LUISS Guido Carli
LIBERA UNIVERSITÀ INTERNAZIONALE DEGLI STUDI SOCIALI

Department of Political Science
Master's Degree in International Relations
Chair in International Organizations and Human Rights

Human Rights Standards and the Responsibility of International Organizations for damage caused by Private Military and Security Companies

SUPERVISOR
Prof. Francesco Francioni

CANDIDATE
Miriam Maurizi
633852

CO-SUPERVISOR
Prof. Marie Louise Cremona

Academic Year 2018/2019

To my family who,

despite adversity,

has always been there.

HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS FOR DAMAGE CAUSED BY PRIVATE MILITARY AND SECURITY COMPANIES

Abstract: *Private Military and Security Companies have become nowadays among the most discussed non-state actors in relation to warfare. These companies have faced many phases during their development, starting from being mercenaries without law, up to become complex corporations with business-like structure. In the last forty years, they quickly developed, finding new contexts where to bring their specialized services. In this phase, they started to work in Peacekeeping operations, offering services to states but also to International Organizations. The reliance on these type of corporations by states and IOs has raised many doubts and questions, especially because of the several cases of Human Rights violations where PMSCs were involved. In this situation, two main issues developed during the last twenty years: that concerning the regulation of PMSCs and that about the Responsibility for the violations perpetrated by these debated companies. Some attempts have been made in order to regulate the matter at multiple levels, while for what concern the concept of Responsibility, there have been some developments in relation to State Responsibility and International Organizations Responsibility. The International Law Commission has been very proactive in this regard, drafting many important Articles in relation to the Responsibility of State and of International Organizations. However, the progress within this context has been very slow, also due to the quick evolution of PMSCs and of peacekeeping.*

Key words: *Responsibility, PMSCs, International Organizations, Human Rights, Regulation, Peacekeeping, United Nations, European Union*

HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF INTERNATIONAL ORGANIZATIONS FOR DAMAGE CAUSED BY PRIVATE MILITARY AND SECURITY COMPANIES

Table of Contents

Introduction

The inglorious myth of mercenary has been present in the collective imagination since immemorial time. The figure of the companies of fortune has gone through every phase of history, confirming that the real exception is the monopoly of the use of force by the state. National sovereignty as we understand it today, of Weberian conception, is a truly recent phenomenon compared to the constant presence of the mercenary in history. The ongoing conflicts over the centuries have been a breeding ground for security outsourcing. If one thinks of the great Italian city-states such as Venice or Florence, the scene of countless clashes and battles, one cannot but think of the hiring of professionals paid to defeat the enemy. The same term soldier, much older than the city-states, takes its meaning from the Latin "Solidare", which means to pay, which in turn derives from Solidarius, that is the one who was paid with the Solidi, a currency used in Imperial Rome in the period of Constantine I.

Fighting for remuneration can be considered one of the oldest works in the world and precisely for this reason the loyalty of the subjects in question could very often be questioned as they were loyal only to gold. Throughout the medieval period, the figure of the mercenary acquired an increasingly negative reputation as the more they were feared the more they were hired by the courts for their wars. The first turning point for these warriors, however, took place in 1648 with the Peace of Westphalia, which laid the foundations for a modern conception of state. From then on, the mercenary category had ups and downs, going through both phases of misfortune where society rejected them, and phases of rebirth such as those which occurred in the era of Colonialism or as the much more recent one that exploded with the neoliberal wave of the Eighties and consolidated after the collapse of the Berlin Wall.

At the end of the last century, what in the collective imagination was classified in the category of soldiers of fortune, of mercenaries without law and without loyalty, changed its skin, being reborn in the form of corporations, driven by the neoliberal wave and almost completely freed from the old label they have always had on. In this phase, the companies try to clean themselves up, to take a more professional turn, becoming part of a branch of that privatized market so much supported by the neoliberal ideology. During

these years, there is a key element that greatly helps these companies to be recognized and accepted as professional corporations operating in the private security sector: peacekeeping operations are among the great protagonists of the nineties, they are the tangible proof of a United Nations rebirth in the post-Cold War era and also of the simultaneous reluctance of states to participate in new conflicts, meaning that the new private security companies have created their own space within peacekeeping, bringing with them their high level of specialization and facilitating the role of states in many respects. If the advent of peacekeeping operations contributed to the revival of the image of what are now the new military and private security companies, the other event that instead allowed the growth of these subjects from an economic point of view, leading to a proliferation of companies, is certainly the one linked to the phase following the 9/11 disaster.

