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Contracting for Stability: The Potential Use of Private Military Contractors as a United Nations Rapid-Reaction Force

Jared Genser and Clare Garvie*

Abstract

In June 2015, the High-Level Independent Panel on Peace Operations established by U.N. Secretary-General Ban Ki-moon and chaired by former East Timor President José Ramos-Horta, published its comprehensive review of U.N. Peacekeeping Operations. The Panel observed that it takes an average of six months from when a peacekeeping mission is authorized by the U.N. Security Council to when the mission is deployed. The Panel further explained that although rapid and effective deployment comes at a cost, responding more quickly saves lives and can avoid a larger, more costly response later. In its request for the Secretary-General to develop options for a new rapid-reaction capability, the Panel suggested evaluating the merits of having a small, standing U.N. force, transferring personnel and assets from other U.N. missions, and instituting national and regional standby arrangements. Each of these options, however, has been available for years, relies heavily on the political will of countries and regional organizations, and has not previously been sufficient to address the requirements of rapid deployment to new missions or crisis situations.

This Article suggests that the U.N. also evaluate the potential use of private military and security companies (PMSCs) to serve as a U.N. rapid-reaction force. In short, the U.N. already relies heavily on PMSCs, it is legally permissible for PMSCs to be engaged in peacekeeping operations, PMSCs are well trained and equipped, and the U.N. could contract with PMSCs to hold a PMSC corporate entity and its employees to higher standards of conduct than country-supplied peacekeepers, who benefit from the privileges and immunities of the U.N. There have been numerous legal, moral, and practical objections raised to the potential use of PMSCs, which are considered in detail. The Article concludes, however, that given the U.N.'s urgent need for a reliable and sustainable rapid-reaction capability, this option could be considered alongside other proposals for reform.

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I. INTRODUCTION

The world is becoming a more peaceful place. Despite the seemingly interminable reports of intra-state conflict, humanitarian crises, and transnational terrorism, violence has declined to a historically low level.¹ Yet at the same time, the task of those mandated by the international community to establish and keep the peace, to protect civilians threatened by violence, and to help facilitate enduring solutions to conflict, has become far more difficult.

Peacekeeping in the twenty-first century faces three new challenges. First, the demand for peacekeeping intervention has increased dramatically over the past fifteen years. As of September 2015, more than 123,000 peacekeepers, police, and civilian personnel were deployed worldwide, a 40,000-troop increase from the number deployed 10 years prior.² The 2015–2016 cash budget for U.N. peacekeeping is some \$8.27 billion, with other in-kind support provided by various countries around the world.³ In a summit led by the U.S. on the sidelines of the 2015 U.N. General Assembly in September, more than 50 countries made commitments to expand their contributions, amounting to an additional 40,000 new soldiers and police officers.⁴

Second, U.N. peacekeepers today are responsible for fulfilling vastly more complex, multifaceted mandates than in the past. Peacekeeping missions established before the mid-1990s focused on ensuring that warring states

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¹ See generally STEVEN PINKER, *THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED* (2011); U.N. Under-Secretary Hervé Ladsous, *New Challenges and Priorities for U.N. Peacekeeping*, Brookings Institution, (June 17, 2014) (transcript available at <http://www.un.org/en/peacekeeping/documents/HL-remarks-brookings.pdf>).

² See *Peacekeeping Operations Fact Sheet*, U.N. PEACEKEEPING, (Aug. 31, 2015), <http://www.un.org/en/peacekeeping/resources/statistics/factsheet.shtml>. In contrast, the U.N. reported 73,560 peacekeepers deployed in October 2004. See *Peacekeeping Fact Sheet Archive, Peacekeeping Fact Sheets for 2005*, U.N. PEACEKEEPING, http://www.un.org/en/peacekeeping/resources/statistics/factsheet_archive.shtml (last visited May 9, 2015).

³ See *Approved Resources for Peacekeeping Operations for the Period From 1 July 2015 to 30 June 2016*, U.N. Doc. A/C.5/69/24 (June 26, 2015).

⁴ See Somini Sengupta, *Rallying Global Support, Obama Pledges Larger U.S. Role in Peacekeeping Missions*, N.Y. TIMES, Sept. 28, 2015, available at <http://www.nytimes.com/2015/09/29/world/americas/rallying-global-support-obama-pledges-larger-us-role-in-peacekeeping-missions.html>.

observed ceasefires.⁵ In contrast, today's mandates charge peacekeepers with facilitating peace processes, protecting civilians, reforming security institutions, vetting and training police forces, overseeing free and fair elections, and other quintessential "nation-building" activities.⁶

Third, these highly involved missions are often carried out in increasingly unstable contexts.⁷ At the behest of states faced with humanitarian crises or rampant internal violence, the U.N. Security Council faces pressure to consider intervention earlier in the course of a conflict.⁸ As a result, peacekeeping forces are now deployed into more volatile environments where there may not yet be peace to keep;⁹ more than two-thirds of deployed U.N. personnel currently operate in active conflict zones.¹⁰

New and old constraints on the U.N.'s ability to deploy peacekeeping missions compound these challenges. The task of sustaining such high troop levels, along with the increasing complexity and volatility of conflict areas, is outstripping the willingness—and to some extent the capacity—of U.N. member states to continue providing troops.¹¹ Estimates suggest that there is a 210,000-troop ceiling on global military resources available for peacekeeping.¹² The U.N. is losing in the competition with non-U.N. operations to secure the

⁵ See Patrick Cammaert, *Issue Brief: The U.N. Intervention Brigade in the Democratic Republic of the Congo*, INT'L PEACE INST. 7 (July 2013), <http://reliefweb.int/sites/reliefweb.int/files/resources/The%20UN%20Intervention%20Brigade%20in%20the%20Democratic%20Republic%20of%20the%20Congo.pdf>.

⁶ See *id.*; see *Report of the Panel on United Nations Peace Operations*, at vii–ix, 3–4, U.N. Doc. A/55/305, S/2000/809 (Aug. 21, 2000) [hereinafter *The Brahimi Report*].

⁷ See *The Brahimi Report*, *supra* note 6, at 3–4.

⁸ See Ladsous, *supra* note 1.

⁹ See DACE WINTHER, *REGIONAL MAINTENANCE OF PEACE AND SECURITY UNDER INTERNATIONAL LAW: THE DISTORTED MIRRORS*, 36 (2013) (noting that “[t]oday . . . the tasks of peacekeeping operations start in situations where there is no peace to keep, but where peace is first to be created”).

¹⁰ See Press Release, General Assembly, *Scale of United Nations Peacekeeping across Massive Distances in Midst of Conflict Matched by Operational Complexity, Department Head Tells Fourth Committee*, U.N. Press Release GA/SPD/567 (Oct. 28, 2014), available at <http://www.un.org/press/en/2014/gaspd567.doc.htm>. There has been an average of 122 peacekeeper deaths per year for the past ten years, from 2005 to 2014, compared to an average of 75 deaths per year for the ten years before 2005. See *United Nations Peacekeeping Fatalities Per Year*, U.N. PEACEKEEPING, 1 (Mar. 31, 2015), http://www.un.org/en/peacekeeping/fatalities/documents/stats_1.pdf.

¹¹ Alex J. Bellamy & Paul D. Williams, *Broadening the Base of United Nations Troop- and Police-Contributing Countries: Providing For Peacekeeping No. 1*, INT'L PEACE INSTITUTE, 1 (Aug. 2012), http://www.ipinst.org/wp-content/uploads/publications/ipi_pub_broadening_the_base.pdf.

¹² Donald C. F. Daniel, *Contemporary Patterns in Peace Operations, 2000–2010*, in *PROVIDING PEACEKEEPERS: THE POLITICS, CHALLENGES, AND FUTURE OF UNITED NATIONS PEACEKEEPING CONTRIBUTIONS* 25, 28 n.6 (Alex J. Bellamy & Paul D. Williams eds., 2013).

specialized capabilities needed for more multidimensional and robust operations.¹³ Countries that maintain these capabilities have shown themselves resistant to placing their forces under U.N. command and control, preferring instead to operate through unilateral action, *ad hoc* coalitions, or multi-state alliances to achieve intervention objectives.¹⁴ And countries with the largest and best trained militaries, including the U.S., U.K., France, Germany, and Japan, only provide about 1.4 percent of the peacekeepers, police, and civilian personnel, even though these countries are providing approximately 60.25 percent (\$5 billion) of the annual peacekeeping budget.¹⁵

In addition, the U.N. faces persistent obstacles to mobilizing peace operations as quickly as crisis situations require. These obstacles stem from political reluctance on the part of many member states to commit more than token troop numbers,¹⁶ as well as from logistical challenges in mobilizing forces contributed by multiple countries.¹⁷ It takes on average six months after a Security Council resolution mandates a peacekeeping mission for forces to be deployed on the ground.¹⁸ And even when deployed, many U.N. peacekeeping

¹³ Bellamy & Williams, *supra* note 11, at 6–7.

¹⁴ *Id.* at 6.

¹⁵ Compare Department of Peacekeeping Operations (DPKO), *How Much Does U.N. Peacekeeping Cost*, <http://www.un.org/en/peacekeeping/operations/financing.shtml> (last visited September 30, 2015), with DPKO, *Troop and Police Contributors*, <http://www.un.org/en/peacekeeping/resources/statistics/contributors.shtml> (last visited September 30, 2015).

¹⁶ Bellamy & Williams, *supra* note 11, at 1, 6 (noting that “the task of providing peacekeepers continues to be met in a highly unequal manner with well over two-thirds of all U.N. uniformed personnel coming from just twenty or so countries,” and that members of the Western European and Others Group (WEOG) “have decided that only in exceptional circumstances [will] they place anything other than token contributions under the U.N. chain of command.”).

¹⁷ See *id.*; see also U.S. General Accounting Office, *U.N. Peacekeeping: Lessons Learned in Managing Recent Missions*, GAO/NSAID-94-9, 40 (Dec. 1993), available at <http://www.gao.gov/assets/160/153972.pdf> (finding that the process by which the U.N. recruits peacekeepers through voluntary contributions from member states delays deployment of peacekeepers missions, which subsequently complicates on-the-ground operations).

¹⁸ See *Report of the High-Level Independent Panel on Peace Operations on Uniting Our Strengths for Peace: Politics, Partnerships, and People*, ¶ 198, U.N. Doc. A/70/95-S/2015/446 (June 17, 2015) [hereinafter *The Ramos-Horta Report*]; see also RODRIGO TAVARES, REGIONAL SECURITY: THE CAPACITY OF INTERNATIONAL ORGANIZATIONS 13 (2009) (noting that it takes on average “three to six month[s]” to deploy a mission). For example, in the early 1990s, it took the Security Council an entire year to coalesce the requisite elements for the deployment of ground forces into Bosnia. Pakistan offered 3,000 troops, but was unable to equip or train them. Germany, and later Austria, subsequently offered equipment, but domestic constitutional provisions prevented both countries from training the troops on their use. Ultimately, Slovakia was able to provide the requisite training after deployment a full year after the initial Security Council Resolution. See Maj. Anthony G. DeMartino, *Rapid Reaction Peacekeeping Under a Blue Flag: A Viable Response to Today’s Global Environment* 7 (May 14, 2002), available at handle.dtic.mil/100.2/ADA402718. In the deployment of its four most recent peacekeeping missions—the U.N. Multidimensional Integrated

missions consist of troops that are not provided with sufficient training or equipment.¹⁹ The consequences of these delays and the deployment of inadequate peacekeeping forces are increased violence, high civilian death tolls and rates of displacement, and a decrease in the mission's overall political effectiveness.²⁰

The U.N. is well aware of these challenges. In 2000, then Secretary-General Kofi Annan convened the Panel on U.N. Peace Operations to examine the conduct and effectiveness of peacekeeping missions and to offer recommendations for improved performance.²¹ This panel produced the landmark Brahimi Report, which recommended that peacekeepers be ready for deployment within 30 days of Security Council authorization for a traditional

Stabilization Mission in the Central African Republic (MINUSCA), the U.N. Multidimensional Integrated Stabilization Mission in Mali (MINUSMA), the U.N. Missions in South Sudan (UNMISS), and the U.N. Interim Security Force for Abyei (UNISFA) – the Security Council took a similarly extended period of time for forces to be deployed following the passage of a Security Council resolution mandating a peacekeeping force. See DPKO, *United Nations Peacekeeping Operations Factsheet 2* (Jan. 31, 2015), <http://www.un.org/en/peacekeeping/archive/2015/bnote0115.pdf>. The Security Council resolution authorizing MINUSCA, for example, was adopted on April 10, 2014, and the mission did not deploy until September 15, 2014, meaning that it took the Security Council over five months to put together the required elements for forces to be deployed in the Central African Republic. See *The U.N. Peacekeeping Mission in the Central African Republic, BETTER WORLD CAMPAIGN*, <http://www.betterworldcampaign.org/un-peacekeeping/missions/central-african-republic.html>; Louisa Waugh, *Will MINUSCA Deployment Make a Difference in CAR?*, *AFRICAN ARGUMENTS* (Sept. 15, 2014), <http://africanarguments.org/2014/09/15/will-minusca-deployment-make-a-difference-in-car-by-louisa-waugh/>. In a similar vein, the Security Council resolution authorizing MINUSMA was adopted on April 25, 2013 and the mission did not deploy until July 1, 2013. See DPKO, *United Nations Stabilization Mission in Mali*, <http://www.un.org/en/peacekeeping/missions/minusma/background.shtml>; U.N. *Takes Over Mali Peacekeeping Mission*, *AL JAZEERA* (July 1, 2013), <http://www.aljazeera.com/news/africa/2013/07/20137182846984106.html>. Similarly, the U.N. Security Council resolution authorizing UNMISS was adopted on July 8, 2011 and the mission did not deploy until August 26, 2011. See DPKO, *United Nations Mission in the Republic of South Sudan*, <http://www.un.org/en/peacekeeping/missions/unmiss/>; U.N. News Centre, *U.N. Deploys Peacekeepers to Help Deter Violence in South Sudan's Jonglei State* (Aug. 26, 2011), http://www.un.org/apps/news/story.asp?NewsID=39390&Cr=South+Sudan&Cr1=%23.VdzejHi4mu4#.Vd0_p7xViko. And the Security Council Resolution authorizing UNISFA was adopted on June 27, 2011 and the mission did not deploy until July 27, 2011. See DPKO, *United Nations Interim Security Force for Abyei*, <http://www.un.org/en/peacekeeping/missions/unisfa/>; U.N. News Centre, *U.N. Troops Move into Sudanese Area of Abyei*, (July 27, 2011), <http://www.un.org/apps/news/story.asp?NewsID=39167#.Vjaefn6rQuU>.

