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THE STATUS OF PRIVATE MILITARY SECURITY COMPANIES IN UNITED NATIONS PEACEKEEPING OPERATIONS UNDER THE INTERNATIONAL LAW OF ARMED CONFLICT

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Private military security companies ('PMSCs') are present in almost all United Nations peacekeeping operations. The utilisation of PMSCs by international organisations raises distinct and complex legal issues. This article discusses the status of PMSCs under the international law of armed conflict, focusing particularly on their involvement in UN peacekeeping activities. We argue that assessing the position of PMSCs requires a sharper understanding of the legal status of civilians who may play an active role in hostilities. The role of PMSCs in UN operations, in particular, places pressure on the widespread view that civilians who participate in hostilities thereby violate the law of warfare. The article then reviews the options for holding PMSCs accountable for violations of international law. We argue that this issue is best addressed by treating international humanitarian law, international human rights law and international criminal law as an interlocking body of norms and mechanisms applicable in armed conflict.

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I INTRODUCTION

In June 1998, the then United Nations Secretary-General Kofi Annan surmised that the world was 'not … ready to privatize peace'.[1] Over a decade later, not only have states engaged the services of private companies in areas of conflict, but the UN itself has regularly utilised private military security

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1 United Nations, 'Secretary-General Reflects on "Intervention" in Thirty-Fifth Annual Ditchley Foundation Lecture' (Press Release, SG/SM/6613, 26 June 1998) <http://www.un.org/press/en/1998/19980626.sgsm6613.html> archived at <https://perma.cc/NDE2-28R2>

companies ('PMSCs') in its peacekeeping and humanitarian operations.[2] The engagement of these companies is partly because of the reluctance of many states to contribute troops to the UN's peacekeeping operations ('PKOs'), but also due to the increasingly complex nature of PKOs themselves. Within UN PKOs, PMSCs perform various security, logistical and support functions. PMSCs work in PKOs either through a direct contractual agreement with the UN or as part of the national contingent contributed by a Troop Contributing Nation ('TCN'). However, the engagement of PMSCs in PKOs remains controversial. In addition to ethical concerns about the role of private military actors in peacekeeping generally, there is also potential for PMSCs in PKOs to violate international law. This then raises the question of how PMSCs can be held accountable. There are significant barriers to the accountability of PMSCs under international law. These accountability gaps arise for three principal reasons.

First, the utilisation of PMSCs in PKOs poses a challenge to existing conceptions of security. The traditional view of international law positions the state as the sole provider of security.[3] The German sociologist Max Weber famously identified the monopoly of the legitimate use of force as a hallmark of statehood.[4] However, the authority of states over security has diminished progressively over time, partially due to the gradual emergence of new actors on the international order.[5] The increasing prominence of intergovernmental organisations — and the establishment of the UN, in particular — has diffused state power over security.[6] These organisations have their own separate legal identities; they are 'endowed with rights and obligations distinct from those of the Member States'.[7] Crucially, the UN has the power to use force in PKOs in self-defence or in 'defense of the mandate'.[8] Private actors in military and security roles now magnify this diffusion of traditional forms of state power. When integrated into UN PKOs as peacekeepers, PMSC personnel are permitted to use force in the same circumstances as other peacekeeping personnel in

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2 Åse Gilje Østensen, 'In the Business of Peace: The Political Influence of Private Military and Security Companies on UN Peacekeeping' (2013) 20 *International Peacekeeping* 33.

3 Thomas Hobbes, *Leviathan* (1651) (Clarendon Press, first published 1651, 1929 ed) ch 13. See also Richard Hullman, 'Redefining Security' (1983) 8(1) *International Security* 129; Simon Chesterman and Chia Lehnardt, 'Introduction' in Simon Chesterman and Chia Lehnardt (eds), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (Oxford University Press, 2007) 1, 1; Antonio Cassese, 'States: Rise and Decline of the Primary Subjects of the International Community' in Bardo Fassbender and Anne Peters (eds), *The Oxford Handbook of the History of International Law* (Oxford University Press, 2012) 49, 50–1.

4 Max Weber, 'Politics as a Vocation' in H H Gerth and C Wright Mills (eds), *From Max Weber: Essays in Sociology* (Routledge & Kegan Paul, first published 1948, 1970 ed) 77, 77–8.

5 Cassese, above n 3, 65.

6 Ibid 65–6.

7 Cassese, above n 3, 66. See generally Kirsten Schmalenbach, 'International Organizations or Institutions, General Aspects' in Rüdiger Wolfrum et al (eds), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, at July 2014).

8 UN Department of Peacekeeping Operations ('UNDPKO') and Department of Field Support ('DFS'), *United Nations Peacekeeping Operations: Principles and Guidelines* (2008) 34 <http://www.effectivepeacekeeping.org/sites/default/files/04/DPKO-DFS_Capstone%20Document.pdf> archived at <https://perma.cc/WKT7-HYQX>.

similar roles.[9] The utilisation of PMSCs in UN PKOs therefore poses a significant challenge to traditional conceptions of security, because it involves not one, but two kinds of non-state actors operating in a domain traditionally thought to be reserved exclusively for states.

Secondly, the corporate nature of PMSCs is a barrier to their accountability for violations of international law. The prevailing opinion in the 20th century, as formulated by Lassa Oppenheim, was that 'States solely and exclusively are the subjects of International Law'.[10] In time, international law has evolved to recognise other classes of actors. For example, international criminal law ('ICL') sees natural persons as subjects and provides for individual criminal liability.[11] However, the status of corporations under public international law remains unclear. No international court has jurisdiction over corporations and there is no existing mechanism under international law for corporations to manage and account for their use of force.[12] There are a number of soft law instruments in which corporations are ascribed some degree of legal status, but the relevance of these instruments for international law more generally is open to dispute.[13] As a result, PMSCs are left in an ambiguous position.

This leads to a third complexity associated with the accountability of PMSCs in PKOs: there are numerous dimensions through which PMSC accountability can potentially be assessed.[14] Accountability can be viewed from public and private law perspectives, both at the international law level as well as the domestic. ICL, international humanitarian law ('IHL') and international human rights law ('IHRL') all have a role to play in determining the responsibility of PMSCs at the international level. On the national level, meanwhile, PMSCs' accountability can be assessed using the frameworks of corporate or individual criminal liability, civil litigation and regulatory mechanisms. Finally, each of these frameworks can be contemplated from the perspective of different subjects: the UN, the state, the corporation or the individual.[15] The desirability and effectiveness of different mechanisms may be assessed differently depending on whose interests are placed in the frame of reference.

This article approaches the issue of the accountability of PMSCs in UN PKOs primarily from the perspective of IHL. The complexities raised by PMSCs have led some commentators to argue that they operate in a legal vacuum and that

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9 Chia Lehnardt, 'Peacekeeping' in Simon Chesterman and Angelina Fisher (eds), *Private Security, Public Order: The Outsourcing of Public Services and Its Limits* (Oxford University Press, 2009) 205, 209.

10 Lassa Oppenheim, *International Law: A Treatise* (Longmans, Green, and Co, 1905) vol 1, 18.

11 As Roger O'Keefe points out, '[i]t is the explicit provision for individual criminal responsibility that distinguishes international criminal law from international human rights law and from the main body of international humanitarian law (or the law of armed conflict)': Roger O'Keefe, *International Criminal Law* (Oxford University Press, 2015) 49 [2.8].

12 Lindsey Cameron and Vincent Chetail, *Privatizing War: Private Military and Security Companies under Public International Law* (Cambridge University Press, 2013) 583.

13 See, eg, Markos Karavias, *Corporate Obligations under International Law* (Oxford University Press, 2013).

14 Cameron and Chetail, above n 12, 583–4.

15 Ibid 7–8.

their hybridity frees them from the restraints of the law of armed conflict.[16] However, we argue that IHL has the resources to deal coherently with the position of PMSCs, particularly when their links to ICL and IHRL are considered. The various issues canvassed above are sometimes thought to lead to difficulties in classifying PMSCs within the traditional IHL dichotomy of combatants and civilians.[17] However, we argue that these difficulties are largely illusory. PMSCs are best viewed in general as groups of non-combatants who may or may not play a direct role in hostilities. It is sometimes argued that non-combatants who participate directly in hostilities thereby violate the laws of armed conflict,[18] but we argue that the case of PMSCs shows this view to be mistaken. We then turn to the specific challenges in holding PMSCs accountable under IHL. We argue that this issue is best addressed by treating IHL, IHRL and ICL as an interlocking body of norms applicable in wartime. This holistic perspective enables a realistic assessment of accountability gaps in this area.

II THE ROLE OF PMSCS IN UN PEACEKEEPING

A *The UN's Mandate and Peacekeeping*

The UN's primary mandate under the *Charter of the United Nations* ('*UN Charter*') is the maintenance of international peace and security.[19] However, the UN's conceptualisation of international security is extremely broad. The following statement of the UN Secretary-General in a 2005 report illustrates the UN's conceptualisation of its mandate:

> The threats to peace and security in the twenty-first century include not just international war and conflict but civil violence, organized crime, terrorism and weapons of mass destruction. They also include poverty, deadly infectious disease and environmental degradation since these can have equally catastrophic consequences. All of these threats … can undermine States as the basic unit of the international system.[20]

This broad understanding of international security has expanded the field activities of the UN. The UN is involved in a myriad of activities including conflict prevention, oversight of democratic transitions and the establishment of

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16 See, eg, Peter Singer, 'War, Profits, and the Vacuum of Law: Privatized Military Firms and International Law' (2004) 42 *Columbia Journal of Transnational Law* 521. Cf Lindsey Cameron, 'New Standards for and by Private Military Companies?' in Anne Peters et al (eds), *Non-State Actors as Standard Setters* (Cambridge University Press, 2009) 113, 115.

17 See, eg, Cameron and Chetail, above n 12, 383–431; Emily Crawford, *Identifying the Enemy: Civilian Participation in Armed Conflict* (Oxford University Press, 2015) 157–71.