The war in Afghanistan has opened the doors to this new subject, allowing it to develop, also bringing various problems with it. The conflict-economy that arose in this period has greatly benefited the growth of the companies in question and, moreover, they have been able to demonstrate a certain versatility, gradually expanding their relations with the US Department of Defense. After few years, indeed, between the two actors, a kind of interdependence developed and not only on the Afghan soil. However, what stands out most in this period are the facts that have awakened in the public opinion a renewed interest for private contractors, which are all those inglorious events, such as that of Fallujah, that triggered in the world, especially in the academic one, a series of questions about the regulation of this subject that until then had remained more or less in the shadows. Precisely in the period contemporary to the wars of the new millennium, especially those in the Middle East, the literature on the PMSCs phenomenon began to expand, trying to answer a whole series of questions that arose at the moment of maximum growth of the private security sector. Many began to wonder about the responsibility of the actions committed by the contractors and, with the various infamous cases, such as that of Blackwater in Fallujah or that of Nisoor square in Baghdad where some contractors employed by Blackwater were involved in the accidental killing of 17 civilians, under the spotlight, the desire to produce systems and guidelines capable of regulating, and eventually sanctioning , illegal acts committed by contractors has increased more and more, showing different lines of thought also on the responsibilities of states and of International Organizations that may have to do with PMSCs in multiple

ways. Of course, this does not mean that during the twentieth century there have been no attempts to stem this phenomenon from a legal point of view, but there is no doubt that the events that have brought PMSCs to the fore in recent years have contributed to pursuing a growing awareness and a constant search for an updated and adequate system capable of regulating the subject. Moreover, all the documents produced in the last century are now far too backward, especially regarding the terminology used.

What at the time was defined as a mercenary, today has a completely another meaning: indeed, in the past the mercenary was hired to be directly involved in hostilities and therefore on the battlefield, while now it has to do with a whole series of services that are most of the time indirect in relation to the conflict. Today's PMSCs offer services ranging from logistics to transport to training, but it is rarer to find a company, even military, that intervenes directly in an armed conflict. This is explained in the fact that contractors continue to be considered as civilians, and non-combatants, therefore they can only operate on a range of activities that may be supportive or in any case necessary for the regular forces deployed on the field. In addition, the figure of today's private military and security companies is far too complex to be generalized and exemplified with the old mercenary label.

The contractors of the twenty-first century are placed in extremely complex and business-like structures, they are employees with highly professional and diverse profiles, and it is clear that this complexity also needs to be reflected on a legal level. What is certain is that the more the functions and services of these companies have expanded and evolved, the more the need for regulation has become urgent. It should be emphasized, however, that different attempts have been made, albeit always in a way that is not sufficient with respect to the entity of the subject who, year after year, has increased its capabilities more and more, coming to conclude contracts with superpowers like the United States. Before this, however, during the twentieth century, while this phenomenon still had to take the form as we know it today, in our analysis we retraced what were the first attempts to approach it, going from fundamental documents such as the Geneva Convention, to arrive at the first UN resolutions and Conventions that advocated a whole other type of approach than today.

However, even if these documents have given their contribution, they remain rather backdated towards the phenomenon that we are discussing in this analysis, that is in

constant evolution. The diversified and well-developed structure that characterizes the PMSCs cannot in fact be even remotely compared to the figure of the mercenary companies as it was thought until some time ago. All the criteria used in the past to identify contractors, today are almost completely obsolete or in any case insufficient. What is still missing internationally is uniformity in the management of PMSCs. The world of private security is certainly complex and the management of this sector, from a legal point of view, and not only, by the states and by IOs is really varied and heterogeneous.

We will see that a greater use of this type of companies also entails a greater risk about the violations of Human Rights and International Humanitarian Law perpetrated by the employees of the PMSCs, especially because they operated many times in what could be defined as a legal vacuum, avoiding in many occasions the consequences of these breaches. With the number of such violations growing, the question that arises, and that many have placed before us, concerns the attribution of responsibility for such actions. If many see this responsibility fall on the individuals directly involved with the violations in question, others have wondered if these acts should be attributed to other involved actors such as the same companies that employed the direct executors of the breach to Human Rights or even to the States or to International Organizations that, nowadays, play an important role in respect to the employment of PMSCs. Moreover, it has been proved that contractors operated in many occasions in what can be defined as a *legal vacuum* due to the fact that the jurisdiction over them can be difficult to assess because they are recognized as civilians and, most of the time, they operate in international contexts through different international contracts. Therefore, assessing the jurisdiction over them resulted to be in many occasions difficult.