¹⁹ See Mohamad Ghazi Janaby, *The Legal Status of Employees of Private Military/Security Companies Participating in U.N. Peacekeeping Operations*, 13 *NW. J. INT'L HUM. RTS.* 82, 86 (2015), available at <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1178&context=njihr>.

²⁰ See William J. Durch et al., *The Brahimi Report and the Future of U.N. Peace Operations* 63 (Dec. 2003), <http://www.stimson.org/images/uploads/research-pdfs/BR-CompleteVersion-Dec03.pdf>.

²¹ See *The Brahimi Report*, *supra* note 6.

mission and 90 days for a complex mission.²² U.N. Secretary-General Ban Ki-moon subsequently created a new review process in October 2014, establishing the High-Level Independent Panel on Peace Operations to determine how to ensure peacekeeping operations remain an effective tool for promoting international peace and security in light of the challenges and complexities of the field in the twenty-first century.²³ This new panel, chaired by former East Timor President José Ramos-Horta, published a new, comprehensive report in June 2015, and expressed serious concern that the U.N. had been unable to come close to the Brahimi Report deployment target timeframes. The panel underscored the serious challenges posed by the inability of the U.N. to deploy peacekeeping missions rapidly:

Slow deployment is one of the greatest impediments to more effective peace operations. When a mission trickles into a highly demanding environment, it is dangerously exposed on the ground and initial high expectations turn to disappointment, frustration and anger The Security Council has no standing army to call upon. Reliance on *ad hoc* solutions for rapidly deploying new missions and for crisis response has limited the timeliness and effectiveness of international response. However, repeated calls for a global on-call standby capacity have foundered time and again on concerns about predictability, availability and cost.²⁴

In response to this challenge, the Ramos-Horta Report said that a “small United Nations ‘vanguard’ capability should be considered to allow the United Nations to insert a quickly responding military capability into a new mission area or to reinforce an existing mission.”²⁵ In addition, it added that “[t]he Secretariat should develop options to generate and place on standby a small dedicated regional strategic reserve contingent for a group of missions”²⁶ As it examined various options, however, the Panel focused on redeploying existing peacekeepers from nearby missions in the same region, re-hatting other deployed forces of U.N. members, or building on emerging regional capabilities such as the African Standby Force and E.U. Battlegroups.²⁷ Yet all of these options have existed previously, rely heavily on the political will of outside third parties not within the direct control of the U.N. Department for Peacekeeping Operations (DPKO), and take, on average, six months to deploy.

²² *Id.* at xi.

²³ See U.N. Secretary-General Ban Ki-moon, *Statement on Appointment of High-Level Independent Panel on Peace Operations* (Oct. 31, 2014), <http://www.un.org/sg/statements/index.asp?nid=8151>.

²⁴ The Ramos-Horta Report, *supra* note 18, at ¶¶ 195–196.

²⁵ *Id.* ¶ 199.

²⁶ *Id.*

²⁷ *Id.* ¶ 202.

Given these constraints, the U.N. could also examine establishing a robust rapid-reaction capability through contracting with private military and security companies (PMSCs).²⁸ A contracted rapid-reaction force would enable the U.N. to respond directly to emerging crises, begin protecting civilians closer to the onset of violence, and create conditions in which a longer-term, multidimensional peacekeeping force can operate safely and more effectively. Using private companies in this capacity lends the training, expertise, and rapid-reaction abilities already existing in the private market to U.N. peacekeeping efforts, curing the logistical challenges constraining the U.N.'s ability to mobilize third parties quickly. Furthermore, using PMSCs would allow for the size of the force to expand or contract as needed, thereby allowing for reductions in costs. In addition, such an approach would help circumvent political reticence on the part of troop contributing countries (TCCs) to commit forces to more dangerous contexts,²⁹ would serve to broaden the pool of forces available to the U.N. for peacekeeping endeavors, and would alleviate the current burden on overstretched U.N. peacekeeping missions. Private contractors additionally may exhibit greater levels of professionalism, and be subject to a higher degree of accountability for bad acts than the current system commands over country-contributed peacekeeping troops.

Section II of this paper examines prior proposals for the establishment of a rapid-reaction force, which have included calls for a standing U.N. force and efforts to build rapid-reaction capabilities into the existing TCC makeup of peacekeeping missions. This Section argues that these proposals remain politically and logistically difficult, and that using PMSC troops could circumvent these defects while achieving the same end goals. Section III examines the question of whether a system of direct contracts between the U.N. and PMSCs would be permitted under international law and in light of the obligations of U.N. member states under the U.N. Charter. It argues that neither international law nor the current role U.N. member states play in providing

²⁸ These companies are also referred to as “private military contractors” (PMCs) or “private security companies” (PSCs). For the purposes of this paper, PMSC is broadly used to refer to a company that advertises rapid-reaction force capabilities. For a longer discussion about the distinctions between various forms of private military and security companies, Kevin O’Brien, *What Should and What Should Not Be Regulated?*, in *FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES* 29, 34–40 (Simon Chesterman & Chia Lehnardt eds., 2007).

²⁹ Some U.N. member states have asserted political rationales for contributing to peacekeeping missions, such as enhancing a country’s perceived national prestige or responding to political pressure from other countries. *See* Bellamy & Williams, *supra* note 11, at 3–4. However these generally counsel in favor of countries contributing troops to “safer” or easier missions, not rapid-reaction engagements. The expressed political goals are still met through contributions to safe missions, and the country does not face domestic opposition for placing forces in harm’s way abroad.

peacekeepers presents a meaningful constraint on the DPKO's ability to contract with PMSCs. Finally, Section IV examines serious concerns of private-actor accountability to human rights and humanitarian legal obligations. This Section explains that with the proper licensing and contractual framework, these forces could actually be held to a higher level of accountability than peacekeepers. As a whole, this Article suggests that the use of PMSCs in a rapid-reaction capacity could greatly enhance the U.N.'s ability to address the challenges of peacekeeping in the twenty-first century, and is a proposal that warrants consideration.

II. PROPOSALS FOR A U.N. RAPID-REACTION FORCE

A. The Potential for a Standing U.N. Rapid-Reaction Force

Support for the idea of establishing rapid-reaction force capabilities as part of the U.N. peacekeeping toolbox gained momentum in the mid-1990s, after the international community failed to prevent the 1994 Rwandan genocide.³⁰ In 1996, a group of 26 U.N. member countries³¹ called on the U.N. to establish a force that could be deployed into situations to help prevent crisis breakout and escalation.³² The group additionally submitted a number of proposals for the composition of the rapid-reaction force to the DPKO.³³ The rapid-reaction force would be a small, highly trained unit of 5,000 or fewer troops with a broad

³⁰ See Cristian Mazzei, Peace Operations Training Inst., Peacekeeping, UN Stand-by Force and Rapid Deployment: A Critical Analysis, 7–12 (May 2009), issuu.com/peaceops/docs/mazzei.

³¹ The “Friends of rapid reaction,” as the group came to be known, included Argentina, Australia, Bangladesh, Brazil, Canada, Chile, Denmark, Egypt, Finland, Germany, Indonesia, Ireland, Jamaica, Japan, Jordan, Malaysia, The Netherlands, New Zealand, Nicaragua, Norway, Poland, Senegal, South Korea, Sweden, Ukraine, and Zambia. See H. Peter Langille, *Conflict Prevention: Options for Rapid Deployment and U.N. Standing Forces*, GLOBAL POLICY FORUM (2000), available at <https://www.globalpolicy.org/component/content/article/199/40962.html>. Note that some reports indicate that twenty-four countries comprised the group; others list twenty-seven countries. See, for example, Frederick Bonnart, *It's Time for a Standing U.N. Rapid Reaction Force*, N.Y. TIMES, Jan. 22, 1997, available at <http://www.nytimes.com/1997/01/22/opinion/22iht-edbonn.t.html>. The group intentionally excluded the permanent members of the Security Council in an attempt to counterbalance the existing concentration of authority in these countries. See Jochen Prantl & Jean E. Krasno, *Informal Groups of Member States*, in THE UNITED NATIONS: CONFRONTING THE CHALLENGES OF A GLOBAL SOCIETY 311, 349–351 (Jean E. Krasno ed., 2004).

³² Bonnart, *supra* note 31. Efforts to develop rapid-reaction capabilities were not confined to the efforts of the “Friends.” The U.K., France, and U.S. were also engaged in improving the peacekeeping capabilities of African troop-contributing countries, and Italy and Argentina had presented proposals for the creation of a rapid-response force for humanitarian purposes. See Langille, *supra* note 31.

³³ *Id.*; Mazzei, *supra* note 30, at 9–12.

range of force capabilities, able to respond in a matter of days to an emerging crisis following Security Council authorization.³⁴ It would be a permanent, standing unit under the ownership of the international community that guaranteed the immediate availability of troops when necessary.³⁵ And it would be designed to serve as a stopgap measure of strictly-limited duration, complementary to either existing or subsequent broader peacekeeping initiatives. Its primary purpose would be to conduct preventive action—protection of civilians and deterrence of further violence—in the months between a Security Council authorization of a robust international peacekeeping mission and its deployment.³⁶ As previously mentioned, the Brahimi Report released in 2000 echoed the call for more rapid deployment into crisis situations, setting the targets of 30 days between Security Council authorization and deployment for a traditional mission and 90 days for a complex mission.³⁷ However, little progress was made on these goals over the next 15 years, and the independent panel headed by José Ramos-Horta faced a virtually unchanged field in 2015. Although the Ramos-Horta Report did not take a position on whether this accelerated deployment capacity should take the form of a U.N.-owned rapid-reaction force, it stated, “the Panel believes that the United Nations needs to be provided with the minimum capacity to reinforce a mission in crisis and more rapidly establish a new mission presence, whether deploying on its own or following a bridging force.”³⁸

All of these proposals identify the contours of a force that would greatly enhance the U.N.’s efficiency and effectiveness in responding to emerging security threats. There are at least four crucial, overlapping benefits that would be supplied by such a force: prevention, credibility, cost-effectiveness, and deterrence.³⁹ First, a brigade, capable of deployment in the days following a Security Council resolution and mandated to directly engage in hostilities to the extent necessary, would be able to mitigate tensions as they arise, stem the entrenchment of violence, and prevent the escalation of a humanitarian crisis.⁴⁰ Second, and relatedly, the ability to deploy a rapid response unit would establish

³⁴ Bonnart, *supra* note 31.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *See* The Brahimi Report, *supra* note 6.

³⁸ *See* The Ramos-Horta Report, *supra* note 18, ¶ 198.

³⁹ *See* DeMartino, *supra* note 18, at 37–39 (identifying the four advantages to a standing rapid-reaction force to be responsiveness, cost efficiency, credibility, and deterrence).

⁴⁰ *See id.* at 37; *see also* Mazzei, *supra* note 30, at 6 (describing that in the context of the 1994 Rwandan genocide, the “late reaction, namely deployment of a peace force, resulted in an uncontrolled escalation much [more] complex and difficult to deal with” and noting that rapid-reaction capabilities could serve to prevent a similar escalation of violence in future conflicts).

the potential to drastically reduce the human suffering perpetuated by the endemic delays to peacekeeping deployment that persist today.⁴¹ Acquiring this capability would enable the U.N. to give effect to the often-repeated mantra of “never again,” referring to the failures in Rwanda, Bosnia and Herzegovina, and elsewhere in recent decades.⁴² Third, such a force could be a more cost-effective approach to peacekeeping in the long-term. Some missions today, including the forces in the Democratic Republic of the Congo (DRC) and Mali, find themselves caught between the need to combat violent groups posing an immediate threat to both civilians and U.N. personnel, and the need to fulfill their mandates of fostering national dialogue and conflict resolution.⁴³ Consequently, these forces find themselves unable to successfully address either their mandate or the immediate concerns on the ground.⁴⁴ A successful rapid-reaction “pre-peacekeeping” force would help ensure that the larger, more robust, and vastly more expensive peacekeeping missions deploy to less volatile environments, enhancing the ability of the larger peacekeeping mission to conduct long-term “peace-building” activities.⁴⁵ And fourth, the U.N. would acquire a powerful deterrent to violence through the ability to credibly threaten rapid, robust deployment. The potential for a swift response to destabilizing acts, efforts to spoil a peace process, or attacks against civilians would alter the cost-benefit analysis for belligerents who currently consider robust international intervention to be either a remote or highly-delayed threat.⁴⁶

⁴¹ DeMartino, *supra* note 18, at 37.

⁴² See, for example, Press Release, Deputy Secretary-General, Repeating ‘Never Again’ After Atrocity ‘a Sign of Continued Failure’, Deputy Secretary-General Says at Event on Rwanda Genocide, U.N. Press Release DSG/SM/736-AFR/2794 (Jan. 15, 2014), available at <http://www.un.org/press/en/2014/dsgsm736.doc.htm> (discussing how the credibility of the U.N. system is dependent on it acquiring the ability to respond and prevent atrocities in a more timely manner).

⁴³ See U.N. News Centre, *DR Congo: Security Council Condemns Massacres of Civilians, Attacks on Peacekeepers*, (Nov. 26, 2014), available at <http://www.un.org/apps/news/story.asp?NewsID=49455#.VT1aeK1Vikp>; see U.N. News Centre, *Mali: Ban voices concern over series of targeted attacks against U.N. mission and personnel*, (Apr. 24, 2015), available to <http://www.un.org/apps/news/story.asp?NewsID=50685#.VT1asK1Vikp>.