18 Knut Dörmann, 'The Legal Situation of "Unlawful/Unprivileged Combatants"' (2003) 85 *International Review of the Red Cross* 45; Gary D Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (Cambridge University Press, 1st ed, 2010) 222–5.

19 *Charter of the United Nations* art 1 ('*UN Charter*').

20 General Assembly, *In Larger Freedom: Towards Development, Security and Human Rights for All: Report of the Secretary-General*, UN GAOR, 59th sess, Agenda Items 45 and 55, UN Doc A/59/2005 (21 March 2005) 24–5 [78].

elections. However, peacekeeping is arguably the UN's most visible contribution to international security.[21]

Broadly speaking, PKOs are UN missions 'involving military personnel, but without enforcement powers, established by the United Nations to help maintain or restore peace in areas of conflict'.[22] The *UN Charter* contains no express provision for PKOs.[23] However, it is generally accepted that the *UN Charter*'s provisions for the maintenance of international peace and security confer upon the UN sufficient power to establish PKOs.[24] The UN General Assembly and the UN Security Council can both establish PKOs, either as a measure of peaceful settlement of disputes under ch VI of the *UN Charter* or as an enforcement measure against a threat to international peace and security under ch VII. Peacekeeping forces established by the UN are subsidiary organs of either the General Assembly or the Security Council pursuant to arts 22 and 29 of the *UN Charter*.[25] They can be either led by the UN or authorised by it. UN-led PKOs are accountable to the UN Secretary-General.[26] In UN-authorised operations, on the other hand, command and control over the operations is contracted out by the UN to one or more states. These operations are independent of the UN. The Security Council's principal role after establishing the PKO's mandate is to receive periodic reports from the TCNs.[27]

Peacekeeping mandates have expanded considerably since the end of the Cold War. Initially, PKOs were limited to observing human rights, establishing buffer zones and preserving law and order.[28] More recently, the peacekeeping agenda has become more robust: it encompasses humanitarian aid, local disarmament,

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21 Jan Wouters et al, 'Accountability for Human Rights Violations by International Organisations: Introductory Remarks' in Jan Wouters et al (eds), *Accountability for Human Rights Violations by International Organisations* (Intersentia, 2010) 1. Peacekeeping has been referred to as the UN's 'flagship activity': Thorsten Benner, Stephan Mergenthaler and Philipp Rotmann, *The New World of UN Peace Operations: Learning to Build Peace?* (Oxford University Press, 2011) 1.

22 UN, *The Blue Helmets: A Review of United Nations Peace-keeping* (UN Department of Public Information, 1985) 3. Another definition describes peacekeeping as a 'multidimensional management of a complex peace operation, usually in a post-civil war context, designed to provide interim security and assist parties to make … peace sustainable'; see Michael W Doyle and Nicholas Sambanis, 'Peacekeeping Operations' in Sam Daws and Thomas G Weiss (eds), *The Oxford Handbook on the United Nations* (Oxford University Press, 2007) 323; Michael Bothe, 'Peacekeeping' in Bruno Simma (ed), *The Charter of the United Nations: A Commentary* (Oxford University Press, 2nd ed, 2002) 573.

23 Alexander Orakhelashvili 'The Legal Basis of the United Nations Peace-keeping Operations' (2003) 43 *Virginia Journal of International Law* 485, 487.

24 *Certain Expenses of the United Nations* (*Advisory Opinion)* [1962] ICJ Rep 151, 163; Nigel D White, 'Peacekeeping and International Law' in Joachim A Koops et al (eds), *The Oxford Handbook of United Nations Peacekeeping Operations* (Oxford University Press, 2015) 43, 45.

25 Jessica Pressler, 'Responsibility of the United Nations for the Activities of Private Military and Security Companies in Peacekeeping Operations: In Need of a New International Instrument' (2014) 18 *Max Planck Yearbook of United Nations Law* 152, 157.

26 Ibid.

27 Ibid.

28 For more on the characteristics of Peacekeeping operations ('PKOs') and their evolution, see Marten Zwanenburg, *Accountability of Peace Support Operations* (Martinus Nijhoff, 2005) 11–49.

building institutional capacity and strengthening the rule of law.[29] Further, the use of force by peacekeepers in PKOs is permissible under ch VII, subject to the limits imposed by the UN's own policies.[30] This has led to a blurring of the line between peacekeeping and peace-enforcement.[31] This changed agenda is an important reason why the UN increasingly relies on PMSCs as a cost-effective supplement or alternative to national troops.

B *The Involvement of PMSCs in UN Operations*

PMSCs are corporations that offer military or support services traditionally considered to be provided exclusively by states.[32] They perform a variety of functions, including support in direct combat operations, strategic planning, consultancy services, military training, intelligence gathering and logistical support for armed forces.[33] The term 'private military company' is sometimes used to denote companies whose personnel engage in combat alongside or in place of national forces, while 'private security company' refers to firms that provide services to armed forces stopping short of direct combat.[34] We will use the term 'PMSC' broadly to include companies operating in all aspects of this spectrum,[35] while recognising that PMSCs in UN PKOs are most commonly deployed in security, law enforcement or logistical roles.

PMSCs have been present in almost all UN peacekeeping, development and humanitarian operations since the 1990s.[36] However, little official information about the UN's contracting practices is available to outsiders.[37] At this point, there appear to be two situations in which PMSCs act in PKOs. The first is where PMSC personnel are seconded to a PKO by a member state or third party. In some of these cases, PMSCs are contributed to PKOs as part of a national contingent. In this case, their duties may be limited to logistical support and security services, but they could also be involved in other kinds of peacekeeping

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29 Bothe, above n 22, 588–9. For a summary on the different 'generations' of PKOs and the broadening of the peacekeeping agenda, see Ramesh Thakur, *The United Nations, Peace and Security: From Collective Security to the Responsibility to Protect* (Cambridge University Press, 2006) 37–41.

30 UNDPKO and DFS, *United Nations Peacekeeping Operations: Principles and Guidelines* (2008), 34 <http://www.effectivepeacekeeping.org/sites/default/files/04/DPKO-DFS_Capstone%20Document.pdf> archived at <https://perma.cc/WKT7-HYQX>.

31 Ulf Häußler, 'Human Rights Accountability of International Organisations in the Lead of International Peace Missions' in Jan Wouters et al (eds), *Accountability for Human Rights Violations by International Organisations* (Intersentia, 2010) 213, 218–19.

32 Peter Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (Cornell University Press, 2008) 73.

33 Ibid.

34 Ibid.

35 Various typologies exist to categorise PMSCs. Peter Singer provides arguably the best known categorisation; he distinguishes between military support firms, military consulting firms and military provider firms using a model he terms the 'tip-of-the-spear typology': Ibid 91–2.

36 Deborah D Avant, *The Market for Force: The Consequences for Privatizing Security* (Cambridge University Press, 2005) 7.

37 Østensen, for example, has written about UN representatives' general lack of willingness to elaborate on UN policies and practices on PMSC contracting, as well as the generally low availability of relevant information. See Åse Gilje Østensen, 'UN Use of Private Military and Security Companies: Practices and Policies' (SSR Paper No 3, Geneva Centre for the Democratic Control of Armed Forces, 2011) 8–9.

functions, such as disarmament, demobilisation and reintegration of former combatants or assisting in the organisation and oversight of elections.[38] When the UN directly contracts a PMSC to provide support to its PKOs, by contrast, they are normally restricted to performing non-military functions such as security guarding, logistical support, mine deactivation and ordnance disposal.[39] Even in these scenarios, however, the potential exists for PMSC and other peacekeeping personnel to become involved in armed exchanges. Field conditions can deteriorate, potentially forcing peacekeepers (including security personnel) to employ armed force in order to defend themselves, civilians or the mandate.

In these circumstances, the involvement of PMSCs in UN PKOs is contentious precisely because of the potential that they will use armed force and, in particular, that they may do so in a way that engages the norms of IHL. PMSC security guards or law enforcement personnel may be heavily armed and, in an active conflict zone, may become involved in confrontations with combatants or other parties where they have the potential to use lethal and/or excessive measures. The complexities that may arise are illustrated by the Mission in the Democratic Republic of the Congo in 2001, where PMSCs were initially hired for logistical support and maintenance services.[40] However, over time, these companies started to perform security tasks such as 'crime prevention and detection, close protection and border security duties'.[41] It is foreseeable in such circumstances that PMSCs may use force that amounts to, or results in, a violation of international law.

It might seem at first that PMSCs playing security, guarding, access control or law enforcement roles are not governed by IHL and are therefore differently situated to combatants deployed with the aim of engaging opposing forces. However, IHL applies in principle to all acts committed *in the context of* an armed conflict, in the sense that the conflict 'played a substantial part in the perpetrator's ability to commit [the act, the] decision to commit it, the manner in which it was committed or the purpose for which it was committed'.[42] PMSCs in UN PKOs deployed during an ongoing armed conflict, even if acting in security or law enforcement roles, could foreseeably be drawn into armed exchanges that would be governed by IHL by virtue of their nexus with the conflict. This does not mean that all use of force by PMSCs in PKOs is governed by IHL, since IHL does not cover ordinary law enforcement activities. Nonetheless, there is significant potential for IHL-governed use of force to occur. The broad application of IHL during armed conflict therefore reinforces the difficulty of drawing a sharp line between military and non-military functions when PMSCs are deployed in conflict situations.

The presence of PMSCs in UN PKOs can be attributed to two main factors. As mentioned above, PKOs have become increasingly comprehensive, leading to

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38 Ibid 17–18, 29.