In this regard, the main purpose of this work is to analyze, in a comprehensive approach, the key elements of the responsibility that International Organizations have for internationally wrongful acts perpetrated by PMSCs, describing also the many attempts that has been made with regard a better and more harmonized regulation of the phenomenon at international level. To better address the question of responsibility we will analyze some of the main Articles included in the Draft Articles on responsibility of the International Organizations adopted by the ILC in 2011, trying to frame these in the context of two of the most important IOs: the United Nations and the European Union. The decision to focus on these two specific IOs resides on the fact that, during last years,

both the Organizations increased their operational commitment, especially in the field of peacekeeping, thus giving in an ever-increasing way more space to PMSCs. It is interesting to dwell on these two IOs, also because their missions have always had as the main objective the maintenance of peace, therefore, an increasing utilization of private contractors in this kind of operations could, and had, raise many objections, given the image of PMSCs among the public opinion and also because of the many controversial accidents concerning HR violations in which these companies were involved. Following these concepts, we will then try to delineate what are the main aspects of the ILC Draft Articles on Responsibility of International Organizations of 2011 in relation to PMSCs, trying to understand if this draft can really affect IOs and what could be further done in order to ensure the compliance with the Articles. Within this framework, we will also attempt to define the development of the legal regulation of PMSCs, trying to highlight the best tools present on the international field.

We will see that the UN, over time, has changed a lot its way of approaching the world of PMSCs, passing from the first resolutions condemning the practice of mercenary, to that of today where to see the employment of PMSCs in many of the UN operations, especially in peacekeeping ones, is now completely usual. The relationship of the PMSCs with the United Nations, in fact, has always been rather complicated and ambiguous, although since the end of the Cold War, with the advent of peacekeeping, there have been several developments. If, indeed, within the UN there has always been a current totally opposed to mercenary, on the other, especially with the progressive decrease of interest by the member states in wanting to participate directly in war contexts, we are witnessing the growing of a perception sustained by those who support the use of PMSCs in war theaters, causing a debate inside the United Nations that today is still ongoing. We will see the legal path within this Organization, then move on to the analysis of the practical use of PMSCs by the UN, studying some important phases in the development of peacekeeping and the parallel growth of the companies within it and its missions. We will also try to understand which of the categories of services offered by PMSCs are those most used in peacekeeping and which instead are not entrusted to these "new" actors, given the differences that still remain between the contractors and the regular troops of an army. Moreover, the ILC Articles on responsibility of the IOs will be recalled in order to assess what of these articles can be more suitable in the case of PMSCs' violations in the context of the UN peacekeeping.

Subsequently, we will move towards the analysis of what is now defined, more or less improperly, an International Organization "sui generis": the European Union. The development of the EU has accelerated more and more in recent years and its system of legislation has brought about various changes on the international, but above all national, level, impacting a lot on the European member states. The use of PMSCs in the European context is known to be very diversified due to the not uniform regulation among the EU member countries. It is not difficult, in fact, to find countries within the Union that approach the world of private security not only in a different way, but quite the opposite. Indeed, we will see that the Member States use PMSCs in different measures and, therefore, the constant growth of these companies has led to the search for cohesion among all the countries belonging to the EU which are still unsatisfied today. We will then see that some attempts have been made within the European framework to move towards a more harmonized regulation at European level. Various policies have been developed with this in mind and, in addition, attempts have also been made to use innovative tools, such as the Montreux Document and others have been suggested such as the International Code of Conduct for Private Security Services Providers or the provisions proposed as Recommendations within the context of the Priv. War Project, aimed at finding binding and non-binding measures both as regards the member states and PMSCs, with, in some cases, some attempts to check on the IOs too. As a matter of fact, there will be an analysis of some of the Articles on the responsibility of the IOs within the European context, with the aim to identify the most important ones for PMSCs matter.

Finally, we will try to draw conclusions by outlining what, in our opinion, could be the most useful options in order to achieve harmonization and what could be the strategy to ensure the fulfillment of the responsibility obligations that International Organizations have in relation to internationally wrongful acts perpetrated by PMSCs.