⁴⁴ See Jessica Hatcher and Alex Perry, *Defining Peacekeeping Downward: The U.N. Debacle in Eastern Congo*, TIME, Nov. 26, 2012, available at <http://world.time.com/2012/11/26/defining-peacekeeping-downward-the-u-n-debacle-in-eastern-congo/>.

⁴⁵ See Langille, *supra* note 31; Mazzei, *supra* note 30, at 9; DeMartino, *supra* note 18, at 38.

⁴⁶ See DeMartino, *supra* note 18, at 39; see also COMMISSION ON GLOBAL GOVERNANCE, OUR GLOBAL NEIGHBORHOOD: THE REPORT OF THE COMMISSION ON GLOBAL GOVERNANCE, 340 (1995) (noting that “the ability to back up preventive diplomacy with a measure of immediate and convincing deployment on the ground . . . would be a deterrent [and] would give support for negotiation and peaceful settlement of disputes”).

The rapid-reaction force proposals offered by U.N. member states and the Ramos-Horta Report, however, all require undertaking substantial reforms to the U.N. system—reforms that have not garnered sufficient support or momentum to be implemented.⁴⁷ Primarily, the proposal for a U.N. standing army remains deeply unpopular on both political and financial grounds.⁴⁸ Furthermore, there would need to be a commitment by a member state to “adopt,” or host and maintain, the brigade.⁴⁹ Unfortunately, the states with the capacity, training, and equipment to host such forces are those that already display a deep reluctance to contribute peacekeepers to regularly-constituted missions.⁵⁰

In addition, these proposals have practical limitations, remaining fundamentally constrained in their capacity to respond to multiple crises at one time. The deployment of a standing U.N. rapid-reaction force would render it unavailable to any other crisis for the duration of its mandate. Maintaining multiple standing forces, a feature not proposed by the “friends of rapid reaction” countries, would balloon the overhead annual cost of the initiative and further exacerbate political skepticism by reviving the specter of a U.N. standing army.⁵¹

B. Rapid-Reaction Force Contributed by Member States

The endemic conflict in the DRC and the U.N.’s fifteen-year commitment there has given birth to an alternate model for a rapid-reaction force. This development came in the wake of the failure of the existing U.N. Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO), to protect the second-largest city in the country from capture by the brutal M23 rebel group in November 2012, despite operating under the most robust

⁴⁷ Mazzei, *supra* note 30, at 16 (noting that “[u]nfortunately, controversy and political opposition have . . . diminished the momentum of the project”). Subsequent proposals like the Brahimi Report, acknowledged delays as one of the key failures in U.N. peacekeeping efforts overall, but significantly retreated from the idea of establishing a rapid-reaction force. These proposals recommended instead that the U.N. establish an “on-call list” of 100 or so qualified military officers to promote the more rapid development of tactical plans, and that U.N. member states establish “pools” of police officers and related experts earmarked for deployment to peacekeeping missions. The Brahimi Report, *supra* note 6, at xi–xii.

⁴⁸ See Langille, *supra* note 31. See Transcript of Press Conference by Secretary-General Elect Kofi Annan, Press Release, at 9, U.N. Doc. GA/9212 (Dec. 18, 1996) (quoting Kofi Annan, newly elected U.N. Secretary-General: “I don’t think we can have a standing United Nations army. The membership is not ready for that. There are financial questions and great legal issues as to which laws would apply and where it would be stationed.”).

⁴⁹ Mazzei, *supra* note 30, at 9–10.

⁵⁰ See, *supra*, Introduction. See Bellamy & Williams, *supra* note 11.

⁵¹ Mazzei, *supra* note 30.

mandate authorized by the Security Council to date.⁵² In March 2013, the Security Council adopted Resolution 2098, which extended the mandate of MONUSCO for another year and established the U.N. Force Intervention Brigade.⁵³ The resolution tasked the Intervention Brigade with carrying out “targeted offensive operations in a robust, highly mobile and versatile manner”⁵⁴ to protect civilians and “neutraliz[e] armed groups.”⁵⁵ The Brigade is authorized to act either unilaterally or jointly with DRC national forces. It is composed of 3,000 troops from South Africa, Tanzania, and Malawi, consisting of three infantry battalions, one artillery, and one special force and reconnaissance company.⁵⁶ MONUSCO’s mandate was just extended until March 31, 2016, by unanimous adoption of Security Council Resolution 2211.⁵⁷

Resolution 2098 clearly states that this Intervention Brigade does not create precedent to change the agreed-upon rules or standards of peacekeeping operations to allow for offensive capabilities.⁵⁸ This is underscored by the debate surrounding the resolution prior to its ultimate unanimous adoption. The representative from Argentina, for example, expressed concerns that the force was improperly tasked with “enforcing peace rather than keeping it.”⁵⁹ Indeed, China’s representative noted that his country was willing to vote in favor of the creation of a specialized brigade only because it would not create precedent that would undercut traditional peacekeeping principles.⁶⁰

⁵² See Pete Jones & David Smith, *Congo Rebels Take Goma with Little Resistance and to Little Cheer*, THE GUARDIAN, Nov. 20, 2012, available at <http://www.theguardian.com/world/2012/nov/20/congo-rebel-m23-take-goma>; see also *Special Rep. of the Secretary-General on the Democratic Republic of the Congo and the Great Lakes Region*, at 1, 3–4, U.N. Doc. S/2013/119 (Feb. 27, 2013).

⁵³ S.C. Res. 2098, U.N. Doc. S/RES/2098 (Mar. 28, 2013).

⁵⁴ *Id.* ¶ 12(b).

⁵⁵ *Id.*

⁵⁶ *Id.* ¶ 9; see Christoph Vogel, *DRC: Assessing the Performance of MONUSCO’s Force Intervention Brigade*, AFRICAN ARGUMENTS (July 14, 2014), <http://africanarguments.org/2014/07/14/drc-assessing-the-performance-of-monuscocs-force-intervention-brigade-by-christoph-vogel/>.

⁵⁷ S.C. Res. 2211, U.N. Doc. S/RES/2211 (Mar. 26, 2015); *Unanimously Adopting Resolution 2211 (2015), Security Council Extends Mission, Intervention Brigade in Democratic Republic of Congo*, U.N. Meetings Coverage SC/11834 (Mar. 26, 2015), <http://www.un.org/press/en/2015/sc11834.doc.htm>.

⁵⁸ S.C. Res. 2098, *supra* note 53 ¶ 9 (deciding “that MONUSCO shall . . . on an exceptional basis and without creating a precedent or any prejudice to the agreed principles of peacekeeping, include an ‘Intervention Brigade’”).

⁵⁹ *Intervention Brigade’ Authorized as Security Council Grants Mandate Renewal for United Nations Mission in the Democratic Republic of Congo*, U.N. Meetings Coverage SC/10964 (Mar. 28, 2013), available at <http://www.un.org/press/en/2013/sc10964.doc.htm>.

⁶⁰ *Id.*

Concerns about the legality and desirability of the use of force by U.N. peacekeepers have existed since the U.N. Emergency Force (UNEF) was deployed by the General Assembly on November 7, 1956, to secure an end to the Suez Crisis.⁶¹ While the Brahimi Report attempted to advance the concept of “robust peacekeeping,” the absence of strategic clarity surrounding the issue of force continues to be problematic.⁶² This issue was provided added salience after 1999 with the introduction of broader mandates authorizing the use of force for the protection of civilians.⁶³

Nonetheless, the Security Council reaffirmed its position that it has the authority to authorize a peacekeeping mission with offensive capabilities under the U.N. Charter when it established the Intervention Brigade.⁶⁴ Similarly, the DPKO has insisted that the Intervention Brigade is not a “revolution” in peacekeeping operations, but rather an “evolution” in the U.N.’s capacity to engage in increasingly complex conflict zones.⁶⁵ This position is supported by previous peace-enforcement engagements in the DRC. In 2003, Security Council Resolution 1484 authorized a short-term, E.U.-led Interim Multinational Emergency Force to recapture and secure the country’s major airport and provide more robust protection to civilians.⁶⁶ Between 2005 and 2007, forces operating under the U.N. Mission in the Democratic Republic of the Congo (MONUC), the predecessor to MONUSCO, conducted offensive operations against rebels in the Ituri district and the North and South Kivu provinces of the DRC, signaling a willingness by the U.N. to transition from reactive tactics primarily focused on protection and defense to more aggressive “pursuit” or offensive operations.⁶⁷ Regardless of the way the Secretary-General and DPKO decide to develop a rapid-reaction force, providing it with prospective offensive

⁶¹ See DPKO, *United Nations Emergency Force*, available at <http://www.un.org/en/peacekeeping/missions/past/unefi.htm>.

⁶² See United Nations Peacekeeping Law Reform Project, University of Essex School of Law, *UN Peacekeeping and the Model Status of Forces Agreement*, 7 (Aug. 26, 2010), https://www.essex.ac.uk/plrp/documents/model_sofa_peliminay_report_august_2010.pdf.

⁶³ For instance, see the following missions MONUC/DRC (1999), ONUB (2004), UNOCI (2004), UNAMSIL (1999), UNMIL (2003), MINUSTAH (2004), UNMIS (2005), UNAMID (2007), MINURCAT (2007), MONUSCO (2010).

⁶⁴ See also Cammaert, *supra* note 5, at 7 (“The Security Council . . . believes its authority to deploy the Intervention Brigade is enshrined in the U.N. Charter.”).

⁶⁵ *Id.*

⁶⁶ S.C. Res. 1484, U.N. Doc. S/RES/1484 (May 30, 2003).

⁶⁷ See Julie Reynaert, *MONUC/MONUSCO and Civilian Protection in the Kivus*, 16, INT’L PEACE INFORMATION SERVICE, http://reliefweb.int/sites/reliefweb.int/files/resources/D11C9B161C343539C1257847004BF8BF-Full_Report.pdf.

capabilities like the Intervention Brigade would be of great value in securing the peace and protecting civilians.

In addition to falling within the authority of the Security Council, the Intervention Brigade acts under the requirements of international humanitarian law. It operates in an area where there is an ongoing armed conflict between Congolese and non-state armed forces.⁶⁸ The conduct of the Congolese forces and non-state armed groups is clearly bound by international humanitarian law,⁶⁹ and so the question arises when considering this DRC rapid-reaction force as a model: to what extent are the U.N. forces as well as PMSCs contracted by the U.N. also bound by international humanitarian law, and what is the content of that law as it applies to the U.N.?⁷⁰ In the case of the Intervention Brigade, the best characterization of the conflict that it engages in with the non-state armed groups in the Congo is that of a non-international armed conflict (NIAC).⁷¹ The Intervention Brigade acts with the consent of the Congolese government—indeed in concert with the Congolese armed forces⁷²—and is only engaged in hostilities with non-state armed groups within the Congo.⁷³

Given the conclusion that the law of NIACs applies to the Intervention Brigade in its dealing with non-state armed forces in the Congo, at a minimum, the provisions of Common Article 3 of the Geneva Conventions applies to the Brigade's operations.⁷⁴ Common Article 3 requires that the parties to the conflict treat persons not taking an active part in hostilities humanely, and in relation to such persons, those parties must refrain from:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) taking of hostages; (c) outrages upon personal dignity, in particular humiliating and degrading treatment; (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the

⁶⁸ See Devon Whittle, *Peacekeeping in Conflict: The Intervention Brigade, MONUSCO, and the Application of International Humanitarian Law to United Nations Forces*, 46 *GEO. J INT'L L.* 838, 846 (2015), <https://www.law.georgetown.edu/academics/law-journals/gjil/recent/upload/zsx00315000837.PDF>.

⁶⁹ See Louise Arimatus, *The Democratic Republic of the Congo 1993–2010*, in *INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS* 147 (Elizabeth Wilmshurst ed., 2012).

⁷⁰ See Whittle, *supra* note 68, at 846.

⁷¹ *Id.* at 858.

⁷² See S.C. Res. 2098, *supra* note 53, ¶ 12(b) (authorizing the Brigade to undertake its mission “either unilaterally or jointly with the FARDC.”).

⁷³ See *id.*, which authorizes the Brigade to undertake operation “to prevent the expansion of all armed groups, neutralize these groups, and to disarm them.”

⁷⁴ See Whittle, *supra* note 68, at 859.

judicial guarantees which are recognized as indispensable by civilized peoples.⁷⁵

Thus the Intervention Brigade is, at a minimum, required to afford the above protections to all persons not participating in the conflict and, in particular, to any non-government forces that have “laid down their arms” or are *hors de combat*.⁷⁶ Beyond Common Article 3, the provisions of international humanitarian law applying to NIACs that form part of customary international law can also be said to apply to the Brigade.⁷⁷ These include requirements to distinguish between civilians and combatants when targeting attacks,⁷⁸ prohibitions on “methods and means of warfare calculated to inflict unnecessary suffering,”⁷⁹ and perfidy.⁸⁰ This model of U.N. peacekeepers as bound by international humanitarian law is the standard to which PMSCs contracted as a rapid-response force should be held.

The Intervention Brigade has largely been viewed as a success. However, as a model for future rapid-reaction forces, it suffers from many of the same obstacles faced by existing peacekeeping missions. Most critical is its inability to provide a truly rapid response. Despite its small size relative to other peacekeeping missions, it still took five months following Resolution 2098 for the troops to deploy and become operational.⁸¹ Furthermore, it deployed into the existing structure of a well-established U.N. presence on the ground; this delay would likely be exacerbated in a situation in which the force was deploying in advance of a larger peacekeeping mission. In addition, while composed of

⁷⁵ See Whittle, *supra* note 68, at 859; Geneva Convention for the Amelioration of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva Conventions].

⁷⁶ See Whittle, *supra* note 68, at 859; Geneva Conventions, *supra* note 75, common art. 3.

⁷⁷ See Brian D. Tittmore, *Belligerents in Blue Helmets: Applying International Humanitarian Law to United Nations Peace Operations*, 33 STAN. J. INT'L L. 61, 64 (1997); INT'L COMM. RED CROSS, CUSTOMARY IHL, Rule 1.