39 Ibid 15.

40 Ibid 16.

41 Ibid.

42 *Prosecutor v Kunarac (Judgement)* (International Tribunal for the Former Yugoslavia, Appeals Chamber, Case Nos IT-96-23 and IT-96-23/1-A, 12 June 2002) [58]. See also *Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1, 2 October 1995) [69].

an increased demand for personnel.[43] This is combined with the fact that states have been increasingly reluctant to contribute their own troops to UN PKOs.[44] PMSCs fill the ensuing gap. Furthermore, in crisis situations, states are often slow to send peacekeeping troops and aid, if they do so at all.[45] The troops they do send may be unorganised, under-equipped, and unused to working together as a team.[46] PMSCs, on the other hand, are generally efficient, well-organised and often indispensable to the UN in PKOs. Where regular soldiers are deployed to PKOs for short-term assignments, PMSC personnel are often contracted for longer assignments, have better knowledge of operations and have even been given access to confidential information.[47] These advantages of PMSCs, combined with the difficulty of mobilising and deploying an effective, efficient and organised peacekeeping force, lends the prospect of PMSC inclusion in PKOs significant appeal. As a result, the UN may, in the foreseeable future, have to rely on a still broader range of services from PMSCs, including directly contracting PMSCs for military assistance.

However, as noted above, the circumstances in which PKOs operate have the potential to place PMSC personnel in a position where they are susceptible to violating international law. In particular, the use of force is permitted in PKOs 'in self-defence and defence of the mandate'.[48] The use of force (even non-lethal force) by PMSCs is problematic for a number of reasons. First, as we will see below, difficulties are sometimes thought to arise in fitting PMSCs into the traditional categories of persons recognised by IHL. Secondly, PMSCs have gained a reputation for excessive force. The infamous human rights violations at Abu Ghraib in 2003 during the war in Iraq and Nisour Square in 2007 both involved gross misconduct by PMSC personnel.[49] Although in these cases the PMSCs were hired by states, such PMSC misconduct could also occur under the aegis of the UN.

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43 'The military resources needed to help keep the peace are being strained by so much peace to keep'. See the comments of former UN Under-Secretary-General for Peacekeeping, Jean-Marie Guéhenno, 'Third World Conflicts: A Plan to Strengthen UN Peacekeeping', *The New York Times* (online), 19 April 2004 <http://www.nytimes.com/2004/04/19/opinion/third-world-conflicts-a-plan-to-strengthen-un-peacekeeping.html> archived at <https://perma.cc/T2G8-K9RP>.

44 For example, countries with large financial resources and military capabilities do not contribute troops or funding towards African conflict. See Jakkie Cilliers and Greg Mills (eds), *From Peacekeeping to Complex Emergencies: Peace Support Missions in Africa* (South African Institute of International Affairs and Institute for Security Studies, 1999); Thakur, above n 29, 46.

45 See *Identical Letters Dated 21 August 2000 from the Secretary-General to the President of the General Assembly and the President of the Security Council*, UN GAOR, UN SCOR, 55th sess, Agenda Item 87, UN Docs A/55/305 and S/2000/809 (21 August 2000) ('*Brahimi Report*').

46 States may send troops 'without rifles, or with rifles but no helmets, or with helmets but no flak jackets, or with no organic transport capability … Troops may be untrained in peacekeeping operations, and … are unlikely to have trained or worked together before': Ibid 18.

47 Østensen above n 37, 16–17.

48 UNDPKO and DFS, above n 30, 34.

49 Ottavio Quirico, 'The Criminal Responsibility of Private Military and Security Company Personnel under International Humanitarian Law' in Francescio Francioni and Natalino Ronzitti (eds), *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (Oxford University Press, 2011) 423, 424.

Thirdly, PMSCs face an ostensible accountability gap under international law. PMSCs often escape accountability for violations of international law committed in the course of their duties. Following the Abu Ghraib incidents, for example, while state military officials were prosecuted under courts martial, the PMSCs involved and their personnel faced no criminal prosecution.[50] In contrast, criminal prosecution did take place for Blackwater personnel involved in the Nisour Square massacre, as well as another incident in Kabul in 2009.[51] However, these cases are far from representative. There is a general accountability problem in holding perpetrators to account for violations of IHL, but this problem is exacerbated in the case of PMSCs by their ambiguous position under the legal framework. The following part of this article considers some of the specific issues raised by PMSCs under IHL. We then conclude the article by offering a response to these problems.

III PMSCs AND THE PRINCIPLE OF DISTINCTION

A *The Role of Humanitarian Norms*

As the body of public international law that regulates the conduct of armed conflicts, IHL plays a crucial role in holding PMSCs accountable. IHL is relevant to PMSC accountability for four main reasons. First, UN PKOs, by their very nature, frequently operate in the context of active armed conflicts or in situations where armed conflict is an imminent possibility. IHL applies automatically during both international and non-international armed conflicts (although the applicable rules may differ between these scenarios).[52] Secondly, IHL binds all participants in armed conflicts, including non-state actors.[53] Thirdly, IHL is non-derogable; its rules, once they apply, must be observed without exception.[54] Finally, international law requires states not only to refrain from violating IHL, but to prosecute and punish anyone responsible for serious violations.[55]

There are, however, several barriers to holding PMSCs in UN PKOs accountable under IHL. The first is the immunity of the UN and its officials and experts on missions from proceedings in domestic courts and international tribunals.[56] Similar immunities from local and international legal processes typically extend to personnel contributed by TCNs under Status of Forces

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50 Ibid.

51 Ibid.

52 Cameron, above n 16, 116–17.

53 See, eg, *Prosecutor v Akayesu (Judgement)* (International Criminal Tribunal for Rwanda, Appeals Chamber, Case No ICTR-96-4, 1 June 2001) [437]–[443]. There is broad consensus that non-state armed groups are bound by IHL, although the precise basis and extent of this application is debated. For discussion, see Antonio Cassese, 'The Status of Rebels under the *1977 Geneva Protocol on Non-International Armed Conflicts*' (1981) 30 *International and Comparative Law Quarterly* 416; Sandesh Sivakumaran, 'Binding Armed Opposition Groups' (2006) 55 *International and Comparative Law Quarterly* 369.

54 Cameron and Chetail, above n 12, 80–1.

55 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press, 2005) vol 1, 607.

56 *Convention on the Privileges and Immunities of the United Nations*, opened for signature 13 February 1946, 1 UNTS 15 (entered into force 17 September 1946) arts 5 and 6 ('*CPIUN*').

Agreements,[57] as we will discuss at greater length below. This potentially covers PMSCs involved in UN PKOs. There is, accordingly, some doubt as to how UN peacekeepers may be held practically accountable for violations of IHL and other international norms. On the other hand, the *Convention on the Safety of United Nations and Associated Personnel* ('*Safety Convention*') affirms the responsibility of UN personnel to respect IHL[58] and Status of Forces Agreements also typically reference these obligations.[59] The second barrier to accountability in this area is that the categorisation of PMSCs in UN PKOs under IHL remains disputed. The context for this issue is provided by the sharp distinction under IHL between combatants and civilians.

IHL encourages a clear and reliable division between combatants and non-combatants. The principle of distinction — a central tenet of the law of armed conflict — requires combatants to distinguish at all times between military targets and civilian objects and stipulates that only military targets may be the object of attack. The importance of the distinction between combatants and non-combatants is reflected in art 43(2) of the *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts* ('*Additional Protocol I*'), which provides that '[m]embers of the armed forces of a Party to a conflict … are combatants, that is to say, they have the right to participate directly in hostilities.'[60] According to art 50(1), anyone who is not legally a combatant is classified a civilian.[61] Article 48 further provides that parties 'shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives'.[62]

The question of whether members of PMSCs in UN PKOs are combatants or civilians under IHL is important for accountability due to its implications for the use of force. We have seen that art 43(2) designates combatants as the primary agents of armed conflict.[63] It is sometimes suggested that this means civilians are prohibited under IHL from using armed force against combatants (unless, perhaps, they do so in self-defence).[64] Call this the *prohibitive view* of civilian status. The prohibitive view raises difficulties for the status of PMSCs. If PMSCs are combatants, then this view holds that they are permitted to use force against other combatants and military objectives. However, they then also become fair targets for other participants. If PMSCs are not combatants — that is, if they are

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57 Pressler, above n 25, 157.

58 *Convention on the Safety of United Nations and Associated Personnel*, opened for signature 9 December 1994, 2051 UNTS 363 (entered into force 15 January 1999) art 20(a) ('*Safety Convention*').

59 Katarina Grenfell, 'Perspective on the Applicability and Application of International Humanitarian Law: The UN Context' (2013) 95 *International Review of the Red Cross* 645, 648–9.

60 *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, opened for signature 12 December 1977, 1125 UNTS 3 (entered into force 7 December 1978) art 43(2) ('*Additional Protocol I*').

61 Ibid art 50(1).

62 Ibid art 48.

63 Ibid art 43(2).

64 See, eg, Dörmann, above n 18; Solis, above n 18, 222–5. For critical discussion, see Jonathan Crowe and Kylie Weston-Scheuber, *Principles of International Humanitarian Law* (Edward Elgar, 2013) 46–8.

civilians — then they are immune from direct attack. However, the prohibitive view then holds that they may not exercise force in armed conflict. These problems seem to raise doubts about the suitability of IHL to govern PMSCs in UN PKOs. However, we argue below that these problems are allayed if the prohibitive view is rejected.

B *Applying the Principle of Distinction*

It is useful to begin with a preliminary assessment of whether members of PMSCs in UN PKOs are, generally speaking, best viewed as combatants or civilians. The classic definition of combatant status under IHL is found in art 4 of *Geneva Convention III*.[65] That provision sets out the categories of people who are entitled to prisoner of war status. The first category comprises members of the regular armed forces of a party to the conflict.[66] The second category covers members of other armed groups, such as militias and volunteer corps, who are under responsible command, bear a fixed, distinctive sign recognisable at a distance, carry arms openly, and respect the requirements of IHL.[67]

A broadly similar definition, albeit with some differences, is found in arts 43 and 44 of *Additional Protocol I*. That definition covers all armed forces or groups under the command of a party to the conflict who are subject to an internal disciplinary system and distinguish themselves from the civilian population or, where this is not possible, carry arms openly whenever engaging in or preparing to engage in an attack.[68] The main difference between the definitions is that whereas *Geneva Convention III* requires combatants to systematically distinguish themselves from civilians at all times, *Additional Protocol I* recognises that in some cases they may only do so when launching an attack. Further, *Geneva Convention III* treats the bearing of a fixed, distinctive sign (such as a uniform) as a necessary requirement of combatant status, while *Additional Protocol I* focuses on the overarching requirement that combatants distinguish themselves from the civilian population.