Chapter 1 The Historical development of PMSCs: from being mercenaries to the institutionalization of PMSCs

1.1 Privatized security as a constant through History

The infamous myth of the mercenary is something we all know in a, more or less, vague way. We have heard many times, almost always in a negative way, about this kind of soldier who sells his loyalty to the highest bidder. Over the centuries, this figure has changed its skin, changing from time to time some distinctive aspects, but what has never been permuted is its tendency to be seen by public opinion as someone to stay away from, a killer without a flag who sells its services and, therefore, its loyalty. To date we are used to thinking of the state as the sole holder of the use of force, but the truth is that this concept is really young compared to all the centuries of history where the armies of private soldiers were the majority. In the last decades, what are known today as Private Military and Security Companies (PMSCs) grew and evolved in a massive way, diversifying their tasks and abilities and getting rid of their old label of being mercenaries. Now we use to call them Private Security Companies, framing them in a broader context. But the privatized sector of Security Industry, to become what we know today, passed through many phases and got influenced by a lot of different external factors. The practice to privatize security is nothing new in this world: thousands of mercenaries died in almost all the important wars we know and even in the less famous ones. These particular soldiers have always been present in every phase of History: from the Persian wars to the fall of the Roman Empire, from Feudalism to the so-called city states in Italy. The latter, especially between the thirteenth and the fourteenth century, has been the ideal field for contractors due to the constant conflict situation and to the richness of important city states such as Venice and Florence[1]. The success of mercenaries was related to their high level of specialization: they used to know well how to use many special weapons such as the crossbow[2]. In addition, paying them was certainly less expensive than investing in the development of a regular army. Furthermore, at the time, instability was a constant all over Europe and, because of that, contractors were able to become powerful, sometimes

[1] SINGER, P.W., C*orporate Warriors: the rise of the Privatized Military Industry*, 2003

[2] Ibidem

putting at the string the political equilibrium. In this historical period, it was not difficult to find wealthy gentlemen who also made profit thanks to the companies of fortune they managed. This is the case of Count Albrecht von Wallenstein who is known historically for his fortunes accumulated thanks to his private army of mercenaries[3]. They always played their role and, in doing so, they depicted an infamous image of themselves, helping to create in the collective imaginary the myth of mercenary. The more they were threatening the more they were employed. Moreover, the development of the economy, and of the warfare, led to the creation of the first forms of contract, the so-called *condotta*[4]. After this innovation, all the hired soldiers were under specific contracts and, in few decades, many of them understood that the only solution to keep their job even during peace periods was to create stable private companies, avoiding the free-lance approach. Even Niccolò Machiavelli wrote about the infamous *condottieri*[5] and in *The Prince* he does not describe them in a gentle way.

Following the path of this phenomenon, an important turning point in History is marked by the well-known Peace of Westphalia (1648) which ended the Thirty Years War and permitted the creation of the modern conception of the State. One important feature that matured from this important historical moment is the one concerning the idea of sovereignty and, linked to that, the need to protect it[6]. It is precisely because of this need that the newborn modern state starts to institutionalize a regular national army. Here we can find the Weberian conception of the modern state in which sovereignty is preserved by the legitimate monopoly of coercion exercised by the state. This perception of the use of force grew for at least two centuries, putting mercenaries in a narrow position. They did not disappear, but the gradual nationalization of the regular armies restricted their possibilities of being employed. The general idea concerning the selling of security and the possible erosion of the state's monopoly use of force mounted the public opinion against these figures. During the eighteenth century, the growing perception of the Nation State legitimatized by the popular will, culminated with the French Revolution, permitted

[3] ABRAHAMSEN, R ET WILLIAMS, M.C., (2007) *"Selling security: Assessing the impact of military privatization"*, Review of International Political Economy, 15:1, 131-146

[4] Ibidem.

[5] MACHIAVELLI, N., "The Prince", 1532

[6] SINGER, P.W., C*orporate Warriors: the rise of the Privatized Military Industry*, 2003

to create a regular and solid structure which progressively relegated the task of security to State's responsibility. Because of the Revolution, France was among the first modern states in restricting contractors' possibilities, while the British Government kept using them, especially because of its commercial interests all over the Globe, at least for a while. In fact, for Great Britain, the use of mercenaries also had an importance from an economic point of view, since these had a much lower cost than the maintenance of British troops scattered throughout the Empire. India is a clear example of this, which for a long time remained under English control thanks to the use of the East India Company and only after 1857 England regained direct control of the Indian territories[7].