⁷⁸ See Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law*, 26 (2006), <https://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf>.

⁷⁹ U.N. Secretary-General, Bulletin: Observance By United Nations Forces of International Humanitarian Law, U.N. Doc. ST/SGB/1999/13 (Aug. 6, 1999).

⁸⁰ See Whittle, *supra* note 68, at 859–60.

⁸¹ See Scott Sheeran and Stephanie Case, *The Intervention Brigade: Legal Issues for the U.N. in the Democratic Republic of the Congo*, INT'L PEACE INST., (Nov. 2014), available at <http://www.responsibilitytoprotect.org/index.php/crises/151-the-crisis-in-drc/5651-the-intervention-brigade-legal-issues-for-the-un-in-the-democratic-republic-of-the-congo>.

regional forces from a select few countries, the Intervention Brigade still relied on the ability and political willingness of U.N. member states to contribute forces.⁸² As such, this model operates within the same logistical and political framework as the current peacekeeping structure, which faces persistent coordination and capacity challenges.⁸³ In short, while the Intervention Brigade can be hailed as a welcome moderate success within the peacekeeping goals in the DRC,⁸⁴ it is unlikely this TCC-based composition could serve as a model for future rapid-reaction forces in other contexts. It seems equally unlikely that transferring assets from one peacekeeping mission to another in a crisis or relying on national and regional standby arrangements will be sufficient to address the rapid-reaction requirements of U.N. peacekeeping in the future.

III. THE U.N.'S USE OF PRIVATE MILITARY CONTRACTORS

Prior proposals or models for U.N. rapid-reaction capabilities have sourced troops in one of two ways, either from the establishment of a standing unit of “international U.N. military servants,”⁸⁵ or through the existing practice of requesting contributions from U.N. member states.⁸⁶ There is a third option available to the U.N., however—one that is more practicable and efficient than the others, while ultimately accomplishing the same goals. Since the early 1990s, the market of PMSCs has drastically expanded.⁸⁷ Many of these private companies have at their disposal highly-trained military personnel and equipment, as well as expertise in humanitarian, stabilization, and development missions.⁸⁸

⁸² The initial idea of deploying an offensive military force came out of the International Conference on the Great Lakes Region (ICGLR) in July 2012 and had widespread support from regional countries. *See Issue Brief, supra* note 5, at 5. It is unclear whether this level of regional support and initiative would exist in other contexts. In addition, it was not feasible for the ICGLR countries to deploy peacekeepers independently of broader support, due to financial constraints. *Id.*

⁸³ *See* Bellamy & Williams, *supra* note 11.

⁸⁴ *See* Sheeran & Case, *supra* note 81.

⁸⁵ *See* Bonnard, *supra* note 31.

⁸⁶ *See* S.C. Res. 2098, *supra* note 53.

⁸⁷ *See* Sean McFate, *The Modern Mercenary: Private Armies and What They Mean for World Order* 8–10 (2014).

⁸⁸ *See* Åse Gilje Østensen, *Geneva Centre for the Democratic Control of Armed Forces, U.N. Use of Private Military and Security Companies: Practices and Policies*, 7, 11 (2011), http://psm.du.edu/media/documents/reports_and_stats/think_tanks/dcaf_ostensen_un_use_of_pmscs.pdf; *see, for example, Subject Matter Expertise*, IDS INT'L, <http://www.idsinternational.net/we-are-experts> (last visited April 24, 2015). In 2006, PMSC Blackwater (now Academi) Vice Chairman J. Cofer Black announced that his company had the capacity to deploy a small, rapid-reaction force into conflicts such as the one in Darfur, Sudan at the time. *See* Rebecca Weiner, “Peace Corp.,” *BOSTON GLOBE*, Apr. 23, 2006, http://belfercenter.ksg.harvard.edu/publication/944/peace_corp.html.

The U.N., in fact, already contracts with PMSCs for risk assessments, logistical support, and training in support of peacekeeping efforts.⁸⁹ Examples of PMSCs supplying services to U.N. peacekeeping operations include Dyncorp providing helicopter transport and satellite network communications to the U.N.-sanctioned International Force in East Timor, while Defence Systems Limited (DSL) provided both logistical and intelligence support for national contingencies participating in that mission.⁹⁰ Pacific Architects & Engineers (PAE) provided general logistics in support of the U.N. Mission in Sierra Leone in 2000 and 2003 and various logistical services to MONUC in 2001.⁹¹ Indeed, the Ramos-Horta Report notes that the Panel “supports . . . the use of properly vetted private security contractors where they are a necessary option” to assist missions without military components.⁹² Barring an express legal prohibition on the use of private actors in missions with military components, the U.N. could capitalize on the resources available to it in the private sector and establish contracts with PMSCs to supply comprehensive rapid-reaction capabilities including personnel, equipment, and logistics.

Many commentators have expressed legal and practical concerns about the U.N.’s use of private contractors.⁹³ This Section examines two of the more persuasive challenges raised. The first argument is that PMSCs are a modern equivalent of mercenaries and are banned under international law.⁹⁴ The second is that the use of PMSCs would frustrate the necessary role U.N. member states play in contributing troops to peacekeeping missions. This Section argues that neither of these challenges, however, presents legal barriers to the U.N.’s use of PMSCs.

⁸⁹ *Id.* at 11.

⁹⁰ *Id.* at 15–16.

⁹¹ *Id.* at 16.

⁹² The Ramos-Horta Report, *supra* note 18, ¶ 300.

⁹³ See, for example, Lou Pingeot, *Global Policy Forum, Dangerous Partnership: Private Military & Security Companies and the U.N.*, (June 2012), https://www.globalpolicy.org/images/pdfs/GPF_Dangerous_Partnership_Full_report.pdf; see also Sarah Percy, *Morality and Regulation*, in FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES 11, 11–28 (Simon Chesterman & Chia Lehnardt eds., 2007).

⁹⁴ See Louise Doswald-Beck, *Private Military Companies under International Humanitarian Law*, in FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES 115, 122–123 (Simon Chesterman & Chia Lehnardt eds., 2007).

A. International Legal Prohibitions on the Use of Private Military Actors

Does the use of PMSCs violate international law? If PMSCs are viewed as the modern-day iteration of mercenaries,⁹⁵ or “soldiers for hire,” there appears to be a solid basis for arguing that their use is illegal. Thanks in large part to their widespread engagement on the African continent during the 1960s and 1970s, mercenaries came to be associated with fomenting instability and threatening sovereignty and the right to self-determination—fighting on behalf of the highest-paying party to preserve quasi-colonial structures, achieve independence for breakaway regions, or stage coups d’états.⁹⁶ Against this backdrop, international and regional bodies codified rules to expressly prohibit mercenary use. In 1977, the Organization for African Unity (OAU) adopted the Convention on the Elimination of Mercenaries in Africa.⁹⁷ The U.N. system followed suit a decade later. The Commission on Human Rights created the position of U.N. Special Rapporteur on the Use of Mercenaries,⁹⁸ and the General Assembly adopted the International Convention against the

⁹⁵ “Whilst the term ‘mercenary’ can be used in a generic—and often politically loaded sense—it has a precise meaning from a legal viewpoint. The definition of mercenary is found in three documents: Article 47 of Protocol I, the “*Convention on the Elimination of Mercenarism in Africa*” of 1977, and the “*International Convention against the Recruitment, Use, Financing and Training of Mercenaries*” adopted in 1989 by the United Nations General Assembly. According to Article 47 of Protocol I, a mercenary is any person who: (a) is specifically recruited locally or abroad in order to fight in an armed conflict; (b) does, in fact, take a direct part in the hostilities; (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party; (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict; (e) is not a member of the armed forces of a Party to the conflict; and (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces. This definition, which requires that all six conditions be fulfilled, has been judged unworkable by many authors and will very seldom be applicable to [PMSCs]. . . . From a strictly legal point of view, it appears that the answer to the question of whether individuals employed by private companies are mercenaries will most of the time be negative, as these persons will usually fall outside the conjunctive definition provided for in international instruments.” See Alexandre Faite, *Involvement of Private Contractors in Armed Conflict: Implications under International Humanitarian Law*, 4 Def. Studies 166, 170–71 (2004), available at <https://www.icrc.org/eng/assets/files/other/pmc-article-a-faite.pdf>.

⁹⁶ Angela McIntyre & Taya Weiss, *Weak governments in search of strength: Africa’s experience of mercenaries and private military companies*, in FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES, 67–68 (Simon Chesterman & Chia Lehnardt eds., 2007).

⁹⁷ Convention for the Elimination of Mercenaries in Africa, O.A.U. Doc. CM/817 (1977) [hereinafter O.A.U. Convention].

⁹⁸ Comm’n on Human Rights, at 60, U.N. Doc. E/1987/16 (1987) available at [http://www.un.org/ga/search/view_doc.asp?symbol=E/1987/18\(SUPP\)](http://www.un.org/ga/search/view_doc.asp?symbol=E/1987/18(SUPP)).

Recruitment, Use, Financing and Training of Mercenaries.⁹⁹ Protocol I additional to the Geneva Conventions, which entered into force in 1978, further constrains the application of its protections to mercenary forces.¹⁰⁰ As recently as 1999, in a report to the Commission on Human Rights, the Special Rapporteur on the Use of Mercenaries stated that “mercenarism is an international crime . . . the mere fact that it is a government that recruits mercenaries, or contracts companies that recruit mercenaries, in its own defense or to provide reinforcements in armed conflicts, does not make such actions any less illegal or illegitimate.”¹⁰¹

Despite this unsparing and unequivocal assessment, however, there are four counterarguments to the blanket proposition that PMSCs should be considered illegitimate or their operations illegal under international law. First, there are concrete distinctions that can be drawn between mercenarism and the practices and structures of modern PMSCs. Mercenaries, motivated by the prospect of earning money from the highest bidder in military conflicts,

⁹⁹ Int’l Convention against the Recruitment, Use, Financing and Training of Mercenaries, U.N. Doc. A/Res/44/34 (Dec. 4, 1989) [hereinafter U.N. Convention]. The convention

stipulates various ways states should take responsibility for PMSC activities. It emphasizes state responsibility to regulate and monitor the industry, establish licensing regimes and draft laws that would hold companies legally accountable . . . The convention also aims to establish an avenue of redress to potential victims of human rights abuses by PMSCs. In an effort to give effect to the convention, the draft entails the creation of an international committee to maintain international oversight of state initiatives and measures implemented to regulate PMSCs. The committee would also be tasked with mediation between states where human rights violations are reportedly committed by PMSC personnel, and the home state or contracting state of the company. As a means to prevent human rights abuses, the convention thus continues to underscore the importance of reinstating the state as the main locus of action regarding the control of PMSCs.

See Østensen, *supra* note 88, at 60.

¹⁰⁰ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), art. 47, 1125 U.N.T.S. 3 (June 8, 1977) [hereinafter Protocol I].

¹⁰¹ *See* U.K. HOUSE OF COMMONS, PRIVATE MILITARY COMPANIES: OPTIONS FOR REGULATION ¶ 37 (Feb. 12, 2002), available at <http://www.globalsecurity.org/military/library/report/2002/mercenaries.pdf> [hereinafter U.K. Green Paper] (quoting the January 1999 U.N. Special Rapporteur report to the Commission on Human Rights). The General Assembly, moreover, has passed more than 100 resolutions touching upon the topic of mercenaries since the late 1960s, many of which equate mercenaries to international criminals. This has fostered institutional hostility towards considering the positive uses of private military forces, despite the rather narrow focus of the General Assembly on the threat private actors pose to nations seeking self-determination. *See* Sarah Percy, *The Security Council and the Use of Private Force, in* THE UNITED NATIONS SECURITY COUNCIL AND WAR: THE EVOLUTION OF THOUGHT AND PRACTICE SINCE 1945 624, 624–40 (Adam Roberts et al. eds., 2010).

destabilized conflicts.¹⁰² A PMSC, by contrast, is a corporate entity, which incentivizes its directors to maintain the reputation of the PMSC as a respectable organization; switching sides mid-conflict or allowing its employees to commit abuses unchecked would likely prove to be an unsustainable business model.¹⁰³ PMSCs conduct their work under contractual obligations to their clients, with a focus on providing tactical support and often operating side-by-side with their principal, rather than conducting independent action on behalf of a distant client.¹⁰⁴ It could be countered that the language employed by the Special Rapporteur in the 1999 statement can be read to encompass the modern PMSC. However, the broader context of this statement defined the actors so strongly condemned as those likely to “carry out acts that impede the self-determination of peoples, to jeopardize the independence and sovereignty of the state itself, or to condone actions that may do severe harm to their citizens’ lives and security.”¹⁰⁵ Any rapid-reaction force would be contracted by the DPKO and would operate exclusively within the mandate authorized by the U.N. Security Council. Such missions are only authorized with the explicit consent of the state and under strict requirements of adherence to international human rights and humanitarian law.

Second, none of the definitions put forth in the OAU and U.N. Conventions Against Mercenaries and Protocol I apply well to the use of PMSCs by the U.N.¹⁰⁶ The OAU Convention prohibits the actions of persons or groups who intend “to overthrow by force of arms or by other means, the government” of a member state.¹⁰⁷ Both the U.N. Convention and Protocol I contain exceptions for peacekeeping or similar interventions—individuals “sent by a State which is not a party to the conflict on official duty as a member of its armed forces.”¹⁰⁸ While this does not expressly cover a private actor contracted by the U.N. to engage in peacekeeping, it would be hard to argue that privately-contracted interventions lie outside those interventions permitted by the exception. And as a matter of practice, the Security Council does not send

¹⁰² See, for example, U.N. Convention, *supra* note 99.

¹⁰³ See U.K. Green Paper, *supra* note 101, ¶ 38; see also DEBORAH D. AVANT, THE MARKET FOR FORCE: THE CONSEQUENCES OF PRIVATIZING SECURITY 31–38 (2005).