The criteria for determining whether an individual is entitled to civilian protections under IHL differ depending on whether the armed conflict is international or non-international in nature. There is strong (although not unanimous) support for the proposition that once a UN PKO is introduced, the relevant armed conflict automatically takes on an international character.[69] There

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65 *Geneva Convention Relative to the Treatment of Prisoners of War*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) ('*Geneva Convention III*').

66 *Geneva Convention III* art 4A(1).

67 *Geneva Convention III* art 4A(2).

68 *Additional Protocol I* arts 43(1) and 44(3).

69 For an overview of the debate on the 'automatic internationalization' of non-international armed conflicts involving UN PKOs, see Devon Whittle, 'Peacekeeping in Conflict: The Intervention Brigade, MONUSCO and the Application of International Humanitarian Law to United Nations Forces' (2015) 46 *Georgetown Journal of International Law* 837, 854–5. See also, Katie E Sams, 'IHL Obligations of the UN and other International Organisations Involved in International Missions' in Marco Odello and Ryszard Piotrowicz (eds), *International Military Missions and International Law* (Martinus Nijhoff, 2011) 45, 63; Robert Kolb, 'Report: Expert Meeting on Multinational Peace Operations: Applicability of International Humanitarian Law and International Human Rights Law to UN Mandated Forces' (Report, International Committee of the Red Cross ('ICRC'), 11–12 December 2003) 61, 61–2.

is no general definition of combatant status in non-international armed conflicts.[70] As a result, the treatment of an individual in a non-international armed conflict is conduct-based, in that it is dependent on that particular individual's participation in hostilities at the relevant point in time. The law of international armed conflicts, on the other hand, utilises the definitions of combatant status outlined above. This makes the rules of targeting and treatment status-based, rather than contextual. Combatants are defined by their membership of an appropriately constituted group. A person who is a combatant due to their membership of an appropriately constituted armed group does not lose that status because they are not, at a particular moment, actively engaged in hostilities.

The UN is very unlikely to be considered a party to an armed conflict, not least because the UN's impartiality is a fundamental characteristic of its peacekeeping operations.[71] The notion that each of the TCNs should be regarded as a party to the conflict also presents difficulties, since the troops may not be under the TCN's control.[72] Any attempt to categorise UN peacekeepers as combatants in an international armed conflict is therefore likely to depend on the application of the second limb of the definition of combatant status: namely, that applicable to non-state armed groups.[73] However, there is an obvious incongruity in using a standard designed to cover non-state groups to deal with forces operating under the governance or in association with the UN. PMSCs involved in UN PKOs will likely be organised enough to meet the standards of combatant status and will likely bear a fixed, distinctive sign. However, there may be a real question as to whether they could be said to carry arms openly or otherwise distinguish themselves from the civilian population. This issue demonstrates the basic incongruity in seeking to classify PMSCs in UN PKOs as combatants according to traditional definitions.

There is, by contrast, strong international support — as well as good reasons — for characterising UN peacekeepers as civilians. We have seen that the *Safety Convention* affirms the responsibility of UN personnel to respect IHL.[74] However, the *Safety Convention* only applies in so far as peacekeepers are not 'engaged as combatants'.[75] The UN Secretary-General's 1999 *Bulletin: Observance by the United Nations Forces of International Humanitarian Law* provides that peacekeepers are 'non-combatants, as long as they are entitled to the protection given to civilians under the international law of armed conflict'.[76]

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70 Solis, above n 18, 191. For helpful discussion, see Michael Bothe, 'Direct Participation in Hostilities in Non-International Armed Conflict' (Expert Paper, The Hague, 25–26 October 2004) <https://www.icrc.org/eng/assets/files/other/2004–05-expert-paper-dph-icrc.pdf> archived at <https://perma.cc/7EFV-92KX>.

71 Joachim A Koops et al, 'Introduction: The United Nations and Peacekeeping' in Joachim A Koops et al (eds), *The Oxford Handbook of United Nations Peacekeeping* (Oxford University Press, 2015) 7.

72 Whittle, above n 69, 855.

73 It is notable that the *Safety Convention* expressly contemplates the possibility that peacekeepers may be combatants under certain circumstances: art 2(2).

74 Ibid art 20(a).

75 Ibid art 2(2).

76 Kofi A Annan, *Secretary General's Bulletin: Observance by the United Nations Forces of International Humanitarian Law*, UN STOR, UN Doc ST/SGB/1999/13 (6 August 1999) s 1.2.

The *Bulletin* also provides that UN forces can (and should) be prosecuted for contraventions of IHL.[77] There is good reason for the UN's decision to characterise peacekeepers as non-combatants, since it immunises the peacekeepers from direct attack by the parties to the conflict. Peacekeepers, on this view, are akin to humanitarian workers. They are not there to participate directly in hostilities, so they should not be engaged militarily by other parties.[78]

The view adopted, albeit tentatively, by most experts is that UN peacekeepers are non-combatants — that is, civilians — unless they are 'engaged in fighting in an armed conflict', in which case they are combatants.[79] A potential problem for this view, however, is that UN peacekeepers are permitted to use force 'to accomplish [their] mandate'.[80] The prohibitive view of civilian status (as discussed above) holds that civilians who directly participate in armed exchanges violate international law, suggesting that UN peacekeepers who use force, even in defence of their mandate, may thereby contravene the laws of armed conflict. This leaves peacekeepers in a tenuous and ambiguous position. For example, a peacekeeper entrusted with the protection of high-level individuals or UN premises could quickly become embroiled in an armed exchange with combatants. However, abandoning the prohibitive view offers a solution to this problem.

C *The Significance of Combatant Status*

It is a fundamental principle of IHL (as applicable to international armed conflicts) that combatants cannot be punished merely for fighting against opposing forces. This is the traditional notion of combatant immunity. Combatants can, of course, be tried and punished for using indiscriminate or prohibited weapons, as well as for other violations of international law. However, as long as they respect the laws of armed conflict, they are entitled to engage in armed exchanges. This is why art 43(2) of *Additional Protocol I* states that combatants 'have the right to participate directly in hostilities'. The prohibitive view of civilian status, as discussed above, goes beyond the notion of combatant immunity to draw conclusions about civilians. This view holds that while combatants may participate in hostilities without legal sanctions, civilians are prohibited from doing so.

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77 Ibid s 4.

78 It has been suggested that PMSC personnel may be 'persons accompanying armed forces' pursuant to art 4A(4) of *Geneva Convention III*. See also Cameron and Chetail, above n 12, 432. Persons falling into this category are technically non-combatants, although they are entitled to prisoner of war status.

79 Michael Bothe, 'War Crimes' in Antonio Cassese, Paola Gaeta and John R W D Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) vol 1, 379, 411. See also Cameron and Chetail, above n 12, 27; Chia Lehnardt, 'Peacekeeping' in Simon Chesterman and Angelina Fisher (eds), *Private Security, Public Order: The Outsourcing of Public Services and its Limits* (Oxford University Press, 2009) 205, 209; Marten Zwanenburg, 'United Nations and International Humanitarian Law' in Rüdiger Wolfrum et al (eds), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, at October 2015) [20].

80 Trevor Findlay, *The Use of Force in UN Peace Operations* (Oxford University Press, 2002) 8.

The pivotal question here is what art 43(2) means when it says that combatants 'have the right to participate directly in hostilities'.[81] One way of interpreting this provision is to infer that *only* combatants have the right to participate in hostilities. This would make it a violation of IHL for a non-combatant to engage directly in armed conflict. A practical illustration of this interpretation can be found in § 950v(15) of the *Military Commissions Act of 2006*, the United States statute enacted to govern military commissions hearing charges against detainees at Guantanamo Bay.[82] That provision made it a crime under US law, punishable by death, to intentionally kill 'one or more persons, including lawful combatants, in violation of the law of war'.

In March 2007, the provision was used as the basis for a charge against Australian detainee David Hicks, based on the allegation that he attempted to shoot anti-Taliban forces during the war in Afghanistan.[83] Hicks, as a member of an armed group deemed not to satisfy the legal requirements for combatant status, was what the *Military Commissions Act of 2006* described as an 'unlawful enemy combatant'.[84] The charge against Hicks under § 950v(15) was dropped before trial. The US Congress subsequently enacted a revised *Military Commissions Act of 2009*, which removed the term 'unlawful enemy combatant', replacing it with 'unprivileged enemy belligerent'.[85] However, the crime of 'murder in violation of the law of war', previously contained in § 950v(15), was retained.[86]

The prohibitive view of civilian status, then, has support from at least some quarters of the international community. As noted above, it has also been endorsed by scholars.[87] However, the view creates serious difficulties when applied to UN peacekeepers. We have seen that there is compelling reason to regard UN peacekeepers as non-combatants for the purposes of international law. However, it seems odd to say that a peacekeeper who fires on combatants in pursuit of the peacekeeping mandate thereby commits a violation of international law. Our suggestion, then, is that it is a mistake to interpret art 43(2) of *Additional Protocol I* as prohibiting non-combatants from participating in hostilities. There is, after all, no provision in the *Geneva Conventions* or *Additional Protocols* expressly stating such a prohibition. Other provisions that expressly deal with the position of civilians who engage directly in hostilities, such as art 51(3) of *Additional Protocol I*, merely state that they lose their immunity from attack while doing so.

Article 43(2), on this interpretation, serves two main purposes. The first is to reinforce the importance of the distinction between combatants and non-combatants, by designating combatants as the primary agents of warfare. The second is to emphasise that combatants may not be tried or punished merely for taking part in hostilities. The provision therefore reinforces the prohibition on

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81 *Additional Protocol I* art 43(2).