After this period of crisis, private companies experienced another moment of intense activity during the explosion of Colonialism which required a not-so-small military activity[8]. The latter lasted for many years, permitting to enlarge the space of action of a lot of companies, also increasing the illegal activities and the immoral behaviors among them. In this phase, mercenary companies gave a huge contribution in worsening the general perception about them. During the Imperialism, most of private soldiers around the globe, especially in Africa, committed despicable actions intended to mark the history of private security companies[9].

However, all these immoral deeds perpetrated by mercenaries during the colonial exploitation came to an end with the explosion of the Great War in 1914. The First World War required the intervention of all the men fit for military activity, making the position of private companies completely irrelevant. Therefore, in this phase, contractors' tasks were only about the delivering of weapons and logistic services, at least until the end of World War II[10] . However, in the aftermath of the war, the companies that were still present in the market for force begun to lose their importance even in logistics and weapon services, especially because of the total affirmation of the sovereignty concept at the

[7] GODFREY ET AL., "The private military industry and neoliberal imperialism: Mapping the terrain", 2014, SAGE

[8] SINGER, P.W., C*orporate Warriors: the rise of the Privatized Military Industry*, 2003

[9] Ibidem

.

[10] AVANT, D., The market for force: the consequences of privatizing security, 2005

international level. In the three decades after the war, the general idea of privatizing war, despite all the centuries of battles fought by hired soldiers, was perceived as wrong[11].

Now, this was the time that saw the fragmentation of companies and the rising of the individual specialized (ex)soldier, mostly involved in dirty and infamous business linked to the process of decolonization[12]. The war in Congo or the apartheid in South Africa were the perfect habitat for careless and lawless mercenaries ready to take advantage from instability. Between the 1950s and the 1970s public opinion at the international level was almost unanimously in agreement about the condemnation of contractors and, because of that, many countries started to ban all the activities linked to the private selling of security. The UN resolution n.44/34 of 1989[13] is one of the clearest examples of condemnation of this kind of activities.

Besides the affirmation of the concept of national sovereignty, another important concept started to put at the string the figure of the private contractor: the growing perception of Human Rights. In this phase, private soldiers took advantages from serious conflicts, especially in Africa[14]; they violated a lot of basic human rights just to fulfill their goals, which were essentially related to their personal gains.

But despite everything, the private security market was destined to recover, going towards another season of fortunes, important for the rebirth of military and private security companies. With the advent of Neoliberalism, this phenomenon could regain ground, taking advantage of the new economic trends characterized by unbridled privatization, at least in the first phase.

[11] Ibidem.

[12] SINGER, P.W., C*orporate Warriors: the rise of the Privatized Military Industry*, 2003

[13] General Assembly resolution 44/34 of 4 December 1989 (International Convention against the Recruitment, Use, Financing and Training of Mercenaries)

[14] AVANT, D., The market for force: the consequences of privatizing security, 2005

1.2 The Neoliberal wave and the end of the Cold War

Neoliberalism must be seen as something in constant movement, it can change in relation to the context and time and, because of that, it is clear that every factor connected with it can change too. During the last decade, this economic theory did not live its best moments, but today it is still very relevant, especially in certain parts of the world. United States are for sure one of the most fertile soil for neoliberalism, even if they made some adjustments in the last three decades. This phenomenon has taken many forms and changed meaning over time, gradually showing "the emerging features of a hybrid formation of neoliberal empire, a mélange of political-military and economic unilateralism, an attempt to merge geopolitics with the aims and techniques of neoliberalism"[15]. Basically, there are two phases in which neoliberalism is divided: the "roll back" and the "roll out"[16] . The first phase starts during the 1980s where some of the powerful states in the world decided to "roll back" from the market, meaning that they believed in the self-sustainment of the free market[17]. Of course, reducing, at the minimum level, the state intervention in the economy brought some problems (we can find the consequences in the military privatization too, but we will enter in the detail later), especially at social levels and this is why, at the end of the 1980s, we enter in the second phase: the "roll out". In this period states made some adjustments, introducing new policies and regulations; making, in some areas, interventions in the free market in order to reconcile neoliberalism with social issues. It is exactly in this context that PMSCs can start again: because of this progressive neoliberal influence started during the 1980s (even if in the United States already started it in the post WWII period) we can observe a steady blurring between the private and the public sector, even in the defense field. Privatization is one of the milestones of Neoliberalism and thanks to that the industry of private security flourished again, rebranding itself as being just a branch of the free market where PMSCs were regular corporations just as much the others in different sectors of the economy[18].