¹⁰⁴ For a more comprehensive discussion about the distinctions between mercenaries and modern-day PMSCs, as well as the distinctions between various forms of private military and security companies, see O’Brien, *supra* note 28, at 34–40.

¹⁰⁵ U.K. Green Paper, *supra* note 101, at ¶ 37.

¹⁰⁶ See O’Brien, *supra* note 28, at 31 (asserting that “[l]egitimate PMCs do not constitute ‘mercenaries’ under any of the existing legal (national or international) or otherwise established definitions today—themselves deeply problematic”).

¹⁰⁷ O.A.U. Convention, *supra* note 97, art. 1(a).

¹⁰⁸ U.N. Convention, *supra* note 99, art. 1(e); Protocol I, *supra* note 100, art. 47(2)(f).

peacekeeping missions into member states without their approval. Moreover, the actor authorizing both a rapid-reaction force and peacekeeping mission would be the Security Council—the U.N. body vested by states with the authority to take actions necessary to ensure peace and stability. A PMSC used in peacekeeping may be regarded as an “agent” of the U.N.¹⁰⁹ According to the International Court of Justice (ICJ) in its advisory opinion in *Reparation for Injuries Suffered in the Service of the U.N.*, the term “agent” can be used to refer to those who are contracted 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.¹¹⁰

Similarly, in its advisory opinion on the *Applicability of Article VI, Section 22, of the Convention on the Privileges and Immunities of the U.N.*, the ICJ stated that “[i]n practice, according to the information supplied by the Secretary-General, the U.N. has had occasion to entrust missions—increasingly varied in nature—to persons not having the status of U.N. 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 U.N. on the basis of functions conferred by an organ of the organisation.”¹¹¹ Given these interpretations, a PMSC hired by the U.N. to advance the deployment of a peacekeeping operation or supplement an existing operation would be classified as an agent of the U.N.¹¹² This would mean that the PMSC’s personnel would presumptively have 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.¹¹³ However, by contract, the U.N. could require PMSCs to surrender this immunity and be held to a higher standard of accountability.

Third, the U.N. has, in recent years, retreated from the position expressed by the Special Rapporteur in 1999 that mercenaries and private companies always operate illegitimately. In 2005, the Working Group on the Use of

¹⁰⁹ See Janaby, *supra* note 19, at 98.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*

Mercenaries replaced the position of Special Rapporteur.¹¹⁴ With this succession, the focus of the office shifted away from promoting the complete ban on mercenaries and towards creating international standards to regulate, monitor, and oversee the activities of mercenaries and private military companies.¹¹⁵ Indeed, the final report of the Special Rapporteur, published in 2005, “strongly” recommended “that the U.N. re-examine the relevance of the term ‘mercenary.’ This derogatory term is completely unacceptable and is too often used to describe fully legal and legitimate companies engaged in vital support operations for humanitarian peace and stability operations.”¹¹⁶ The mercenary association that has lingered around the PMSC industry is seen as a particular impediment to its positive contributions to the U.N. and removing this association is critical to changing misperceptions among policy-makers and the public.¹¹⁷

Finally, and perhaps most persuasively, the U.N. already has an extensive and growing relationship with PMSCs. Private military and security firms supply the U.N. with armed and unarmed security services, strategic consulting and personnel training, and landmine removal, policing, and other tactical support through direct contracts.¹¹⁸ The largest U.N. agency clients of PMSCs include the U.N. Development Programme, the U.N. High Commissioner for Refugees, and the U.N. Procurement Division, which supports peacekeeping missions.¹¹⁹ In light of these relationships, the Working Group on the Use of Mercenaries has adopted the position that the U.N. should serve as a model for states, and possibly other organizations, in its contractual use of PMSCs, and has begun establishing guidance and policy documents to further this goal.¹²⁰ In 2012, the Working Group, together with the U.N. Department on Safety and Security, published a Security Policy Manual and a Security Management Operations Manual that were designed to govern the use of armed private security

¹¹⁴ U.N. Office of the High Commissioner for Human Rights (OHCHR), *Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, <http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/WGMercenariesIndex.aspx> (last visited April 25, 2015).

¹¹⁵ *Id.*; OHCHR, *See Study on the Use of Private Military and Security Companies (PMSCs) by the United Nations*, <http://www.ohchr.org/EN/Issues/Mercenaries/WGMercenaries/Pages/StudyOnPMSC.aspx> (last visited May 11, 2015).

¹¹⁶ Special Rapporteur of the Comm’n on Human Rights Shaista Shameen, Report 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, at 21, U.N. Doc. A/60/263 (Aug. 17, 2005).

¹¹⁷ *See* Østensen, *supra* note 88, at 8.

¹¹⁸ *See* Pingeot, *supra* note 93, at 7, 9, 12–13.

¹¹⁹ *Id.* at 45–46.

¹²⁰ *See* OHCHR, *Concept Note: Expert Panel Event on the Use of Private Military and Security Companies (PMSCs) by the United Nations* (July 31, 2013), <http://www.ohchr.org/Documents/Issues/Mercenaries/WG/StudyPMSC/ExpertPanelConceptNote.pdf> [hereinafter Concept Note].

companies by U.N. agencies.¹²¹ These documents attempt to enhance the U.N. regulatory framework for PMSC contracting by establishing a coherent policy regarding selection criteria and screening requirements for security providers and their personnel, use of force operating procedures, training requirements, and accountability within the U.N. agency for management and oversight of the contract.¹²² In fact, the Working Group on the Use of Mercenaries is “of the opinion that the U.N. has the opportunity and indeed the responsibility to positively influence the standards of [the PMSC industry] to comply with international human rights norms.”¹²³

The International Committee of the Red Cross (ICRC) has additionally expressed its intention to establish more systematic contacts and relationships with PMSCs operating in humanitarian crisis zones.¹²⁴ In 2004, the ICRC indicated it would encourage private companies to include international humanitarian law in their training.¹²⁵ This further indicates a growing acceptance on the part of the international community that PMSCs are here to stay and will continue to play an integral role in the field of humanitarian intervention. Rather than calling for their prohibition, the U.N. and the ICRC are seeking to reconcile and to formalize their participation under international law.¹²⁶

B. Affirmative Obligations on States to Provide Peacekeepers

While PMSCs are not expressly prohibited under international law, is there nevertheless an affirmative obligation for U.N. member states to provide

¹²¹ U.N. Department of Safety and Security (UNDSS), *United Nations Security Management System: Security Policy Manual, Armed Private Security Companies* (Nov. 8, 2012), <http://www.ohchr.org/Documents/Issues/Mercenaries/WG/StudyPMSC/UNSecurityPolicyManual.pdf>; UNDSS, *Security Management Operations Manual, Guidelines on the Use of Armed Security Services from Private Security Companies* (Nov. 8, 2012), <http://www.ohchr.org/Documents/Issues/Mercenaries/WG/StudyPMSC/GuidelinesOnUseOfArmedSecurityServices.pdf>; see also UNDSS, *Guidelines on the Use of Armed Security Services from Private Security Companies Annex A—Statement of Works* (Nov. 8, 2012), <http://www.ohchr.org/Documents/Issues/Mercenaries/WG/StudyPMSC/GuidelinesAnnexAStatementOfWork.pdf>; UNDSS, *Guidelines on the Use of Armed Security Services from Private Security Companies Annex B—Model Contract*, UNDSS (Nov. 8, 2012), <http://www.ohchr.org/Documents/Issues/Mercenaries/WG/StudyPMSC/GuidelinesAnnexBModelContract.pdf>.

¹²² U.N. *Security Management System: Security Policy Manual*, *supra* note 121; Østensen, *supra* note 88, at 43.

¹²³ Anton Katz, United Nations Working Group on the Use of Mercenaries: The Use of Private Military Security Companies by the United Nations in Peace Operations (July 31, 2013), *summary available at* <http://www.ohchr.org/Documents/Issues/Mercenaries/WG/StudyPMSC/EventSummary.pdf>.

¹²⁴ I.C.R.C., *The I.C.R.C. to Expand Contacts with Private Military and Security Companies* (2004), *available at* <https://www.icrc.org/eng/resources/documents/misc/63he58.htm>.

¹²⁵ *Id.*

¹²⁶ *See, for example, id.*; see Concept Note, *supra* note 120.

peacekeeping forces? In other words, would the U.N.'s direct contracting with a PMSC to create a rapid-reaction force interfere with a requirement or eliminate a crucial role that states play through providing forces?

The U.N. Charter places on states the obligation to give effect to Security Council decisions.¹²⁷ Under Article 48, actions “required to carry out the decisions of the Security Council for the maintenance of international peace and security shall be taken by all the Members of the U.N. or by some of them, as the Security Council may determine.”¹²⁸ This obligation has resulted in the current system under which member states contribute the funds, forces, equipment, and training required to carry out U.N. peacekeeping missions.

It is hard to see how this language requires that states provide support to peacekeeping in a particular manner, and more specifically, through the provision of troops. The U.N. Charter does not specify how member states are to carry out Security Council decisions.¹²⁹ Moreover, the Charter does not mention peacekeeping, much less requirements for troop composition, despite its widespread acceptance as one of the most critical tools at the Council's disposal for achieving its principal responsibility of maintaining international peace.¹³⁰

Some commentators have argued that the process by which U.N. member states are required to contribute troops, equipment, funds, and other forms of support to peacekeeping missions adds a crucial layer of democratic accountability to the way in which international peace and security is preserved.¹³¹ The U.N. Security Council represents a concentration of authority in the hands of a few member states.¹³² In choosing whether or not to contribute to the fulfillment of a mandate, TCCs are presented with the opportunity to exercise some form of a vote through their support, or lack thereof. Indeed, some countries view contributing to a peacekeeping mission as a critical avenue through which member states with limited political power within the U.N.

¹²⁷ DPKO, *Mandates and the Legal Basis for Peacekeeping*, available at <http://www.un.org/en/peacekeeping/operations/pkmandates.shtml> (last visited April 25, 2015).

¹²⁸ U.N. Charter art. 48, para. 1.

¹²⁹ *Id.*

¹³⁰ See *Mandates and the Legal Basis for Peacekeeping*, *supra* note 127.

¹³¹ See Stephen Mathias, *Regulating and Monitoring Private Military and Security Companies in United Nations Peacekeeping Operations*, INT'L INST. OF HUMANITARIAN LAW, <http://www.iuhl.org/iuhl/Documents/Mathias.pdf> (last visited May 11, 2015); Ramesh Thakur, *The United Nations in Global Governance: Rebalancing Organized Multilateralism for Current and Future Challenges* (2011), http://www.un.org/en/ga/president/65/initiatives/GlobalGovernance/Thakur_GA_Thematic_Debate_on_UN_in_GG.pdf.

¹³² See Mathias, *supra* note 131.

system can increase their voice on issues of international security.¹³³ Article 44 of the Charter requires the Security Council to include a troop-contributing country in decisions concerning the deployment of its forces, which underscores the idea that TCCs are key stakeholders in the peacekeeping process.¹³⁴

The proposal to employ PMSCs as rapid-reaction forces, however, does not remove or limit this layer of accountability in any fundamental way. First, U.N. member states will still be called on to bear the budgetary costs of deploying the force regardless of troop makeup. Second, a rapid-reaction force would be a short-term, comparatively small part of a larger peacekeeping mission, which will still require troop contributions from member states. Third, the use of PMSCs does not have to be exclusive. If U.N. member states have both the capacity and the political will to establish a TCC force capable of rapid deployment, the Security Council should encourage such an initiative. Using PMSCs would allow the U.N. to bypass political intransigence, lack of capacity, or other barriers created by member states reluctant to commit their own troops to a high-risk environment. It would make available to the U.N. the rapid-reaction capabilities that exist in the private sector, a feature that member states have proven unable, or perhaps unwilling, to provide to U.N. peacekeeping efforts.¹³⁵ The national interest of TCCs may invoke resistance to the deployment of PMSCs as a rapid-response force, as they may regard the use of PMSCs in peacekeeping operations as contrary to their own economic interests if it threatens to replace their contributions to U.N. peacekeeping.¹³⁶ However, the proposal at hand does not view sourcing of U.N. peacekeepers from TCCs as mutually exclusive from using PMSCs as a temporary rapid-reaction force. In fact, the deployment of PMSCs as U.N. peacekeepers would not in any way inhibit TCCs from contributing troops to U.N. peacekeeping operations and garnering a financial benefit from doing so. The PMSCs would merely constitute a short-term stop-gap measure for situations requiring a more rapid deployment than TCCs can manage.

The U.N. has never hired PMSCs to serve in a peacekeeping role, much less the more robust peace enforcement role of a rapid-reaction force.¹³⁷ In

¹³³ See Bellamy & Williams, *supra* note 11, at 4, 6 (also noting some states contribute to peacekeeping because they “see it as a fairer and more preferable alternative to great power hegemony and provide peacekeepers to support that system.” It is also viewed as a way to strengthen a state’s bid for a temporary seat on the Security Council. *Id.* at 4.).

¹³⁴ U.N. Charter, *supra* note 128, art. 44.

¹³⁵ See, *supra*, Section II (discussing the timetable for the DRC Force Intervention Brigade); see also Bellamy & Williams, *supra* note 11, at 6 (noting that WEOG countries have specialized capabilities, but are more likely to work under an *ad hoc* group or alliance, such as NATO).

¹³⁶ See Østensen, *supra* note 88, at 53.

¹³⁷ See *id.*, at 15–17.

