Nations, (Advisory Opinion) 20 July 1962.
\footnote{61} ibid.
\footnote{62} ILC (n 55) 19.
\footnote{63} ibid, 20.
\footnote{64} See ILC ‘Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries’ (2001), UN Doc A/56/10, 43.
choose the states with which to make contracts. The limitations on their activities exist only within the contract to which they have consented.

Furthermore, whereas Article 8 of the ILC Draft on State Responsibility provides that the conduct of a person or group shall be considered as an act of a state if the act of the person or the group is under effective control of the state, the requirement for applying Article 7 of the ILC Draft Article includes effective control over the act by international organization. Thus, such double conditions, which are not likely to coexist, make the application of Article 7 of the ILC Draft Article rather complicated.

Therefore, when a seconding state is the employer of a PMSC, it is still not clear whether it is possible to attribute the conduct of the PMSC to the UN under Article 7 of the ILC Draft Articles. From the perspective of the UN’s accountability, it is recommended that the UN makes a contract directly with the PMSCs, not through the cooperating states. When the contractor is a state, the victims of wrongful acts by PMSCs can only bring a claim against the sending state or the host state, which is far more difficult than utilizing the UN’s claim procedure because the possibility of success in a national procedure depends on the willingness of the state authority and the level of judicial infrastructure of those states. As another option, if the UN is sufficiently willing, it is possible to refer to Article 9 of the ILC Draft Articles, which stipulates that “[c]onduct which is not attributable to an international organization under Articles 6 to 8 shall nevertheless be considered an act of that organization under international law if and to the extent that the organization acknowledges and adopts the conduct in question as its own.”

IV. Roles of the UN as a regulator

1. Comprehensive regulatory attempt

(1) Providing a forum for rule setting

Having found a certain possibility to expect the UN to be responsible for what PMSC employees have done, this chapter examines the UN’s role as regulator as its second important role. Among many other potential roles, this article focuses on its role in making a comprehensive regulatory framework and in responding to cases of wrongful acts.

The UN Human Rights Committee decided, for the purposes of transparency and inclusivity, to establish an open-ended intergovernmental working group in 2005.\(^66\) Whereas in 2008, the soft-law approach marked some achievements and created widely accepted non-binding documents in Geneva,\(^67\) the newly established Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise

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of the Right of Peoples to Self-Determination (UN Working Group) is mandated to consider the possibility of elaborating an international regulatory framework on activities of PMSCs.\(^{68}\) The activities of the UN Working Group crystallized as a Draft Convention on Private Military and Security Companies (Draft Convention) in 2010\(^{69}\) and series of reports on national legislation practices.\(^{70}\) The results of the UN Working Group are expected to contribute to a comprehensive understanding of the use of PMSCs and future regulation.

In addition, in November 2010, the International Code of Conduct was signed by hundreds of PMSCs.\(^{71}\) Although the Code is an important initiative and may raise standards across the industry, it does not address the key issue of accountability.\(^{72}\) Nonetheless, from the perspective of the encouragement of self-regulation, the initiative is significant. De Nevers finds that effective self-regulatory schemes are more likely to merge in the shadow of a hierarchy, or when companies can be punished directly by consumers, which generates reputational incentive to self-regulate.\(^{73}\) As a consumer, the UN has to be aware of its accountability in this regard. Moreover, the UN can potentially provide such occasions and forum. In fact, the UN Working Group has commented on the International Code of Conduct.\(^{74}\)

(2) General rule setting, establishing international supervision and enhancing national regulation

Another critical opinion is that a national and international system of self-regulation is not sufficient and that there needs to be a synthesis between international standard setting, supervision and accountability, and robust national systems of licensing and regulation for successful regulation of PMSCs, as with any other attempt to regulate non-state actors.\(^{75}\) The Draft Convention suggested by the UN Working Group is going to provide such an innovative but challenging combination of general rules, oversight and national legislation.

The Draft Convention first defines inherent state functions, which are ‘consistent with the principle of State monopoly on the legitimate use of force’ and cannot be outsourced or delegated to non-state actors.\(^{76}\) As to the PMSCs utilized in peacekeeping, it is provided that when using force, PMSC employees must exercise

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72) ibid.
76) Draft Convention (n 69) Preamble (at 9), art 2(i). It is pointed out that, as the listed activities include: intelligence, security and policing application and police powers and such a wide definition seems to encroach on functions already being performed by private contractors. It will no doubt lead to opposition to the Convention from states where the PMSC industry is largely based. ibid, 138.
restraint; must minimize damage, injury and loss of life; and may only use force to defend themselves from imminent unlawful threat of death or serious bodily injury, to defend persons they are contracted to protect under similar circumstances, resist abduction, and to prevent the commission of a serious crime that would have involved or involves a grave threat to life or serious bodily injury.\textsuperscript{77}

As to the oversight, a Committee on the Regulation, Oversight and Monitoring of Private Military and Security Activities (Oversight Committee) would be set up if the treaty came into force.\textsuperscript{78} Furthermore, two additional methods for supervision are proposed: an inquiry procedure and an individual and group petition procedure.\textsuperscript{79} It is expected that jurisprudence from those systems would complete and adjust the regulations corresponding to current situations.\textsuperscript{80}