[15] PIETERSE, J. N., *Neoliberal Empire*

[16] ETTINGER, A., *Neoliberalism and the rise of private military industry*, International Journal, 2011

[17] Ibidem.

[18] Ibidem.

The Foreign Policy of Margaret Thatcher and Ronald Reagan gave the input to this new wave of self-regulating economy and the logic of the private industry gained a lot of space in the market. In this context, PMSCs grew in an incredible way, their market expanded easily, and great corporations started to diversify their services in order to adapt to the new security challenges that were about to start. In 1966 the American government decided to start a more specific procedure that could analyze in practice the cost-benefit comparison between the supply of services and goods by the public or private sector. The so-called A-76 Circular has laid the foundations for the outsourcing of military services in the United States. This procedure was divided into five phases ranging from the identification of the possible service to be contracted to the final comparison between military and private costs for the service in question. When outsourcing to a company turned out to be a cost drastically lower, then the service was entrusted to this. Once the contract was finished, the service was again advertised among other competitive companies (without using another time the comparison with the military provision capacity). Thanks also to this circular, the PMSCs have gradually expanded, taking advantage of the neoliberal policies constantly increased by the various US governments[19]. Even after the Reagan administration, neoliberal ideologies have greatly influenced the country's policymaking, progressively moving towards a fragmentation of services and an increasingly outsourcing of these[20]. The logic of privatization has been extended further into the military sector, so much so that during the Clinton government a Commission on Roles and Missions of the Armed Forces is established in order to find a way to apply as much as possible the policies of privatization and deregulation in the military sector[21]. This Commission then drafted a report that testified to the cost-effectiveness of outsourcing, encouraging the Armed Forces to focus exclusively on their primary functions and leaving a series of "commercial" services to the private sector. Subsequently, the House Committee on Armed Forces criticized the suggestions of the Commission and indicated that the policies implemented in the field by Al Gore and the Clinton administration did not obtain the expected benefits, even putting the Armed Forces in difficulty because of spending cuts implemented prematurely. Within a few

[19] KRAHMANN, E., *States, Citizens and the Privatization of Security*, Cambridge, 2010

[20] ETTINGER, A., *Neoliberalism and the rise of private military industry*, International Journal, 2011

[21] Ibidem.

years, the forecasts were not confirmed, but despite this, the subsequent Bush administration continued and expanded the Neoliberal approach, always seeking new partnerships with PMSCs. The behavior highlighted by the various governments that succeeded each other makes us understand how the influence of an ideology can be strong even in a field like the military one which, in theory, should remain isolated from political logic, at least economically and strategically. One of the consequences brought by the neoliberal wave concerns the rethinking of the figure of the regular soldier. Over the years he has been flanked by private contractors who paradoxically have "civilized" the places that were previously strictly military, influencing and putting into question even the main values brought forward by the figure of the soldier who took the oath to his country. The growing presence of private individuals in the ranks of international operations has increasingly blurred the differences between the two worlds, instilling doubt in the ear of the professional soldier. The latter in fact responded to the neoliberal approach of the government, increasingly seeing the Army as a company (which thus behaved in many sectors), implementing and assimilating an individualist, employee-oriented vision, thus forgetting those core values that led him to take an oath for his country and die for it. In addition to this, the professionalism of the regular soldier has also faltered in the face of the confrontation between military and private pay. Many professionals have begun to doubt after seeing contractors earn three times their salary. In addition to this, the continuous outsourcing of services has reduced the chances of making careers in the military ranks, while private companies have diversified more and more in view of the new demands. It must be highlighted the distinction between civil and combatant that has always characterized the "elitist" aspect and aimed at the sacrifice of the soldier[22]. The questions that arise spontaneously about this distinction are based, above all, on the roles held by contractors who are very often the same covered by the militaries, even if the latter respond to their actions in a completely different way, subject to a strict hierarchy. Therefore, what's the point of swearing on the Constitution? If contractors can do most of what a soldier does, why should the latter enlist? Fortunately, at least since the period immediately following the Cold War, most private contractors came from the Armed Forces. Many of them in fact, after a career in the Army, then moved to private companies after their leave, partly because of the consequent easing of the post-1990 troops[23]. The

[22] KRAHMANN, E., *States, Citizens and the Privatization of Security*, Cambridge, 2010

[23] Ibidem.

positive side of this shift is that all these former soldiers brought with them their own code of conduct, their values and military education. The downside of this is that over time and with the increase of the Neoliberal approach, they will be changed with new contractors who lack military training and ethics, thus leading to consequent problems. Many companies have tried to mitigate these shortcomings by establishing their own corporate code of conduct, even if in a very bland manner[24].
In addition to the neoliberal wave, however, we find another essential moment in the development of PMSCs: the real turning point, at the end of the nineteenth century, is the fall of the Soviet Union and the end of the Cold War.