1994, however, the Security Council did consider the possibility, which was met with some support.¹³⁸ The DPKO faced the seemingly insurmountable task of delivering humanitarian aid to 1.2 million refugees who had fled the Rwandan genocide into the DRC, then known as Zaire. The location of the refugees created the risk both that the aid would fall into the wrong hands and that the mission would prove highly dangerous for a deployed peacekeeping force. To overcome these challenges, the DPKO proposed that the U.N. employ a PMSC to help deliver the aid and provide added security.¹³⁹

According to confidential interviews with those present at the Security Council discussions, the proposal ultimately failed to garner the necessary support. This was not due to any express legal obstacle, but rather to cost considerations and moral objections.¹⁴⁰ One argument against the measure did consider the impact on U.N. member state obligations to provide peacekeeping troops: that “using a private security company to fulfill an international public responsibility was tantamount to shirking that responsibility.”¹⁴¹ This refrain has been echoed more recently by some U.N. officials and experts, who have expressed concern that, in employing PMSCs as U.N. peacekeepers, the international community is sending the signal to those in conflict zones “that we care about you, but not to the point of risking our own boys.”¹⁴² One has to wonder, though, which should be seen as amounting to the greater abrogation of responsibility—the use of private contractors instead of TCC forces to ensure the safe delivery of humanitarian aid, or the failure to provide any aid to over one million refugees, due to states’ political unwillingness to either contribute troops or to employ private security companies to do so?

Ultimately, the primary responsibility of the Security Council is to decide what measures the international community should take to maintain or restore international peace and security.¹⁴³ The use of private contracting firms to comprise a rapid-reaction force could prove a valuable tool to achieve these ends. Neither the U.N. Charter and the obligations it places on states, nor the current system of troop contribution to peacekeeping, should be taken to

¹³⁸ Krzysztof Kotarski & Samuel Walker, *Privatizing Humanitarian Intervention? Mercenaries, PMCs and the Business of Peace*, in CONFRONTING GENOCIDE 239, 261–266 (René Provost & Payam Akhavan eds., 2011).

¹³⁹ *Id.*

¹⁴⁰ BRUCE D. JONES, PEACEMAKING IN RWANDA: THE DYNAMICS OF FAILURE 142 (2001).

¹⁴¹ *Id.*

¹⁴² This sentiment was expressed by Jean-Marie Guehenno, the U.N.’s top peacekeeping official from 2000–2008. See Colum Lynch, *U.N. Embraces Private Military Contractors*, FOREIGN POLICY, Jan. 17, 2010, <http://foreignpolicy.com/2010/01/17/u-n-embraces-private-military-contractors/>.

¹⁴³ U.N. Charter, *supra* note 128, at art. 39.

constrain the Security Council's ability to deploy PMSCs in a timely manner to protect civilians and prevent conflict escalation.

IV. ACCOUNTABILITY OF A PMSC RAPID-REACTION FORCE

Many of the persistent criticisms and concerns surrounding the use of PMSCs stem from a perception that they operate in a legal vacuum, lacking transparency, democratic oversight, and legal accountability for their actions.¹⁴⁴ Anecdotal and sensational reports of the actions of private contractors hired by the U.S. to assist military efforts in Iraq and Afghanistan did not help this perception. Rather, they have entrenched the idea that PMSCs, like mercenaries, are free to violate human rights and international humanitarian legal norms with impunity.¹⁴⁵

In reality, however, the extent of accountability for the actions of PMSCs depends on who is employing them, as well as the terms of the legal and contractual structure under which they are employed.¹⁴⁶ Contrary to public perception, PMSCs generally operate under a complex system of international and domestic legal provisions, codified through contract.¹⁴⁷ This Section explains that the U.N. could hold PMSCs to a substantially higher level of accountability than the level to which U.N. peacekeepers are currently held if it establishes a robust licensing system, clearly articulates a contractual relationship and operational mandate, and ensures that PMSCs can be held criminally or civilly liable for bad acts. This Section explains the basic elements necessary for an effective regulatory scheme, but it does not attempt to provide a model contract. Instead, it offers a sketch of an area that is ripe for further research and development.

As a preliminary matter, the perception that PMSCs on the whole behave in a worse manner than state troops is not entirely warranted. Studies have shown that in some instances private military and security companies have demonstrated a higher respect for human rights and humanitarian law than national armies or peacekeeping forces,¹⁴⁸ and that “what worries the international community enough to shy away from utilizing PMCs is the *potential*

¹⁴⁴ See Percy, *supra* note 93, at 11–28.

¹⁴⁵ See, for example, Pingeot, *supra* note 93, at 15.

¹⁴⁶ See U.K. Green Paper, *supra* note 101, ¶ 34–35.

¹⁴⁷ See O'Brien, *supra* note 28, at 38; see also Laura Diskenson, *Contract as a Tool for Regulating Private Military Companies*, in FROM MERCENARIES TO MARKET: THE RISE AND REGULATION OF PRIVATE MILITARY COMPANIES 217, 217–28 (Simon Chesterman & Chia Lehnardt eds., 2007).

¹⁴⁸ See Benjamin Perrin, *Promoting Compliance of Private Security and Military Companies With International Humanitarian Law*, INT'L REVIEW OF THE RED CROSS NO. 863, n.5 (Sept. 2006), https://www.icrc.org/eng/assets/files/other/irrc_863_perrin.pdf.

harm that they could do, not any particular past incident.”¹⁴⁹ To illustrate this point, many commentators have pointed to the actions of the private South Africa-based Executive Outcomes (EO, no longer in operation) in Sierra Leone during the 1991–2002 civil war. The PMSC’s presence in the field “appear[ed] to bring with it elements of military professionalism and international values Compared with the [Sierra Leone Armed Forces], the [Revolutionary United Front rebels], and the militias, EO’s record looks stellar.”¹⁵⁰

A related example can be found in neighboring Liberia. To combat a legacy of gross and widespread human rights violations committed by the Armed Forces of Liberia (AFL) during the country’s 1999–2003 civil war, it was agreed that the AFL would be completely dissolved and a new army created.¹⁵¹ To accomplish this monumental task, the U.S.—intimately involved in Liberia’s post-conflict reconstruction—contracted with PMSCs DynCorp and PAE to build the necessary physical infrastructure and conduct the complete demobilization, recruitment, vetting, training, and professionalization required to establish a new AFL.¹⁵² To specifically address the legacy of AFL abuses, DynCorp designed a human rights vetting approach based on international best practices and human rights norms, which was integrated into the broader vetting and training process.¹⁵³ This transformation, facilitated by the innovation and expertise of PMSCs, was labeled “a notable success—the best, several experts said, they had witnessed anywhere in the world.”¹⁵⁴ While this example represents a success in the training and vetting abilities of a private company and not directly its conduct on the ground, it serves to demonstrate that PMSCs have the capacity to establish mechanisms to ensure adherence to international human rights norms. Indeed, the task of designing and implementing a comprehensive vetting and training program was ultimately delegated to a

¹⁴⁹ Doug Brooks, *Messiahs or Mercenaries? The Future of International Private Military Services*, in *MANAGING ARMED CONFLICTS IN THE 21ST CENTURY* 129, 135 (Adekeye Adebajo & Chandra Lekha Sriram eds., 2001) (emphasis added).

¹⁵⁰ See AVANT, *supra* note 103, at 86–92.

¹⁵¹ See MCFATE, *supra* note 87, at 104–15.

¹⁵² *Id.* McFate, a DynCorp employee who was part of the team tasked with the Liberia project, describes this process as “not just a ‘train and equip’ program. The envisioned end was an all-volunteer, ethnically balanced, properly vetted, professionally trained, civilian-led, and apolitical military capable of ‘defending the national sovereignty and in extremis, responding to natural disasters.’” *Id.* at 109.

¹⁵³ *Id.* at 111.

¹⁵⁴ Int’l Crisis Group, *Liberia: Uneven Progress in Security Sector Reform*, AFRICA REPORT NO. 148, i (Jan. 13, 2009), <http://www.crisisgroup.org/~media/Files/africa/west-africa/liberia/Liberia%20Uneven%20Progress%20in%20Security%20Sector%20Reform.pdf>.

private company because neither the U.N. nor the U.S. had the system or capabilities in place to conduct it themselves.¹⁵⁵

Furthermore, many of the risks potentially present when a state contracts with a PMSC may not exist under a contract with the U.N. or another international or regional body. The U.K. Green Paper, a widely cited resource on the topic of regulating the use of private military companies (PMCs), is highly optimistic on this point, arguing that

[m]any of the problems that arise when a sovereign government employs a PMC would not apply if it were contracted to the U.N. . . . It would not for example be a threat to sovereignty or stability; and the question of exploitation of raw material resources would not arise.¹⁵⁶

The paper further posits that “[t]here would also be no difficulty in monitoring the performance and behavior of a PMC employed by the U.N.”¹⁵⁷

This final position, however, fails to recognize the current challenges the U.N. faces in monitoring PMSCs. The current contractual regime governing the U.N.’s use of PMSCs is highly opaque, and thus not well understood.¹⁵⁸ The U.N. Department of Safety and Security has conceded it cannot provide accurate estimates on the number of U.N. private security contracts.¹⁵⁹ While little information about the nature, scope, and parties to the contracts is made public, PMSCs appear to be hired on a largely ad hoc basis, with little formalized or system-wide consultation.¹⁶⁰ The remainder of this Article therefore describes the elements that would be necessary for an effective regulatory scheme of PMSCs by the U.N.

A. Licensing Stringent Standards of Conduct

The U.N. currently maintains a selection process by which private companies are licensed as U.N. Secretariat Registered Vendors, eligible to contract with U.N. bodies.¹⁶¹ This process eliminates from consideration companies that are subject to U.N. sanctions, have been suspended, or are under

¹⁵⁵ See MCFATE, *supra* note 87, at 111.

¹⁵⁶ U.K. Green Paper, *supra* note 101, ¶ 60.

¹⁵⁷ *Id.*

¹⁵⁸ See Pingeot, *supra* note 93, at 24.

¹⁵⁹ *Id.* at 42.

¹⁶⁰ *Id.*

¹⁶¹ U.N. Procurement Division, *U.N. Secretariat Registered Vendors*, <http://www.un.org/Depts/ptd/un-secretariat-registered-vendors> (last visited April 26, 2015).

formal investigation for engaging in unethical practices.¹⁶² In addition, it requires vendors to ratify a U.N. Supplier Code of Conduct, which mandates adherence to the values enshrined in the U.N. Charter including “respect for fundamental human rights, social justice and human dignity,” as well as to international labor standards, principles of non-discrimination, and baseline industry standards.¹⁶³ Qualified vendors must also screen personnel for criminal convictions, including for any breach of international criminal or humanitarian law and provide regular relevant training to its personnel, for example with respect to the International Code of Conduct, the Use of Force Policy, weapons training and management, human rights law and application.¹⁶⁴ Under the current licensing system, many PMSCs including Saracen Uganda, Hart Security, PAE, Aegis Defense Services, G4S, and Academi (successor company to Blackwater), have been established as certified vendors of security services, training, landmine removal initiatives, and policing.¹⁶⁵

Given the unique levels of authority that would be granted a rapid-reaction force, as well as the impact of its conduct on the perceived credibility and competence of U.N. peacekeeping, companies eligible for providing rapid-reaction capabilities must be held to a higher standard than is currently required. In addition to the existing code of conduct, PMSCs should be required to adhere to a peacekeeping-specific code, mandating demonstrated levels of professionalism, competence, accountability, and adherence to existing human rights norms and humanitarian legal principles. Those PMSCs that fail to adhere to these standards would be prohibited from contracting with the U.N. as peacekeepers. Thus, under this model, only PMSCs that strictly adhere to all relevant international laws and protocols in regards to human rights and take every practicable measure to minimize loss of life and destruction of property would be contracted by the U.N. as part of a rapid reaction force.

With respect to the use of force, the U.N. should require PMSCs contracted as a rapid-response force

to develop a ‘use of force policy’ appropriate for the conditions where it is required to operate. The policy must be consistent with the applicable local laws and to the extent possible, consistent with the “use of force policy” of [the U.N.]. In this regard, [the PMSC’s] use of force policy [should] be at

¹⁶² U.N. Procurement Division, *U.N. Secretariat Pre-requisites for Eligibility*, http://www.un.org/Depts/ptd/sites/www.un.org.Depts.ptd/files/files/attachment/page/pdf/prerequisite_for_eligibility.pdf (last visited April 26, 2015).

¹⁶³ U.N. Procurement Division, *U.N. Supplier Code of Conduct*, 1 (Sept. 2013), http://www.un.org/Depts/ptd/sites/www.un.org.Depts.ptd/files/files/attachment/page/pdf/conduct_english.pdf.

¹⁶⁴ See Mathias, *supra* note 131, at 5–6.

¹⁶⁵ *U.N. Secretariat Registered Vendors*, *supra* note 161.

least as restrictive (and more restrictive if required by local laws) as [the U.N.'s] use of force policy. The UN's use of force policy is quite restrictive. And the use of force by a UN security officer must be reasonable and proportional to the threat and the minimum required to negate that threat. The officer must also determine that the force is necessary, under the circumstances known at that time, to negate that threat and that there is no other reasonable alternative. Use of deadly force may only be used for self defence or to protect other persons against imminent threat of harm.¹⁶⁶

That a PMSC would be willing to adhere to such a code of conduct and demonstrate adherence to it is not wishful thinking. Such conduct regimes governing PMSCs already exist. The most widely supported of these is the International Code of Conduct for Private Security Service Providers (ICoC), developed by the Swiss Federal Department of Foreign Affairs in 2010.¹⁶⁷ By 2013, more than 700 companies had become signatories.¹⁶⁸ The purpose of the ICoC is to establish commonly agreed upon principles governing the conduct of PMSCs in contexts where the rule of law has been substantially undermined, and to create a foundation to establish governance and oversight mechanisms.¹⁶⁹ Signatory companies are bound to adhere to various commitments, including: to respect human rights, humanitarian law, and all applicable national laws; to not contract with governments or other entities contrary to U.N. Security Council sanctions; and to avoid benefitting from national or international crimes and ensure the services they provide are not used to perpetrate crimes.¹⁷⁰ In addition, PMSCs are required to incorporate the Code into their company policies and internal control and compliance systems, vet and train personnel and subcontractors to specified levels, and establish grievance procedures to address claims of ICoC noncompliance.¹⁷¹ The ICoC grew out of the Montreux

¹⁶⁶ See Mathias, *supra* note 131, at 6.

¹⁶⁷ Int'l Code of Conduct for Private Security Service Providers (ICoC), <http://web.archive.org/web/20150315001313/http://www.icoc-pp.org/> (last visited May 12, 2015) [hereinafter ICoC].