82 10 USC § 950v(b)(15) (2006).

83 For further discussion, see Jonathan Crowe, 'Combatant Status and the "War on Terror": Lessons from the Hicks Case' (2008) 33(2) *Alternative Law Journal* 67, 69.

84 10 USC § 948a (2006).

85 10 USC § 948a(7) (2009).

86 Ibid § 950t(15).

87 Dörmann, above n 18; Solis, above n 18, 222–5.

reprisals against prisoners of war.[88] Article 43(2) refers to a 'right to participate directly in hostilities', but the term 'right' is notoriously ambiguous. Wesley Newcomb Hohfeld famously argued that the term is commonly used in at least four distinct senses.[89] One possible interpretation of art 43(2) would be that it confers what Hohfeld calls a 'privilege' or 'liberty': combatants are free to participate in hostilities and non-combatants are not.[90] However, we suggest the provision is better understood as conferring what Hohfeld terms an 'immunity'.[91] Combatants enjoy an immunity against punishment merely for taking part in hostilities. Non-combatants have no such immunity, but this does not mean they are prohibited from taking up arms.

PMSC personnel in UN PKOs, on this view, are not culpable under international law for the use of force against combatants, as long as they comply with the principles of IHL. They are bound by the same legal rules as any other participant in armed conflict. They cannot directly attack civilians or their property; they cannot mount their attacks in a disproportionate way; they cannot mistreat civilians or captured combatants; they cannot use prohibited weapons or tactics. They are classified as non-combatants, so they enjoy a general immunity from attack. However, if they take up arms and engage directly in hostilities, they can lawfully be targeted by opposing forces for the duration of their involvement.[92] They could also be liable to prosecution under domestic law, since they do not benefit from combatant immunity (although this is unlikely, for reasons explored below). However, provided they abide by the laws of war, they are not prohibited from using force to pursue their mandate.

IV A HOLISTIC APPROACH TO PMSC ACCOUNTABILITY

A *The Accountability Deficit*

We have argued so far that IHL has the resources to accommodate PMSCs in UN PKOs. PMSC personnel do not occupy a legal vacuum by falling outside the existing categories of persons under IHL; rather, they are best viewed as non-combatants who may, in some circumstances, participate directly in armed conflict (and do not necessarily violate IHL by doing so). However, holding PMSC personnel accountable for violations still poses major challenges. IHL traditionally lacks its own avenues of international enforcement, relying on the internal disciplinary systems of armed forces, supplemented by ad hoc and (more recently) permanent international criminal tribunals. The UN occupies a similar position to a party to a conflict in terms of holding its personnel accountable, but this mechanism may not be effective in relation to PMSCs.

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88 *Geneva Convention III* art 13.

89 Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16; Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 *Yale Law Journal* 710, 716–17. For an overview, see Jonathan Crowe, *Legal Theory* (Thomson Reuters, 2nd ed, 2014) ch 7.

90 Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', above n 89, 32–7.

91 Ibid 55.

92 *Additional Protocol I* art 51(3).

Domestic avenues for holding PMSCs to account are similarly restricted. Host states are unlikely to prosecute PMSC personnel. The capability of host states to prosecute private security actors during armed conflict is likely to be severely limited, while contributing states are often reluctant to prosecute their own troops or associated personnel for fear that this will undermine morale.[93] Many contributing states require that they retain exclusive jurisdiction over their nationals as a condition of their deployment in UN PKOs. This generally extends to private contractors.[94] Furthermore, the collection of evidence for the prosecution of war crimes in a national court generally requires international cooperation. Few states are prepared to undertake the efforts required to acquire evidence.[95]

PMSC personnel may also be granted immunity through judicial approaches such as the political question defence in the US.[96] Under this approach, courts decline to adjudicate upon claims relating to governmental action where discretion is essential to protect constitutional or political interests.[97] Moreover, if PMSC personnel are prosecuted domestically, they may well be charged with ordinary domestic crimes, rather than war crimes. For example, the former Blackwater employees implicated in the Nisour Square massacre were charged with manslaughter and firearms offences,[98] even though their conduct could have amounted to violations of the United States *War Crimes Act of 1996*, such as murder of civilians, mutilation or maiming and intentionally causing serious bodily injury.[99] Finally, not all states have adopted the appropriate domestic legislation that can be used to prosecute war crimes. The prosecution of war crimes through the application of universal jurisdiction is rare for diplomatic reasons.[100]

It might seem, then, that even if IHL can deal with the status of PMSCs in UN PKOs, it lacks the resources to hold their members accountable for violations. The concluding parts of this article outline a tentative response to this problem. We wish to propose that the most promising avenue for addressing the accountability deficit outlined above lies in the current trend towards a unified law of armed conflict that encompasses not only IHL proper, but also aspects of IHRL, ICL and the law governing the use of force. The overlap of IHL with human rights and criminal standards, in particular, offers significant resources for holding PMSCs to account. A legal and political discourse that emphasises these areas of overlap therefore holds the potential to help overcome perceptions that PMSCs operate in a legal vacuum and reveals the full range of legal mechanisms available.

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93 Quirico, above n 49, 441.
94 Ibid 444–5.
95 Ibid 442.
96 Ibid 443.
97 David Cole, 'Challenging Covert War: The Politics of the Political Question Doctrine' (1985) 26 *Harvard International Law Journal* 155, 163–4.
98 Tara Lee, 'MEJA for Street Crimes, Not War Crimes' (2009) 1 *De Paul Rule of Law Journal* 1, 4 n 10, 4–5.
99 18 USC § 2441(d)(1)(D)–(F).
100 Yves Sandoz, 'The Dynamic but Complex Relationship between International Penal Law and International Humanitarian Law' in José Doria, Hans-Peter Gasser and M Cherif Bassiouni (eds), *The Legal Regime of the International Criminal Court* (Martinus Nijhoff, 2009) 1049, 1054.

B *An Integrated Law of Armed Conflict?*

The issue of fragmentation in international law was deemed sufficiently important to be discussed in-depth in a report issued by a high profile study group of the International Law Commission ('ILC').[101] The study group was chaired by Martti Koskenniemi, who had explored the issue previously in a number of academic publications.[102] The ILC study group placed particular emphasis in its report on the need for what it termed 'systemic integration' of different fields of international law.[103] The proliferation of different bodies of rules within international law, differentiated by subject matter, region or forum, creates possible inconsistencies and prevents states and individuals from readily knowing their obligations.[104] Decision-makers therefore have a responsibility to seek coherence between the various norms that are relevant to a dispute that comes before them.

IHL demonstrates the dangers of fragmentation as much as any other field of international law. One example of this is the traditional sharp distinction between the *jus ad bellum* (the law on the use of force) and the *jus in bello* (the rules governing the conduct of armed conflict or IHL proper). This distinction has the positive consequence of ensuring that IHL applies uniformly to all parties to an armed conflict, regardless of how the conflict started. On the other hand, it creates two separate bodies of rules relating to the use of armed force under international law and therefore leads to a degree of fragmentation. IHL itself is traditionally divided into the Hague and Geneva law (although this distinction has become less relevant following the adoption of the *Additional Protocols*), as well as containing distinctive bodies of law applicable in international and non-international armed conflicts. Issues of fragmentation also arise from the relationship of IHL to human rights norms, criminal law and other overlapping

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101 International Law Commission, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, 58th sess, UN Doc A/CN.4/L.682 (13 April 2006) ('*Fragmentation of International Law Report*'). For a helpful overview, see Anthony E Cassimatis, 'International Humanitarian Law, International Human Rights Law and Fragmentation of International Law' (2007) 56 *International and Comparative Law Quarterly* 623.

102 See, eg, Martti Koskenniemi, 'The Politics of International Law' (1990) 1(1) *European Journal of International Law* 4; Martti Koskenniemi and Päivi Leino, 'Fragmentation of International Law? Postmodern Anxieties' (2002) 15 *Leiden Journal of International Law* 553.

103 *Fragmentation of International Law Report*, UN Doc A/CN.4/L.682, 25–8.

104 Ibid 245 [483].

fields of international jurisprudence. The relationship between IHL and IHRL, in particular, has been widely discussed and debated.[105]

There has, however, been a general trend over time towards the erosion of these various jurisprudential boundaries. Authors such as Christopher Greenwood have argued that the distinction between the *jus ad bellum* and the *jus in bello* is not and perhaps cannot be as stark as traditionally supposed[106] — a point reinforced by the overlaps that have emerged in decisions such as the International Court of Justice's ('ICJ') *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)*.[107] The overlapping foundations of the Hague and Geneva law have been widely noted,[108] while the distinction between international and non-international conflicts has also reduced in importance over time.[109] The International Criminal Tribunal for the Former Yugoslavia ('ICTY') famously recognised the artificiality of this distinction in its characterisation of the conflict in the former Yugoslavia as having 'both internal and international aspects'.[110] Non-international conflicts not infrequently possess an extraterritorial aspect — for example, incursions over state borders — and may feature the involvement of international forces fighting alongside the parties or acting in a peacekeeping capacity. Armed conflicts may also arise between a state and a non-state party operating from the territory of another state but not under that state's authority or control, such as the 2006 conflict between Israel and Hezbollah forces operating from within Lebanon.[111] Some, although not all,

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105 See, eg, Jonathan Crowe, 'Coherence and Acceptance in International Law: Can Humanitarianism and Human Rights be Reconciled?' (2014) 35 *Adelaide Law Review* 251; Theodor Meron, 'The Humanization of Humanitarian Law' (2000) 94 *American Journal of International Law* 239; Dale Stephens, 'Human Rights and Armed Conflict — The Advisory Opinion of the International Court of Justice in the *Nuclear Weapons Case*' (2001) 4 *Yale Human Rights and Development Law Journal* 1; René Provost, *International Human Rights and Humanitarian Law* (Cambridge University Press, 2002); Hans-Joachim Heintze, 'On the Relationship between Human Rights Law Protection and International Humanitarian Law' (2004) 86 *International Review of the Red Cross* 789; William Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya' (2005) 16 *European Journal of International Law* 741; Hans-Joachim Heintze, 'The European Court of Human Rights and the Implementation of Human Rights Standards during Armed Conflicts' (2005) 45 *German Yearbook of International Law* 60; Noam Lubell, 'Challenges in Applying Human Rights Law to Armed Conflict' (2002) 87 *International Review of the Red Cross* 737; Henckaerts and Doswald-Beck, above n 55, 299–305; Cassimatis, above n 101.