With the breaking of the bipolar equilibrium, and the progressive instability in Eastern Europe, private military companies really started to regain a lot of space in the security market, entering also in the new wave of military operations: the peacekeeping ones[25]. One of the main causes of this new "coming back" is the progressive decreasing of states' military activities all over the globe immediately after the end of the Cold War. Moreover, because of these withdrawals, a lot of soldiers found themselves without an employment and the lucrative alternative of PMSCs seemed to be an attractive solution[26]. Furthermore, companies were trying to become more legitimatized, they reinvented themselves as serious corporations and a lot of governments started to accept the idea, also because people started to share a sense of fear and insecurity that they were not capable to fix[27]. In this light, states, but also other international subjects, started to be reluctant to getting involved in military action, hence PMSCs seemed to appear the best solution to everybody.

These new corporations started to follow the neoliberal wave in the market, struggling to be seen professional and trustful. During the 1990s, they filled many gaps, giving a lot of job opportunities and lightening up governments' responsibility in conflicts. In

[24] Ibidem.

[25] SCHREIER, F. ET CAPARINI, M., *Privatising Security: Law, Practice and Governance of Private Military and Security Companies, DCAF, Geneva, 2005*

[26] ABRAHAMSEN, R. ET WILLIAMS, M.C., (2007) *"Selling security: Assessing the impact of military privatization"*, Review of International Political Economy, 15:1, 131-146

[27] ETTINGER, A., *Neoliberalism and the rise of private military industry*, International Journal, 2011

peacekeeping operations, they started with indirect services such as the logistic support or the training of locals and then they progressively gained more responsibility and delegations in it. The last years of the twentieth century have been like the starting point of a new generation in security industry made of a large number of high-level specialized companies and lighter regular armies. This phase was just the beginning because the real explosion of PMSCs started with the new millennium, especially after the attacks perpetrated by the Taliban on the 11 of September 2001.

1.3 Post 9/11

After the tragic events happened in 2001, with the start of the Operation Enduring Freedom (OEF), Afghanistan opened the doors to the world of private security and in less than ten years the sector in question boomed in a massive way, bringing advantages for many but also a lot of problems for others. Initially, the US Department of Defense approached a strategy in which the U.S. Special Forces and the air power were deployed heavily in order to gain more control over the territory. After Kabul fell, the US strategy shifted toward the idea of maintaining their presence on the Afghan soil but in a lighter way[28]. Therefore, the increasing of private companies was in part a natural consequence of the new American Foreign Policy. The presence of contractors on the afghan soil alimented an incredible new market, bringing the PMSCs among the most important source of gain in Afghanistan and enlarging the so-called conflict economy. The birth of all these news companies also contributed to the dismantling process of a lot of irregular armed groups and militias, allowing the creation of new job possibilities. The United States have invested billions of funds into this new market, also having the approval of the international community. The presence of the US has diversified between two operations: the OEF one and the International Security Assistance Force (ISAF) led by NATO and deployed by the UN after the fall of the Taliban Government. As the territory controlled by these operations grew, PMSCs expanded too, following the geographical enlargement toward the south of the region where there was the infamous route between

[28] AIKINS, M., *Contracting the Commanders: Transition & the Political Economy of Afghanistan's Private Security Industry*, the NYU Center on International Cooperation (CIC) October 2012