¹⁶⁸ See Scott Jerbi, *Academy Briefing No. 4, The International Code of Conduct for Private Security Service Providers*, GENEVA ACADEMY OF INT'L HUMANITARIAN LAW AND HUMAN RIGHTS, 3 (Aug. 2013), http://www.geneva-academy.ch/docs/publications/briefing4_web_final.pdf. For a full list of companies, see *Int'l Code of Conduct for Private Security Service Providers (ICoC): Signatory Companies*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, <http://business-humanrights.org/en/intl-code-of-conduct-for-private-security-service-providers-icoc-signatory-companies> (last visited Nov. 2, 2015). As of Nov. 3, 2015, the ICoC website, <http://www.icoca.ch>, listed 87 companies in its signatory list. This contraction is likely due to the fact that the website is new and the content is still being populated, rather than attrition of signatories. Older versions of the website, accessed through <https://archive.org/web/>, contain the full list.

¹⁶⁹ ICoC, *supra* note 167, at ¶¶ 5–8. See also ICoC Mandate, available at <http://icoca.ch/en/mandate>.

¹⁷⁰ ICoC, *supra* note 167, at ¶¶ 16–27.

¹⁷¹ *Id.* ¶¶ 44–55.

Document initiative, an effort undertaken by Switzerland and the ICRC in 2008, which establishes principles and good practices for governments that serve as home, contracting, or territorial states to private companies.¹⁷²

The International Stability Operations Association (ISOA) represents a similar initiative. ISOA is an industry-initiated voluntary membership organization, open to private sector companies that operate “in conflict and post-conflict environments and provide disaster relief.”¹⁷³ To be eligible for membership, companies must sign on to the organization’s code of conduct, designed to ensure that its members “contribute their valuable services for the benefit of international peace and human security.”¹⁷⁴ It requires adherence to all pertinent mandatory and voluntary rules of international humanitarian and human rights law, including the ICoC.¹⁷⁵ Additionally, it includes requirements of specific relevance to engaging in combat operations, including transparency and accountability in all operations, the establishment of appropriate rules for the use of force in consultation with the client, the accounting of all weapons during engagement, and prohibitions on the illegal use of weapons.¹⁷⁶

In creating a preliminary PMSC licensing structure, the U.N. should consider either formally adopting an existing mechanism such as the ICoC or ISOA code, or using these as models from which to build a code governing rapid-reaction force contributors. Both these mechanisms articulate higher standards of conduct than those required under the existing vendor registration system, but simultaneously build on fundamental principles and norms espoused in the U.N. Charter, Geneva Conventions, and Universal Declaration of Human Rights.¹⁷⁷ Furthermore, the private military and security industry has already shown itself amenable to adhering to the requirements they establish. The Montreux Document further adds the support of 52 countries to the ICoC system and establishes a mechanism through which other U.N. member states could adopt it as well.¹⁷⁸

¹⁷² See *The Montreux Document*, SWISS FED. DEP’T OF FOREIGN AFFAIRS (FDFA), available at <https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies/montreux-document.html> (last visited May 12, 2015).

¹⁷³ *ISOA Code of Conduct*, INT’L STABILITY OPERATIONS ASS’N., available at <http://www.stability-operations.org/?page=Code> (last visited May 11, 2015).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ See *id.*

¹⁷⁸ See *Participating States of the Montreux Document*, FDFA, available at <https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/international-law/international->

B. Contracting for Accountability

The initial licensing process would establish baseline requirements to be met before a PMSC was eligible to acquire a contract with the U.N. to provide rapid-reaction services. The subsequent contract for services would establish the primary accountability framework. It would formalize the provisions of the code of conduct, conditioning the relationship on adherence and translating its norms into contractual, legally enforceable obligations.

The contract would additionally articulate concrete parameters, constraints, and liability under which the force would operate. It would place an express ceiling on the degree of force that could be employed by PMSC troops.¹⁷⁹ It would establish the duration of the initial engagement and contain conditions under which the mandate could be extended, renewed, or terminated.¹⁸⁰ It could mandate reporting and transparency requirements, establishing formal channels of communication between the on-the-ground force, the DPKO, and the Security Council.¹⁸¹ And in the event of a failure to adhere to the requirements of the contract or human rights or international humanitarian law on the part of PMSC personnel, the contract could contain provisions articulating individual and company liability and jurisdiction over violations, including forum selection and choice of law provisions.¹⁸² Under the contract, irrespective of their status or assignment, “private contractors [could] be held responsible for war crimes and other violations of international humanitarian law they may commit.”¹⁸³ The fact that PMSCs contracted to provide a rapid-reaction force would “carry weapons and may be de facto placed in situations where they can exercise some form [of] authority are additional reasons to insist on their obligations under humanitarian law.”¹⁸⁴

The Security Policy Manual and Security Management Operations Manual, produced by the Working Group on the Use of Mercenaries and the U.N. Department of Safety and Security, could be used to help inform the creation of

humanitarian-law/private-military-security-companies/participating-states.html (last visited April 26, 2015).

¹⁷⁹ See, for example, S.C. Res. 2098, *supra* note 53. Chapter VII, under which more robust peacekeeping forces are mandated, does not expressly address peacekeeping; interpreting its spirit and meaning has given rise to disagreement about whether mandates establish a ceiling or a floor on the use of force. See Cammaert, *supra* note 5, at 7. These types of uncertainties would need to be completely eliminated from a U.N. contractual relationship with PMSCs.

¹⁸⁰ See Diskenson, *supra* note 147, at 217–28.

¹⁸¹ See *id.* at 23–24.

¹⁸² Kotarski & Walker, *supra* note 138, at 257–59.

¹⁸³ See Faite, *supra* note 95, at 14.

¹⁸⁴ *Id.*

a model contract for a PMSC rapid-reaction force. The U.N. could also look to the U.S.-U.K. Voluntary Principles and the U.N. Business Norms.¹⁸⁵ The Security Management Operations Manual already contains a model contract for private security services, identifies elements of a successful contractor proposal, and establishes baseline technical requirements of equipment provision, subcontracting, communications and reporting, training, and performance evaluations.¹⁸⁶ This system would require substantive expansion, however, or the creation of a supplemental, parallel system to accommodate the actions required of a rapid-reaction force. The manuals at present expressly limit U.N. agencies to contracting with private companies for static physical protection only, restricting companies to primarily performing basic monitoring and search functions.¹⁸⁷

In addition to a formal contract, a PMSC-comprised rapid-reaction force would need to operate under a Security Council mandate. Because the specifics of a contract would likely not be public, a mandate would require regular reporting and provide a layer of accountability through transparency into the operations of the force, making the general contours of the contract public by articulating its goals, authorized force levels, and mission duration.¹⁸⁸

Some critics have expressed concern that PMSCs, as private entities designed to profit from participation in conflict, would have no incentive to bring a conflict to an end.¹⁸⁹ The establishment of both a short-term contract with clearly delineated responsibilities and a public mandate governing their actions and accountability would constrain this risk. The failure to meet the articulated goals of the mandate and contract, or achieve measurable progress towards their realization, would result in the termination of a mandate or failure to renew it. PMSCs that exhibit persistent failures to meet their obligations or

¹⁸⁵ See *supra* Section II(a); Østensen, *supra* note 88; see generally OHCHR, *Study on the Use of Private Military and Security Companies (PMSCs) by the United Nations*, *supra* note 115.

¹⁸⁶ *Guidelines on the Use of Armed Security Services from Private Security Companies Annex A—Statement of Works*, *supra* note 121; *Guidelines on the Use of Armed Security Services from Private Security Companies Annex B—Model Contract*, *supra* note 121. This system also requires that a company's Use of Force Policy, developed in pursuance of the system, comport with the ICoC. See *United Nations Security Management System: Security Policy Manual, Armed Private Security Companies*, *supra* note 121, ¶ 24(a); see *Security Management Operations Manual, Guidelines on the Use of Armed Security Services from Private Security Companies*, *supra* note 121, ¶ 34; James Cockayne, *Commercial Security in Humanitarian and Post-Conflict Settings: An Exploratory Study*, INT'L PEACE ACAD., 20 (Mar. 2006), https://www.globalpolicy.org/images/pdfs/Cockayne__Commercial_security_in_humanitarian_and_post-conflict_settings.pdf.

¹⁸⁷ *Security Management Operations Manual, Guidelines on the Use of Armed Security Services from Private Security Companies*, *supra* note 121, at Section C: "Services which may be contracted from an Armed Private Security Company", ¶¶ 7–13.

¹⁸⁸ See, for example, S.C. Res. 2098, *supra* note 53.

¹⁸⁹ See U.K. Green Paper, *supra* note 101, ¶ 43.

adhere to the prescribed code of conduct would additionally lose their status as U.N.-licensed vendors and thus the potential for future contracts.¹⁹⁰

C. Civil and Criminal Liability

Within a robust contractual system, the U.N. would also need to ensure that adequate avenues for redress exist in the event of crimes committed by a Security Council-mandated and DPKO overseen rapid-reaction force. If such a force were made up of PMSCs, despite its private makeup, the rapid-reaction force would be a contractor of the U.N. The legitimacy of the mission's work, and the work of U.N. peacekeeping more generally, depends on the confidence it inspires. Nothing destroys this confidence more than real or perceived impunity for violations committed by its personnel.¹⁹¹ Thus, PMSCs would need to be held to a higher degree of accountability than that to which traditional peacekeepers are held. Such standards would assist in curing the negative perceptions that persist about the legal responsiveness of private military actors. Fortunately, such heightened accountability is actually much easier to achieve with private actors than with traditional peacekeepers.

Peacekeepers are traditionally granted a high degree of jurisdictional immunity from the laws of the host state by a number of international and bilateral agreements and U.N. policies.¹⁹² This immunity is codified in a Status of Forces Agreement (SOFA) drawn up between the U.N., the TCC, and the country hosting the peacekeeping mission.¹⁹³ The U.N. model SOFA extends the Convention on the Privileges and Immunities of the U.N. to the operation, its property, and its members, and establishes immunities unique to peacekeeping personnel.¹⁹⁴ All personnel enjoy complete immunity for actions

¹⁹⁰ See *id.*

¹⁹¹ See U.N. General Assembly, *Criminal Accountability of United Nations Officials, Experts on Mission Critical to Organization's Credibility, Legal Committee Stresses in Debate* (Oct. 22, 2014), <http://www.un.org/press/en/2014/gal3485.doc.htm>; see also Andrew Ladley, *Peacekeeper Abuse, Immunity and Impunity: The Need for Effective Criminal and Civil Accountability in International Peace Operations*, in *POLITICS AND ETHICS REVIEW* 81, 82 (2005) (describing the effects of allegations of rape and other abuses by peacekeepers on the perceived integrity and legitimacy of the mission).

¹⁹² See generally Róisín Burke, *Status of Forces Deployed on U.N. Peacekeeping Operations: Jurisdictional Immunity*, in *J. CONFL. & SEC. L.* 1–42 (2011).

¹⁹³ *Id.*; see also Micaela Frulli, *Immunity for Private Military Contractors: Legal Hurdles or Political Snags?*, in *WAR BY CONTRACT: HUMAN RIGHTS, HUMANITARIAN LAW, AND PRIVATE CONTRACTORS* 448, 448 (Francesco Francioni & Natalino Ronzitti eds., 2011).

¹⁹⁴ U.N. Secretary General, *Comprehensive Review of the Whole Question of Peace-Keeping Operations in All Their Aspects: U.N. Model Status of Forces Agreement for Peacekeeping Operations*, ¶¶ 4–5, U.N. Doc. A/45/594, 1990, <http://www.ilsa.org/jessup/jessup09/basicmats/UNsofa.pdf>.

performed in their official capacity.¹⁹⁵ In addition, the model SOFA holds that “[m]ilitary members of the military component of a U.N. peacekeeping mission shall be subject to the exclusive jurisdiction of their respective participating states in respect of any criminal offences which may be committed by them.”¹⁹⁶ The power to effect an arrest of a peacekeeper rests exclusively with the military police belonging to the U.N. peacekeeping operation,¹⁹⁷ and the host government is responsible for turning over any allegations and evidence of an offense to the U.N. force commander.¹⁹⁸ The U.N. is additionally authorized to administratively discipline peacekeepers, and to discharge them back to their origin states.¹⁹⁹

In sum, individual peacekeepers are essentially immune from suit. Due to highly-limited political will by TCCs, actual accountability is rare.²⁰⁰ Furthermore, the U.N. mission as a whole enjoys complete legal immunity, a feature only the U.N. itself can waive.²⁰¹ This complex, multi-layered structure of immunities is well entrenched, supported by the customary international principle of reciprocity among states and more than 70 years of U.N. and state practice.²⁰²

However, the immunities afforded to private contractors—or their liability in the absence of such immunity—is determined exclusively by contract.²⁰³ According to the ICRC, the civil liability of a PMSC has been generally accepted in most countries.²⁰⁴ This means the company itself could potentially be sued in a host state for monetary damages in the event of a crime committed by one of its employees.²⁰⁵ This is a higher level of accountability than that currently governing the conduct of peacekeepers, and would incentivize PMSCs to avoid liability by putting the necessary mechanisms in place to ensure their employees

¹⁹⁵ *Id.* ¶ 46.

¹⁹⁶ *Id.* ¶ 47(b).

¹⁹⁷ *Id.* ¶ 41.

¹⁹⁸ *Id.* ¶ 47.

¹⁹⁹ See Burke, *supra* note 192.

²⁰⁰ *Id.* at 64; see also Ladley, *supra* note 191, at 83.

²⁰¹ Convention on the Privileges and Immunities of the United Nations, art. II, section 2, Feb. 13, 1946, 1 U.N.T.S. 15.

²⁰² Burke, *supra* note 192, at 77.

²⁰³ See Frulli, *supra* note 193, at 448. Frulli notes, however, that immunity has been granted to private contractors through SOFAs or provisional agreements, such as the Iraqi Coalition Provisional Authority Order 17, issued by the U.S. State Department in 2004, which was interpreted as granting blanket immunity from Iraqi legal processes. *Id.* at 455–56.