106 Christopher Greenwood, 'The Relationship between the *Ius ad Bellum* and the *Ius in Bello*' (1983) 9 *Review of International Studies* 221, 222.

107 *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, 240 [25]–[26] ('*Nuclear Weapons Advisory Opinion*').

108 See, eg, James Summers, 'Introduction' in Caroline Harvey, James Summers and Nigel D White (eds), *Contemporary Challenges to the Laws of War* (Cambridge University Press, 2014) 1, 4.

109 Emily Crawford, 'Unequal before the Law: The Case for the Elimination of the Distinction between International and Non-International Armed Conflicts' (2007) 20 *Leiden Journal of International Law* 441, 441.

110 *Prosecutor v Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1, 2 October 1995) [77] ('*Tadić*').

111 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* (Report, ICRC, 2011) 9–11.

rules governing international armed conflicts have become applicable to non-international armed conflicts as a matter of customary international law.[112]

The ICTY Appeals Chamber commented in the *Tadić* decision on jurisdiction that since the 1930s the distinction between international and non-international conflict has become increasingly blurred.[113] The ICTY Appeals Chamber attributed this to various factors, including the increasing frequency and protracted nature of civil conflicts, sometimes involving the whole population of the state where they occur.[114] The increasing interdependence of states in the modern world also means that armed violence within one state will impact on the interests of others, making them more likely to have an interest in such internal conflicts. The Appeals Chamber further pointed to the relevance of human rights doctrines in this context and, in particular, to their implications for state sovereignty:

> Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted 'only' within the territory of a sovereign State?[115]

Influential discussions of the relationship between IHL and IHRL have recently been produced by both the ICJ[116] and the ILC.[117] These two bodies have helped to forge a consensus that IHL and IHRL should be viewed as part of an integrated body of rules governing armed conflicts. The orthodox view is now that the two fields of law can be reconciled by drawing on the maxim *lex specialis derogat legi generali* (the specialised law overrides the general law).[118] In wartime, IHRL is the *lex generalis* (general law); it gives way to the *lex specialis* (specialised law) of IHL. In other words, during armed conflicts, the former set of norms is amended by the latter to the extent that they are in tension. The upshot of this view is that IHL and IHRL must both be taken into account when analysing a situation of armed conflict. As the ICJ noted in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)*:

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112 Henckaerts and Doswald-Beck, above n 55, xxix. See also International Committee of the Red Cross, above n 111, 12.

113 *Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* (International Criminal Tribunal for the Former Yugoslavia, Appeals Chamber, Case No IT-94-1, 2 October 1995).

114 Ibid [97].

115 Ibid.

116 *Nuclear Weapons Advisory Opinion* [1996] ICJ Rep 226, 240 [25]–[26]; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion)* [2004] ICJ Rep 136, 178 [106] ('*Israeli Wall Advisory Opinion*'); *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168, 242–3 [216]–[217].

117 *Fragmentation of International Law Report*, UN Doc A/CN.4/L.682.

118 See, eg, *Nuclear Weapons Advisory Opinion* [1996] ICJ Rep 226, 240 [25]; *Israeli Wall Advisory Opinion* [2004] ICJ Rep 136, 178 [106]; *Fragmentation of International Law Report*, UN Doc A/CN.4/L.682, 47–8.

> [T]he protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation … As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; yet others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.[119]

A related point could potentially be made about the relationship between IHL and ICL. The point in this context is not so much that one field of law gives way to the other in cases of tension or conflict, but rather that they are mutually supporting, at least so far as serious violations of IHL are concerned. The content of international criminal standards in this area draws heavily on the norms of IHL, while the mechanisms and procedures of ICL have furnished humanitarian law with an important method of promulgation and enforcement, particularly since the Second World War. There is, then, increasing reason to speak of an integrated international law of armed conflict that is not reducible to IHL or any other traditional area, but includes norms with a range of different sources. This development, although still evolving, is not (we think) highly controversial, but its implications for specific issues are nonetheless prone to be overlooked. We therefore wish to conclude this article by exploring how an integrated law of armed conflict can respond to the accountability deficit raised by the involvement of PMSCs in PKOs. This broader perspective provides a useful adjunct to the resources of IHL discussed previously.

C *The Role of Human Rights*

The IHRL framework is highly relevant to the accountability of PMSCs in PKOs. While it is not possible to enumerate all the rights that might be at risk during PKOs,[120] there are some that are particularly susceptible to violations.[121]

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119 *Israeli Wall Advisory Opinion* [2004] ICJ Rep 136, 178 [106]. See also *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* [2005] ICJ Rep 168, 242–3 [216]–[217].

120 For a comprehensive review of human rights that PMSCs can threaten, see Federico Lenzerini and Francesco Francioni, 'The Role of Human Rights in the Regulation of Private Military and Security Companies' in Francesco Francioni and Natalino Ronzitti (eds), *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (Oxford University Press, 2011) 55, 60–78.

121 See, eg, *Brahimi Report*, UN Docs A/55/305 and S/2000/809; Borhan Amrallah, 'The International Responsibility of the United Nations for Activities Carried Out by UN Peace-keeping Forces' (1976) 32 *Revue Égyptienne de Droit International* 57; Marten Zwanenburg, *Accountability of Peace Support Operations* (Martinus Nijhoff, 1st ed, 2005) 1–8. For discussion of the UN and its human rights responsibilities, see Frédéric Mégret and Florian Hoffmann, 'The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities' (2003) 25 *Human Rights Quarterly* 314. Note also that the UN's self-identity is, to a large extent, inseparable from the concept of human rights. Article 55 of the *UN Charter* requires the UN to promote 'universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion'.

PMSC personnel can impinge on the right to life if they use excessive force.[122] It is readily foreseeable that misconduct by private security forces can infringe the right to liberty and to security of the person.[123] There is also a risk that PMSC personnel will violate the right to freedom from torture and cruel, inhuman and degrading treatment.[124] The atrocities at Abu Ghraib are perhaps the most widely publicised example of how this may occur; it was not only security personnel, but also interrogators and translators that were implicated in those violations.[125] The cholera epidemic in Haiti following poor sanitation practices by UN peacekeepers highlights how the right to health may be infringed during PKOs.[126] Allegations against peacekeepers for perpetrating sexual abuse and exploitation also demonstrate that the right to a private life can be violated (as well as prohibitions on sexual violence and gender discrimination).[127] Further, when peacekeepers do not undertake their duties diligently, the right to an adequate standard of living (including the right to food, clothing and housing) is at risk.[128] Finally, theft by PMSC personnel can also infringe the right to the use and enjoyment of property.[129]

The human rights mentioned above are enumerated in treaties that impose obligations upon states. They do not directly bind non-state actors.[130] However, there have been recent attempts to bridge the accountability gaps that ensue from the lack of binding human rights obligations on corporations.[131] The 2003 UN *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with regard to Human Rights* was an attempt to impose on corporations the same human rights duties applicable to states.[132] Following dissatisfaction with this proposal, a new mandate was established for a Special Representative of the Secretary-General ('SRSG') to investigate and report on

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122 The right to life is proclaimed in art 6 of the *International Covenant on Civil and Political Rights* ('*ICCPR*'), as well as in customary international law. See *ICCPR*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 6(1).

123 Ibid art 9(1).

124 *Universal Declaration of Human Rights,* GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) art 5 ('*UDHR*').

125 Cameron and Chetail, above n 12, 665.

126 The right to health is not expressly provided for in the *ICCPR*, however art 25(1) of the *UDHR* provides that '[e]veryone has the right to a standard of living adequate for the health and well-being of himself [sic] and of his [sic] family, including food, clothing, housing and medical care and necessary social services'.

127 See Human Rights Committee, *General Comment No 16: Article 17 (The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation*), 32nd sess, UN Doc HRI/GEN/1/Rev.9 (8 April 1988) [8].

128 See Lenzerini and Francioni, above n 120, 66.

129 Ibid 72–3.

130 Note, however, the suggestion of Daragh Murray that sufficiently organised non-state groups could be bound by international human rights norms in the absence of directly applicable treaties: Daragh Murray, *Human Rights Obligations of Non-State Armed Groups* (Hart, 2016) 42–3.

131 Jena Martin and Karen E Bravo, 'Introduction: More of the Same? Or Introduction of a New Paradigm?' in Jena Martin and Karen E Bravo (eds), *The Business and Human Rights Landscape: Moving Forward, Looking Back* (Cambridge University Press, 2016) 1, 4.

132 Sorcha MacLeod 'The Role of International Regulatory Initiatives on Business and Human Rights for Holding Private Military and Security Contractors to Account' in Francesco Francioni and Natalino Ronzitti (eds), *War by Contract: Human Rights, Humanitarian Law and Private Contractors* (Oxford University Press, 2011) 343, 345.

the issue of businesses and human rights.[133] At the end of his mandate, the SRSG, John Ruggie, presented the UN *Guiding Principles on Business and Human Rights* ('*Guiding Principles*') and the three-pillar Protect-Respect-Remedy Framework.[134] In doing so, he effectively created the first UN-approved global standards that can be used to 'prevent and address the risk of adverse impacts on human rights linked to business activity'.[135]

The SRSG's report established the 'Protect, Respect and Remedy' framework as the standard to which corporate behaviour should adhere.[136] The SRSG's report reaffirmed that the primary duty to prevent abuses of human rights lies with the state.[137] However, it also asserted that businesses have an active obligation to respect and protect human rights.[138] This includes the inclusion of avenues through which victims of human rights abuses resulting from a corporation's activities can access remedies.[139] Integral to this framework is the responsibility incumbent upon businesses to exercise due diligence in the performance of commercial activities.[140] This due diligence requirement has four essential components: a written company policy communicating the corporation's commitment to respect human rights; the establishment of periodic assessments identifying human rights implications (both actual and potential) of the corporation's activities; instituting internal control and oversight systems that address issues highlighted by these periodic assessments; and mechanisms through which corporations can refer to and report on its human rights performance.[141]

The Organisation for Economic Cooperation and Development's ('OECD') *Guidelines for Multinational Enterprises* ('*Guidelines*') is another initiative that sought to develop a set of principles that, if not impose, at least promote human rights considerations in business practices.[142] The *Guidelines* endorse a range of voluntary mechanisms and standards. They require signatory states to establish

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133 Ibid 346.