The Draft Convention, reaffirming that national legislative efforts will never be successful without a coordinated response by the international community, also provides various legal frameworks to lead states to provide effective national regulation in an integrated manner with other states.\textsuperscript{81} Together with the obligation to investigate, prosecute and punish if violations of human rights law or international humanitarian law occurs,\textsuperscript{82} it is noted that to avoid the development of vastly different national licensing regimes and consequent problems of forum shopping, further effort may be necessary to specify some minimal conditions that rule out the possibility of a company being granted an open-ended and unsupervised license.\textsuperscript{83}

The Draft Convention is just a touchstone to observe states’ responses to such an international regulatory instrument, and it may be quite difficult to include all the proposals in the future convention. However, the fact that discussions such as the above-mentioned are conducted at the UN forum is significant, and it is not an overreaction to expect further development of an international comprehensive legal framework for the general regulation of PMSCs.

2. Responding to cases of wrongful acts

   (1) Cooperation to prosecute the criminal acts committed by PMSC members

   The UN can be involved in the issue of PMSCs in UN-led peacekeeping operations not only in a general manner but also in critical situations where the UN is required to respond using its authority and power. Therefore, such case-based regulatory action potentially taken is worth noted as one of the roles of the UN in regulation of PMSCs.

   Impunity in cases of criminal conducts committed by PMSC members due to a lack of authority responsible

\textsuperscript{77} ibid, art 18(3), (4). White comments that this final provision would apparently allow PMSCs to defend civilians under imminent threat of serious injury, and mirrors the move in the UN towards mandating peacekeepers to protect civilians. White (75) 138.

\textsuperscript{78} ibid, art 27.

\textsuperscript{79} ibid, art 33, 37.

\textsuperscript{80} Gómez Del Prado (n 37) 275.

\textsuperscript{81} ibid, 269.

\textsuperscript{82} Draft Convention (n 69) art 7, 9, 10, 13.

\textsuperscript{83} White (n 75) 144.
for the PMSC’s activities is one of the problems that have to be overcome. First, with no judicial organ dealing with individual criminal responsibility, the UN has to rely on other entities: sending states’ judicial authority, host states’ judicial authority, or the International Criminal Court (ICC).

In the case of peacekeepers being sent by a state, investigation of a crime is usually the troop-contributing state’s responsibility. Article 47 of the Model SOFA provides different procedure for cases with a civilian component or military members. Article 47(a) says “[i]f the accused is a member of the civilian component or a civilian member of the military component, the Special Representative/Commander shall conduct any necessary supplementary inquiry and then agree with the Government whether or not criminal proceedings should be instituted.” By contrast, paragraph (b) of the same article says “[m]ilitary members of the military component of the United Nations peace-keeping operation shall be subject to the exclusive jurisdiction of their respective participating States in respect of any criminal offences which may be committed by them in [host-country/territory].” When it is regarded that the PMSC’s staff was sent by a sending states as a ‘member’ of a peacekeeping operation, the staff falls into the definition of a ‘civilian staff’ and need not necessarily be prosecuted exclusively by the sending state.

However, the intention to let the sending state prosecute the members of peacekeeping operations regardless of their status was emphasized in the Security Council Resolution 1593, which “[d]ecides that nationals, current or former officials or personnel from a contributing State outside Sudan which is not a party to the Rome Statute of the International Criminal Court shall be subject to the exclusive jurisdiction of that contributing State for all alleged acts or omissions arising out of or related to operations in Sudan established or authorized by the Council or the African Union, unless such exclusive jurisdiction has been expressly waived by that contributing State.”

As another option for contributing to justice, the UN can cooperate with the ICC. Such a situation is obviously limited to serious crimes under the jurisdiction of the ICC: crimes of genocide, crimes against humanity, war crimes, and crimes of aggression. The number of cases that can be dealt with by the ICC seems quite small considering the gravity threshold of the ICC. In February 2006, the ICC Prosecutor, Luis Moreno-Ocampo, when explaining his decision not to proceed on the basis of complaints filed concerning the behavior of British troops in Iraq since the 2003 invasion, asserted that the number of victims was not enough to justify ICC prosecution. By contrast, citing the recent ICC case of attacks against African Union Mission in Sudan (AMIS) operations in Darfur, Sudan, where 12 members of peacekeeping operations were killed and the case was considered of sufficient gravity, O’Brien argues that cases where the peacekeepers are the

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84) UNSC ‘Resolution 1593’ UN Doc, S/RES/1593 (31 March 2005).
86) ibid, art 17(1), 53.
88) See e.g. Abu Garda, ‘Decision on the Confirmation of Charges’ ICC-02/05-02/09-243-Red, Pre-Trial Chamber 1 (8 February 2010).
alleged perpetrators of serious crimes are also concerned grave enough to be tried before the ICC because of their role as protector.\textsuperscript{89)}