²⁰⁴ I.C.R.C., *The I.C.R.C. to Expand Contacts with Private Military and Security Companies* (Apr. 8, 2004), <https://www.icrc.org/eng/resources/documents/misc/63he58.htm>.

²⁰⁵ *Id.*

do not commit crimes.²⁰⁶ In addition, the civil liability of a PMSC as a corporate entity would allow for an increased possibility of redress for any crimes committed by guaranteeing a defendant with the monetary resources to cover damages.²⁰⁷

Criminal liability of PMSCs, on the other hand, has traditionally been more limited in most countries. As a consequence, criminal accountability would most readily rest on prosecuting the individual responsible.²⁰⁸ Identifying liability, and establishing which countries or courts maintain jurisdiction, rests in the contracting arrangement. Even if some form of limited immunity is provided for contractors for acts committed pursuant to their U.N. mandate, a contract should state, as a minimum standard, that such immunity does not cover any acts exceeding that authority, including breaches of international humanitarian law or violations of human rights.²⁰⁹

Prior to deploying a PMSC rapid-reaction force, the U.N. would still negotiate a SOFA with the host country. A new style of SOFA designed to provide enhanced accountability for rapid-reaction forces would need to be developed. The ICoC and Montreux Document began to formulate an alternative, suggesting that either the host country or an international tribunal should be empowered to pursue prosecutions in the case of a crime or violation of international law, as contracting states have already done.²¹⁰ What is crucial is that the PMSC's liabilities are clearly determined in the contract negotiations with the U.N. At a minimum, members of a rapid-reaction force should be subject to the jurisdiction of the host country, the country in which they are incorporated, and/or an agreed-upon binding arbitration mechanism for breaches or crimes falling outside contractually approved actions.²¹¹ This system

²⁰⁶ The ICoC requires signatory companies to establish grievance procedures to address claims alleging failure by company personnel to uphold any of the principles contained in the Code. The Code further establishes baseline requirements that the procedure be fair, accessible, and that the company offer effective remedies; that the details of the grievance system be made public; that investigations be conducted promptly and impartially; and other guarantees of adequate redress. The ICoC notes that this is in addition to, and does not replace, additional contractual requirements to which the companies might be subject. ICoC, *supra* note 167, ¶¶ 66–68.

²⁰⁷ Kotarski & Walker, *supra* note 138, at 257–59.

²⁰⁸ *The I.C.R.C. to Expand Contacts with Private Military and Security Companies*, *supra* note 204.

²⁰⁹ See Frulli, *supra* note 193, at 455–60 (describing the contours of what immunity for private contractors might cover in compliance with international law).

²¹⁰ *Montreux Document*, *supra* note 172; see JENNIFER K. ELSEA, *Private Security Contractors in Iraq and Afghanistan: Legal Issues*, CONGRESSIONAL RESEARCH SERVICE, 10 (Jan. 7, 2010), <http://www.fas.org/sgp/crs/natsec/R40991.pdf>; also see, ICoC, *supra* note 167.

²¹¹ See Frulli, *supra* note 193, at 456 (suggesting that violations of the laws of the host state apparently committed under the auspices of an official act should be carefully scrutinized to determine elements that might amount to an abuse of authority, thus permitting prosecution).

of liability would allow host countries to hold PMSCs accountable for legal violations committed by their agents within the country's jurisdictional borders.²¹² Where appropriate, command responsibility should extend liability for serious crimes committed by private security personnel to their superiors.²¹³ In addition, PMSCs should be subject to civil liability and made responsible for misconduct by their employees.²¹⁴ It is important to note that any PMSC hired to become a rapid-reaction force would, by contract, not enjoy the full immunity of the U.N.

Some critics have raised concerns that the U.N. risks undermining its image and credibility if it contracts with PMSCs to form a rapid-response force.²¹⁵ In general, PMSCs contracted by the U.N. as peacekeepers would be identically situated in that they would be held accountable for violations of international humanitarian law committed pursuant to their U.N. mandate. Unlike current peacekeepers, however, who can only be prosecuted as individuals, PMSCs, as companies established in a particular country, could additionally be prosecuted for actions that violate the laws of the country in which they operate or are incorporated. By giving preference to PMSCs with significant assets or those incorporated in foreign jurisdictions with effective regimes regulating extra-territorial commercial security provisions, the U.N. can assure that PMSCs could be prosecuted appropriately.²¹⁶ Therefore, the proposed model of a rapid-response force composed of PMSCs would in fact add an additional layer of accountability to U.N. peacekeepers.

PMSCs, as forces contracted by the U.N., would of course be subject to the human rights obligations of the U.N. and therefore liable for violations of international law, including international humanitarian law, as the U.N. itself is a subject of international law.²¹⁷ As a preliminary matter, one might contest whether international humanitarian law is applicable to the U.N. at all.²¹⁸ This question "was confronted to some extent during early U.N. operations, such as in Korea. The ICJ has considered the U.N. to be 'a subject of international law and capable of possessing international rights and duties.'"²¹⁹ This refers to all

²¹² See Faite, *supra* note 95, at 11.

²¹³ See Elsea, *supra* note 210, at 10.

²¹⁴ Kotarski & Walker, *supra* note 138, at 257–58.

²¹⁵ See Mathias, *supra* note 131, at 5.

²¹⁶ See Cockayne, *supra* note 186, at 19–20.

²¹⁷ See Matija Kovac, Legal Issues Arising from the Possible Inclusion of Private Military Security Companies in U.N. Peacekeeping, in 2009 MAX PLANCK Y.B. U.N. L. VOLUME 13, 307–374 (A. von Bogdandy & R. Wolfrum eds.).

²¹⁸ See Janaby, *supra* note 19, at 88.

²¹⁹ *Id.*

the rules of international law, including international humanitarian law. Respect for international humanitarian law by U.N. forces is also mandated by the SOFA agreement entered into between the U.N. and the State receiving a peacekeeping mission. Both the Secretary General's Bulletin on Observance by U.N. 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, and accordingly to PMSCs contracted by the U.N. as a rapid-reaction force.²²⁰

It is important to recall that the DPKO is funded by the contributions of U.N. members, and therefore their demands on the U.N. to account for the effective use of their resources will provide an additional level of accountability for PMSCs. Existing mechanisms may already provide the basis for such action by donor states, for example through the European Commission Humanitarian Office Framework Partnership Agreement.²²¹ Long-term, donor-driven oversight of PMSCs may include: donor-maintained registries of PMSCs and their performance; baseline security standards; and encouraging the U.N. to reward socially responsible PMSCs through preferential treatment.²²² For their part, PMSCs have acknowledged their industry's negative association with mercenaries and recognized that they must self-regulate to gain credibility in the eyes of the public at large.²²³

D. Market Accountability: Making Human Rights Good for Business

Heightened levels of accountability built into contracts will increase a PMSC's risk exposure. As a consequence, the greater the accountability, the more expensive the rapid-reaction force is likely to be for U.N. member states to fund. However, the costs saved by the U.N. in gaining the capacity to respond in a more timely manner to emerging conflicts—and to hold off on deploying the more costly and robust peacekeeping mission—should not be discounted. While the U.N. currently reimburses TCCs at a rate of \$1,332 per person per month, the actual costs of traditional peacekeeping missions are much higher, as they include substantial additional costs for things like equipment and infrastructure.²²⁴ In a U.S. Senate appropriations bill regarding U.S. contributions to international peacekeeping activities, the Committee found that in many cases, PMSCs “can carry out effective peacekeeping missions for a fraction of the

²²⁰ *Id.*

²²¹ *See* Cockayne, *supra* note 186, at iii.

²²² *Id.*

²²³ *Id.*

²²⁴ S.C. Res. 68/281, U.N. Doc. A/RES/68/281 (June 30, 2014).

funding the U.N. requires to carry out the same missions” and concluded that “the United Nations can no longer afford to ignore the potential cost-savings that private companies with proven records of good service and good behavior can offer.”²²⁵ While the U.N. will have to independently investigate these potential cost-savings and determine the value of having a privately-contracted rapid-reaction force—including the value of preventing a difficult situation from becoming much worse—the U.N.’s previous decisions to contract with PMSCs bode well for the current proposal.

Turning to the market to provide peacekeepers for a rapid-reaction force has the potential to reduce administrative, training, and insurance costs and the replacement costs from peacekeeper turnover and relocation.²²⁶ Further, market-based solutions to the U.N.’s peacekeeping challenges are seen as “more flexible and efficient, and are considered to reduce exposure to liability.”²²⁷ As one senior UNHCR official expressed, “[i]f you can find a qualified contractor, that really does save you a lot of time and effort . . . plus then they don’t become UN employees,” which would imply responsibilities related to protection of employees, benefits, hiring and firing, tenure, and retirement contributions.²²⁸

Furthermore, it is hard to place a monetary value on the civilian lives that could potentially be saved through the more rapid deployment of forces. There are likely to be secondary long-term benefits within the private military contracting market as well. If the U.N. were to become one of the “super clients” of the private security industry, eventually there would be an overall skew in the market towards standards of conduct that comport to international human rights and humanitarian legal norms, which would marginalize disreputable PMSCs.²²⁹ By contracting with private companies for peacekeeping purposes, not only could the U.N. cure some of the persistent challenges of peacekeeping by establishing rapid-reaction capabilities, it could make human rights a better business practice.²³⁰

²²⁵ See Østensen, *supra* note 88, at 52.

²²⁶ See Cockayne, *supra* note 186, at 5.

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ See U.K. Green Paper, *supra* note 101, ¶ 45; see AVANT, *supra* note 103, at 53 (arguing that by giving PMSCs a legitimate role as military professionals, the U.N. and other clients can help ensure that they operate according to international values).

²³⁰ This would require the U.N. to ensure the contracts are awarded competitively. In analyzing the policy prospects for regulating PMSCs, Eugenio Cusumano notes that many major contracts are awarded to PMSCs non-competitively; in order for public demand to contribute to the regulation of company conduct, the market should be open. Eugenio Cusumano, *Policy Prospects for Regulating Private Military and Security Companies*, in *WAR BY CONTRACT: HUMAN RIGHTS, HUMANITARIAN*

V. CONCLUSION

In October 2014, Foreign Minister Abdoulaye Diop of Mali asked the Security Council to take “urgent measures” and deploy a rapid-reaction force on top of the current U.N. peacekeeping mission.²³¹ Not only were countless civilians being killed, he explained, but the U.N. Multidimensional Integrated Stabilization Mission in Mali (MINUSMA) had been subject to some of the deadliest violence targeting a U.N. peacekeeping mission in history—at the time of the request, 31 peacekeepers had been killed and 66 injured since MINUSMA’s establishment in July 2013.²³² A rapid-reaction force with more robust rules of engagement, Foreign Minister Diop argued, would help stem the upsurge in violence and enable MINUSMA to focus on restarting the stalled peace talks.²³³ Despite this request, however, the Security Council took no action. When MINUSMA’s mandate was renewed in June 2015, the levels of peacekeepers and police were kept at the same levels as those mandated in June 2014.²³⁴

Meanwhile, the Secretary-General reported “the security situation remained extremely volatile,” and that “extremist and asymmetric attacks as well as criminal threats against the Malian defence and security forces and MINUSMA persisted throughout the reporting period, and have spread to formerly safer regions”²³⁵ The total number of peacekeepers killed has almost doubled to 56.²³⁶ The Secretary-General added that civilians faced “[a]rmed banditry, intercommunal violence, indiscriminate attacks by extremist groups and retaliation from armed groups due to suspected support to the opposite group.”²³⁷ And although the inter-Malian peace talks culminated in the signing of a peace and reconciliation agreement in June 2015, the Secretary-General noted “the magnitude of the challenges and risks of reversals should not be underestimated,” the “security situation . . . remain[s] alarming,” and “[t]he gross

LAW, AND PRIVATE CONTRACTORS 11, 21–23 (Francesco Francioni & Natalino Ronzitti eds., 2011).

²³¹ Carole Landry, *Mali Asks For Rapid-Reaction Force*, AGENCE FRANCE-PRESSE, Oct. 8, 2014), available at <http://news.yahoo.com/mali-asks-special-un-force-end-peacekeepers-attacks-165915266.html>.

²³² *See id.*

²³³ *See id.*

²³⁴ S.C. Res. 2227, U.N. Doc. S/RES/2227 (June 29, 2015).

²³⁵ U.N. Secretary General, *Report on the Situation in Mali*, ¶ 16, U.N. Doc. S/2015/732 (Sept. 22, 2015).

²³⁶ DPKO, *MINUSMA Facts and Figures* (Sept. 30, 2015), <http://www.un.org/en/peacekeeping/missions/minusma/facts.shtml>.

²³⁷ *See Report on the Situation in Mali*, *supra* note 235, ¶ 31.

human rights violations that continue to be committed throughout Mali are unacceptable.”²³⁸

Yet despite these collective observations, which mirrored the concerns expressed by Foreign Minister Diop a year earlier, the Secretary-General still did not recommend adding a temporary rapid-reaction force or changing MINUSMA’s mandate to provide an offensive capability to peacekeepers. The violent conflict in Mali further demonstrates that the U.N. and its member states need to develop the political will to create and then deploy a rapid-reaction force in the first place. Although the Ramos-Horta Report makes clear “a more reliable system for responding quickly to save lives and arrest emerging conflicts can potentially avoid a larger, more costly response later,” this has not yet proven to be a sufficiently persuasive argument for the Security Council to take action.²³⁹

The world may well be growing more peaceful. Nonetheless, there remains a pressing need for the U.N. to be able to respond to threats to international peace and security, and to do so in a robust and timely manner. As the U.N. considers options for developing a more reliable system for acting quickly in emerging conflicts, it could evaluate the prospective use of PMSCs as a source of rapid-reaction force capabilities.

²³⁸ *Id.* ¶¶ 61, 65, 66.

²³⁹ The Ramos-Horta Report, *supra* note 18, ¶ 197.