134 John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie — Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework*, 17th sess, Agenda Item 3, UN Doc A/HRC/17/31 (21 March 2011) annex ('*Guiding Principles*').

135 UN Office of the High Commissioner for Human Rights, *Call for Input: Report on Business and Human Rights and the UN System* (2012) <http://www.ohchr.org/EN/Issues/Business/Pages/CallforinputreportonbusinessandHRandtheUNsystem.aspx> archived at <https://perma.cc/UDQ9-GKCP>.

136 *Guiding Principles*, UN Doc A/HRC/17/31, 4 [6].

137 Ibid 4 [6] and 6.

138 Ibid 20 [22].

139 John Ruggie, *Protect, Respect and Remedy: A Framework for Business and Human Rights, Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie*, 8th sess, Agenda Item 3, UN Doc A/HRC/8/5 (7 April 2008) 24 [93] ('*Protect, Respect and Remedy*').

140 *Guiding Principles*, UN Doc A/HRC/17/31, 4 [6].

141 John Ruggie, *Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie – Business and Human Rights: Further Steps Towards the Operationalization of the 'Protect, Respect and Remedy' Framework*, 14th sess, Agenda Item 3, UN Doc A/HRC/14/27 (9 April 2010) ('*Ruggie Report*') 17 [83].

142 Organisation for Economic Cooperation and Development ('OECD'), *OECD Guidelines for Multinational Enterprises* (OECD, 2011).

National Contact Points ('NCPs') through which the *Guidelines* can be implemented. Any 'interested party' can lodge a complaint through a specific instance procedure, alleging extraterritorial wrongdoing by a business operating from an OECD adherent state.[143] The NCP can investigate these complaints. Some national NCPs, like that of the United Kingdom, publicise their determinations concerning corporate human rights compliance.

These UN and OECD guidelines are arguably the most influential set of human rights standards for businesses and, in the context of PMSCs, both initiatives have several features to recommend them. First, both soft law instruments use a multi-stakeholder approach to address human rights violations by corporations and bring human rights to the attention of company executives. Secondly, both initiatives are addressed to the particular risks that PMSCs regularly face, particularly the increased risk of human rights violations in conflict zones. The SRSG's report specified that the worst corporate abuses of human rights occur during armed conflicts and that, in such contexts, no human rights regime can function precisely as expected.[144] Particular mention was made of security forces tasked with protecting company installations and personnel in armed conflict situations.[145]

Similarly, the OECD produced the Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones. Not only does the Risk Awareness Tool educate companies operating in conflict zones about the required level of sensitivity to human rights, but it also identifies that corporations can make a positive contribution to social progress in such areas.[146] Thirdly, both standards promote reporting mechanisms and transparency to varying degrees. While the UN *Guiding Principles* recommend a reporting process in its due diligence standards, the OECD *Guidelines* entail a more formal accountability mechanism by requiring states party to establish an NCP. The standards as a whole therefore implement a combined top-down and bottom-up approach that foresees the application of international human rights standards that are implemented on a domestic level through NCPs.[147] Regulatory initiatives such as the *Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict*[148] and the *International Code of Conduct for Private Security Service Providers*[149] further aim to reiterate and boost the international legal standards applicable to PMSCs and the states engaging their services.[150] These

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143 MacLeod, above n 132, 355.

144 *Ruggie Report*, UN Doc A/HRC/14/27, 10 [44].

145 Ibid.

146 MacLeod, above n 132, 353; OECD, 'Annual Report on the OECD Guidelines for Multinational Enterprises: Conducting Business in Weak Governance Zones' (Report, OECD, 2006) 151, 168.

147 MacLeod, above n 132, 355.

148 *Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies during Armed Conflict*, UN GAOR, 63rd sess, Agenda Item 76, UN SCOR, UN Docs A/63/467 and S/2008/636 (6 October 2008).

149 International Code of Conduct Association, *International Code of Conduct for Private Security Service Providers* (9 November 2010).

150 Faiza Patel, 'Regulating Private Military and Security Companies: A Comprehensive Solution' (2013) 107 *American Society of International Law Proceedings* 201, 202.

documents, like the other standards discussed above, are not legally binding and cannot be formally enforced. This represents the most evident shortcoming of a human rights approach to PMSC accountability.

However, the role of soft law should not be too readily dismissed. The accountability of non-state actors requires a multi-layered response involving a combination of approaches and legal frameworks. The mechanisms discussed above should not be viewed in isolation, but rather placed alongside the existing norms of IHL and human rights. The law of armed conflict, as we have seen, relies heavily on internal disciplinary mechanisms for its effectiveness. Standards and tools that help promote cultural awareness of, and compliance with, international norms within organisations that play a role in armed conflict therefore form an important part of the overall accountability picture in this area. The importance of enforceable norms should not, of course, be discounted. Indeed, such formally enforceable standards were originally mooted as part of the Protect, Respect and Remedy framework.[151] Nevertheless, as Amartya Sen notes, the protection of human rights 'need not … be confined only to making new laws'.[152] The social pressure exerted by interlocking soft law mechanisms reinforces the need for a holistic perspective in this area.

D *Criminal Accountability*

ICL is a broad body of law covering the substantive and procedural rules governing international crimes. There is a strong historical interconnection between IHL and ICL with regard to enforcement of the norms of armed conflict.[153] ICL imposes direct liability upon individuals for serious violations of the laws of armed conflict. It also applies outside the context of armed conflict, covering crimes against humanity, genocide, torture, aggression and terrorism.[154] ICL does not apply to corporations, but could apply to PMSC personnel as individuals.[155] PMSC personnel are arguably more likely than officials or employees of other kinds of corporations to become direct perpetrators of international crimes, rather than engage in criminal behaviour by complicity or by aiding or abetting.[156] Criminal responsibility, being associated with notions of culpability and retribution, is an appealing option for serious violations.[157] There is also the possibility of command responsibility for officials in positions of de facto control.[158]

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151 MacLeod, above n 132, 351.

152 Amartya Sen, 'Human Rights and the Limits of Law' (2006) 27 *Cardozo Law Review* 2913, 2919.

153 For a detailed overview, see Marco Sassòli, 'Humanitarian Law and International Criminal Law' in Antonio Cassese (ed), *The Oxford Companion to International Criminal Justice* (Oxford University Press, 2009) 111, 111–20.

154 Antonio Cassese et al, *Cassese's International Criminal Law* (Oxford University Press, 3rd ed, 2013) chs 4–8.

155 Cameron and Chetail, above n 12, 582–97.

156 Ibid 598.

157 On the significance of the ideas of criminal responsibility and culpability in the context of international criminal law, see Antoine Garapon, *Des Crimes qu'on ne Peut ni Punir ni Pardonner: Pour une Justice Internationale* (Odile Jacob, 2002).

158 Crowe and Weston-Scheuber, above n 64, 184–5.

The applicability of ICL to PMSC personnel as individuals is relatively straightforward in principle. All individuals are subjects of ICL if their acts fulfil the constitutive elements of the various international crimes.[159] There are, however, potential jurisdictional issues concerning enforcement before international criminal courts and tribunals. The tribunal with the widest jurisdiction is the International Criminal Court ('ICC').[160] The *Rome Statute of the International Criminal Court* ('*Rome Statute*'), which entered into force in 2002, established the ICC as a permanent tribunal dealing with 'individual criminal responsibility for the most serious international crimes of concern to the international community as a whole where national jurisdictions are unwilling or unable genuinely to investigate or prosecute.'[161] Article 8 of the *Rome Statute* deals with war crimes, and lists the constitutive elements of each crime. The *Rome Statute* confers jurisdiction to prosecute war crimes in both international and non-international armed conflicts, although the list of applicable crimes differs subtly between the two contexts.[162] Civilians and combatants can both be held liable for war crimes without distinction.

The focus ICL places on individuals makes it well placed to hold PMSC personnel accountable in the context of PKOs. ICL also arguably places less reliance than IHL on distinctions between wartime and peacetime, and international and non-international armed conflicts, since at least some international crimes — such as genocide and crimes against humanity — transcend these boundaries.[163] Nonetheless, there are several remaining barriers to accountability. We saw above that PMSCs as corporations cannot be found liable under ICL,[164] although individual personnel may be prosecuted and corporate officials could also potentially be held to account as de facto authorities. The most important barrier to PMSC accountability, however, is the potential immunity of personnel directly contracted by the UN. The ICC has jurisdiction over all natural persons for the commission of war crimes.[165] Further, the *erga omnes* nature of grave violations of IHL should in theory

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159 Cameron and Chetail, above n 12, 597.

160 The International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda were both established as ad hoc international criminal tribunals and are the source of significant jurisprudence on international criminal law. However, the International Criminal Court 'has given a stupendous impulse to the evolution of a corpus of international criminal rules proper': Cassese et al, above n 154, 7.

161 Hans-Peter Kaul, 'International Criminal Court' in Rüdiger Wolfrum et al (eds), *The Max Planck Encyclopedia of Public International Law* (Oxford University Press, at December 2010) [1]; *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('*Rome Statute*').

162 The most important difference is perhaps that jurisdiction over war crimes in non-international armed conflicts is not universal. For discussion, see Djamchid Momtaz, 'War Crimes in Non-International Armed Conflicts under the Statute of the International Criminal Court' (1999) 2 *Yearbook of International Humanitarian Law* 177.