As a general agreement on the cooperation between the ICC and the UN, the Negotiated Relationship Agreement Between the International Criminal Court and the United Nations was adopted on 4 October 2004. Furthermore, the Memorandum of Understanding Between the United Nations and the International Criminal Court Concerning Cooperation Between MONUC and the International Criminal Court provides a specific form of cooperation of UN peacekeepers for the activities of the ICC. However, these agreements are aimed not at bringing the staff of UN-led peacekeeping operations to the ICC but rather at cooperating widely in gathering information and surrendering the accused. The agreements may be referenced when the UN is motivated to do so, but there is no provision that obligates the UN to cooperate in the prosecution of members of peacekeeping operations. Still, the contributions of the UN in ICC investigations are significant; a large amount of evidence used in the cases of the Democratic Republic of the Congo was provided by MONUC.\textsuperscript{90)}

\textbf{(2) Regulation as sanctions}

Although the UN Security Council is the entity that holds the primary responsibility for maintenance of peace and is the strongest authority for rendering legally binding resolutions on security issues, it has not yet exercised such features on the issue of PMSCs. However, the recent action of the UN Security Council is noteworthy.

The inclusion of ‘armed mercenary personnel’ within the terms of the arms embargo imposed upon Libya in Security Council Resolution 1970\textsuperscript{91)} and further elaborated in Security Council Resolution 1973 holds significant implications.\textsuperscript{92)} The resolution “decides that all Member States shall immediately take the necessary measures to prevent the direct or indirect supply, sale or transfer to the Libyan Arab Jamahiriya, (…) of (…) technical assistance, training, financial or other assistance, related to military activities or the provision, maintenance or use of any arms and related materiel, including the provision of armed mercenary personnel whether or not originating in their territories (…).”\textsuperscript{93)}

One of the implications is that the explicit use of the broader term ‘armed mercenary personnel’ is likely to include a significant category of contractors working for PMSCs.\textsuperscript{94)} As a result of British suggestions that PMSCs be contracted to aid or train Libyan rebel forces,\textsuperscript{95)} the width of the terms of the arms embargo may

\textsuperscript{89) Melanie O’Brien, ‘Prosecutorial Discretion as an Obstacle to Prosecution of United Nations Peacekeepers by the International Criminal Court: the Big Fish/Small Fish Debate and the Gravity Threshold’ (2012) 10 JICJ 525, 533-534.}
\textsuperscript{90) Heikelina V. Stuart, ‘The ICC in Trouble’ (2008) 6 JICJ 409.}
\textsuperscript{91) UNSC ‘Resolution 1970’ UN Doc. S/RES/1970 (26 February 2011).}
\textsuperscript{92) UNSC ‘Resolution 1973’ UN Doc. S/RES/1973 (11 March 2011).}
\textsuperscript{93) ibid, para. 9.}
\textsuperscript{95) Patrick Wintour, ‘Libyan Rebels Should Receive Training Funded By Arab Countries, Says Britain’ (The Guardian, 6 April 2011) <http://www.guardian.co.uk/world/2011/apr/06/libyan-rebels-training-funded-arab> accessed on 15 October 2012.}
have the effect of capturing PMSC contractors\textsuperscript{96} despite the general consensus that PMSC contractors may be excluded under the tighter definition of ‘mercenary’ under Article 47 of API.\textsuperscript{97}

To what extent this inclusion impacts the understanding and regulation of PMSCs is still unknown, but it can at least be regarded as an indication of world-wide awareness and recognition of the significance of the PMSCs as an actor in conflict situation. However, it is unlikely that the UN Security Council will take further steps in regulation of PMSCs because the US is one of the most frequent users of PMSCs in various situations.

Conclusion

This article attempts to examine comprehensively the UN’s roles as an employer and regulator for the misconducts committed by the PMSC members utilized in UN-led peacekeeping operations. Through an analysis of the attribution of wrongful acts to international organizations stipulated in the ILC Draft Articles, the article concludes that although it is partly accepted that the activity of PMSCs in peacekeeping operations can be attributed to the UN when the UN is the direct employer and the activity amounts to one of the functions of the UN, complexity exists when the PMSCs make contracts with seconding states. As to the role as a regulator, the article presents several positive effects of the UN in its recent practice, including the UN Working Group’s effort for general rule setting and the Draft Convention, which seeks establishment of an international oversight regime and promotes national legislation. Furthermore, while the UN is not obliged to bring PMSC members who committed serious crimes to the ICC and it is generally agreed that such members be prosecuted in their own states, some forms of possible cooperation can be observed. Additionally, the developed recognition of the necessity to regulate PMSCs is found within the practice of Security Council Resolutions.

These regulatory attempts have just begun. What is needed then is to make the full use of the forum provided by the UN and adopt and ratify the Draft Convention. Although some effort could be put into providing wide understanding and awareness of the importance of the proper uses of PMSCs, creation of a clear legal framework for responding to legal grey areas still has a long way to go. It is likely that use of PMSCs will increase because the UN has already found them to be useful and convenient. Surely, the UN must be well prepared for future claims about taking responsibility of PMSCs’ activities and responding to international demand for regulation, not only from the states but also from the people directly affected by the activities of the PMSCs.

\textsuperscript{96} Liu (n 94) 314.