163 *Rome Statute* arts 6–7. But see *Rome Statute* art 8 which distinguishes between international and non-international armed conflicts with respect to war crimes.

164 There is, however, a nascent concept of corporate criminal liability under international law. Many states hold (or are starting to hold) corporations liable for crimes at the domestic level. This may pave the way for international corporate criminal liability. For an excellent overview, see Mark Pieth and Radha Ivory, 'Emergence and Convergence: Corporate Criminal Liability Principles in Overview' in Mark Pieth and Radha Ivory (eds), *Corporate Criminal Liability: Emergence, Convergence, and Risk* (Springer, 2011) 4.

165 *Rome Statute* art 1.

facilitate the prosecution of PMSC personnel.[166] However, the UN has absolute immunity under the *UN Charter* and the 1946 *Convention on the Privileges and Immunities of the United Nations* (‘*CPIUN’*). Article 105(1) of the *UN Charter* provides that ‘the Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfilment of its purposes’.

The immunity granted under the *CPIUN* is even stronger. Section 2 of the *CPIUN* interprets art 105(1) as granting absolute immunity to the organisation.[167] The UN is afforded ‘immunity from every form of legal process except insofar as in any particular case [the UN] has expressly waived its immunity’.[168] UN officials and experts on mission enjoy functional immunity under the *CPIUN* for any acts performed in an official capacity or in the course of their missions,[169] while similar immunities typically extend to the forces of TCNs under the applicable Status of Forces Agreements.[170] This extension of immunity also has the effect of encouraging TCNs to contribute troops to PKOs.[171] The immunity granted under Status of Forces Agreements may encompass PMSCs; for example, the US frequently stipulates in its Status of Force Agreements that it retains exclusive jurisdiction over its nationals, including private contractors.[172] Prosecution of PMSC personnel working in PKOs in the ICC may therefore depend on the goodwill of the UN or TCNs to waive immunity. In relation to the UN, ‘from a political perspective, it is doubtful whether the Security Council [would] authorize such a prosecution’.[173] A similar point applies to TCNs given the realities of domestic politics in many nations.

The jurisdiction of the ICC over nationals of TCNs is further diminished when art 16 of the *Rome Statute* is utilised. Under this provision, a renewable annual deferral of the ICC jurisdiction may be secured if a resolution to this effect is passed by the UN Security Council acting under ch VII of the *UN Charter*. A clear example of this is the Security Council *Resolution* relating to the renewal of the mandate of PKOs in Bosnia-Herzegovina.[174] *Resolution 1422* suspended the ICC’s jurisdiction over ‘officials’ or ‘personnel’ allocated to PKOs from states non-party to the *Rome Statute*.[175] A similar tendency can be seen in Security Council *Resolution 1497* and *Resolution 1593*, both of which established that states non-party to the ICC were to have exclusive jurisdiction

166 *Israeli Wall Advisory Opinion* [2004] ICJ Rep 136, 199–200 [157]–[159].

167 Marten Zwanenburg, ‘UN Peace Operationsbetween Independence and Accountability’ (2008) 5 *International Organizations Law Review* 23, 38.

168 *CPIUN* art 2(2).

169 *CPIUN* arts 5 and 6.

170 Pressler, above n 25, 157.

171 UN Office of Legal Affairs, ‘Letter to the Acting Chair of the Special Committee on Peacekeeping Operations, United Nations, Regarding Immunities of Civilian Police and Military Personnel’ [2004] *United Nations Juridical Yearbook* xix, 323–5; see, eg, Sean D Murphy, ‘Efforts to Obtain Immunity from ICC for US Peacekeepers’ (2002) 96 *American Journal of International Law* 725, 725–6.

172 Quirico, above n 49, 444.

173 Geert-Jan Alexander Knoops, *The Prosecution and Defense of Peacekeepers under International Criminal Law* (Transnational Publishers, 2004) 317.

174 SC Res 1423, UN SCOR, 57th sess, 4572nd mtg, UN Doc S/RES/1423 (12 July 2002).

175 SC Res 1422, UN SCOR, 57th sess, 4572nd mtg, UN Doc S/RES/1422 (12 July 2002).

over their troops.[176] The language of these Resolutions is broad enough to potentially encompass private military and security contractors.

The factors considered above seem to cast doubt on the effectiveness of ICL as a standalone mechanism for holding PMSCs to account. However, a different picture emerges when ICL is regarded as part of an integrated normative system comprising the international law of armed conflict, operating alongside IHL and IHRL. The law of armed conflict, considered in this way, offers an interlocking system of norms designed to exert pressure on international actors to comply. It operates through an array of mechanisms, including internal disciplinary systems, domestic law, social pressure of various kinds, reporting, monitoring and complaints mechanisms, and accountability before international criminal tribunals. This set of tools still has its accountability gaps and deficits. Its practical effectiveness against PMSCs can be debated, as can its effectiveness against states, non-state armed groups and individuals. However, the challenges raised by PMSCs seem less unique and intractable when situated within this broader context.

V CONCLUSION

International law depends on a wide range of different methods for implementing and enforcing obligations, including diplomatic negotiation and pressure; monitoring and reporting processes; arbitration and mediation; complaints mechanisms; litigation in courts and tribunals; embargoes, sanctions and other countermeasures; and, as a last resort, the threat or use of military force. Roughly speaking, the methods at the start of this list are the most widespread and important, but the ones further down on the list tend to garner a disproportionate share of public attention. Added to this, as we have seen, is the issue of the fragmentation of international law, which risks giving an exaggerated impression of the accountability gaps in any one field of jurisprudence. It is necessary, in order to form an accurate picture of international law's effectiveness, to adopt a holistic and integrated perspective. This is as true of the law of armed conflict as it is of other areas.

The accountability of PMSCs for violations of international law during UN PKOs presents many gaps. The UN has challenged the state's dominance over matters of security. It is now one of the most significant actors in international security and enjoys influence independent from that of its member states. PKOs are the UN's most visible contribution to international peace and security. The need for UN peacekeeping remains and will continue. The robust mandate of recent PKOs, the frequency of increasingly complicated armed conflicts and the reluctance of states to contribute troops has necessitated the introduction of privatised military and security forces. The use of PMSCs in UN PKOs is therefore appealing, regardless of its legal and ethical status. PMSC personnel tend to be efficient, well-trained and have provided stability and a peaceful outcome in scenarios where national armed forces have been unable to do so. One must also recognise the vulnerability that PMSC personnel face in conflict

176 SC Res 1497, UN SCOR, 58th sess, 4803rd mtg, UN Doc S/RES/1497 (1 August 2003) para 7; SC Res 1593, UN SCOR, 50th sess, 5158th mtg, UN Doc S/RES/1593 (31 March 2005) para 6.

zones. They experience stigma and, worse, sometimes lack the levels of protection afforded to other civilians and combatants.[177]

The pressures of armed conflict and the vulnerability of the local population render PMSCs susceptible to violations of international law. Is it true, then, as some have suggested, that PMSCs operate in a legal vacuum and pose a challenge to the existing categories of IHL? We have argued against this perception. IHL can deal coherently with PMSCs by treating them, in most cases, as non-combatants who may or may not play a direct role in hostilities. Any international law regime, viewed in isolation, will appear to present accountability gaps, as has been pointed out in numerous different areas. However, there are multiple applicable international legal regimes in situations of armed conflict. A holistic view of these regimes as an integrated law of armed conflict enables a realistic assessment of the challenges PMSCs pose and how they may be combated.

We have suggested that there are multiple mechanisms for holding PMSCs to account, ranging from social pressure to conform with international norms to the threat of criminal prosecution. None of these mechanisms is perfect, but they do not operate in isolation. Accountability gaps remain, but this is a feature of international law generally, rather than a function of any chronic inability to deal with PMSCs. Indeed, the reliance on an array of more or less formal enforcement mechanisms is arguably a central feature of legal systems more generally, not only in the international context.[178] There is empirical evidence that law influences its subjects' behaviour independently of coercive sanctions.[179] Focusing on the technical legal challenges presented by PMSCs in UN PKOs, such as the immunity they may enjoy from criminal proceedings, therefore risks drawing an unduly pessimistic picture. Any of the fields of law considered above are, at best, a partial solution to the accountability problems in this area. However, a multifaceted approach that recognises the full range of applicable norms and enforcement mechanisms holds promise in applying coherent and effective legal limits to PMSCs in armed conflict situations.

The multifaceted approach to the law of armed conflict that we propose in this article is not presented as a radically new development. Rather, we suggest, this is the way that the relevant body of law already operates in practice. The actions of armed forces, PMSCs and other personnel in conflict zones are not guided by technical distinctions between bodies of international law, but rather by a holistic and dynamic assessment of their obligations under complex and shifting operational conditions. The need to negotiate the complex interaction between IHL and human rights norms — whether or not these norms are framed in explicitly legal terms — is a regular feature of military and other operations in conflict scenarios. The same point is increasingly true of the deliberations of international tribunals and other bodies about alleged violations of the law of

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177 James Cockayne, 'Make or Buy? Principal-Agent Theory and the Regulation of Private Military Companies' in Simon Chesterman and Chia Lehnardt (eds), *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (Oxford University Press, 2007) 196, 213–16.

178 Cf H L A Hart, *The Concept of Law* (Oxford University Press, 2nd ed, 1994) 91. For further discussion, see Crowe and Weston-Scheuber, above n 64, 158–9.

179 See, eg, Tom R Tyler, *Why People Obey the Law* (Princeton University Press, 2006); Bert I Huang, 'Book Review: Law and Moral Dilemmas' (2016) 130 *Harvard Law Review* 659.

armed conflict. The point of this article, then, is not so much to advocate a new approach as to capture what is already occurring. The legal position of PMSCs in UN PKOs — and the extent to which this issue presents a challenge to existing legal frameworks — can only be properly understood by bearing these wider developments in mind.