Kabul and Kandahar, known for the many attacks perpetrated among insurgents and contractors. United States were heavily present on the Afghan soil, but not only with their regular troops: in less than a decade, indeed, USA almost developed a sort of dependence on private security companies, even if they had (and they have) the larger military base in the World. In almost ten years, Afghanistan became a fertile soil for all these military and security firms, also creating many contrasts in the Country. In 2010, President Karzai banned Private Security Firms and in 2012 almost all of the PSCs operations started to be transferred to a sort of parastatal corporation called APPF[29]. After this move, about the 95% of the US-contracted Private Security Companies were Afghan[30]. With this gradual assimilation of PSCs by the Government, an economic conflict erupted among the International Market of Private Security. This move was seen as an attempt to strength the Government, especially in peripheral regions of the country but, in doing so, Karzai initiated a conflict with the international community because his attempts to make the Government stronger and more stable could endanger the international counter-terrorism actions. The fact that almost all of these private firms were Afghan is really peculiar: in other countries, such as Iraq, PMSCs were (and are) international and, furthermore, they used to employ third-country nationals. Here on the Afghan soil, companies grew and spread in a sort of monopolistic way, taking a large part of their work from US contracts[31]. By the way, Afghanistan was not the only case famous for the large use of security firms. There are many infamous wars where PMSCs played an important role and one of them is certainly Iraq. We said that after 2001 the practice of hiring contractors became very inflated, but there is another important event that brought the market for force under the spotlight and gave a lot of resonance to the topic. The tragic facts happened in Fallujah opened a series of questions related to the complex and unclear regulation of PMSCs. Pictures of four American contractors, hanged and burned, were seen all over the world and caused many reactions. In addition to the events in Fallujah, however, it is worth mentioning the sadly known case of Nisoor Square where Blackwater contractors mistakenly killed 17 civilians and injured 24 others. According to reports circulated later,

[29] AIKINS, M., *Contracting the Commanders: Transition & the Political Economy of Afghanistan's Private Security Industry*, the NYU Center on International Cooperation (CIC) October 2012

[30] Ibidem.

[31] Ibidem.

the accident would have resulted from a misunderstanding between the regular troops, the Iraqi police and Blackwater employees. Although the report of the incident is not yet clear, also due to the multiple versions that have sprung up since then, what remains from the Nisoor accident is the media resonance that has shown the possible consequences of the use of PMSCs to the world[32]. From that moment, media started to show the different faces of the Private Security Industry, even if the phenomenon started to grow fast already in 2001.

1.4 Categorization of the phenomenon

Even if public opinion is used to associate contractors to the mercenary, there are instead many differences between the two concepts. We already said that PMSCs grew and evolved over centuries, facing many socio-political and economic contexts and adapting to these as a natural consequence of their development. The main difference that separates private companies from the mercenary label is the fact that, theoretically, security firms provide a wide range of services, from logistic and training to protecting important individuals (private or public)[33]. The offensive measures as a service "per se" is something very limited provided by few companies (PMCs). Therefore, most of the companies provides security-consultancy. The private service of violence is something directly related to the concept of being mercenary, while it is not the same for PMSCs.

[32] HUSKEY, K. A. ET SULLIVAN, S. M., *The American Way: Private Military Contractors & U.S. Law After 9/11*, the University of Texas School of Law ,December 2008

[33] VIGNARCA, F., *Mercenari S.p.A.*, Milano, BUR, 2004,

Characteristics that distinguish the mercenary and differentiate it from other fighters	
Foreignness	the mercenary is not a citizen nor a resident of the territory in he's fighting
Independence	the mercenary is not integrated (in the long run) into one national armed force and must respond only to obligations contractual terms of time employee
Motivation	the mercenary fights for brief economic benefits period, not for political and religious purposes
Recruitment	the mercenaries are called to action by oblique and informal ways in order to avoid legal proceedings
Organization	mercenary units are groups of temporary individual soldiers and set up for specific and limited objectives
Services	not having a pre-established organization, the mercenaries they focus only on the fighting they lead for single customers

Tab. Source: VIGNARCA, F., *Mercenari S.p.A.*, Milano, BUR, 2004, p. 74.

Having made the necessary distinctions between the two categories, it is right to dwell on the division and current structure of private security companies, in order to better contextualize the subject in what will be the main analysis in the next chapters: Human Rights and the responsibility and obligations of International Organizations regarding the

use of PMSCs. We already said that these firms are generally defined as Private Security Companies, a term that refers to a wide range of services which are not directly involved with violence (logistic, training, protection.). Alongside with this definition there is also the other one linked in a more direct way to military services: Private Military Companies. These two categories are often merged in the acronym we use the most: PMSCs, but, in addition to these two distinctions, there is another one, the so-called Nonlethal Service Providers (NSPs). These three sectors were defined by Doug Brooks, and he also call the macro area that groups them as the Military Service Providers (MSPs).

Tab. 2. Military Service Providers

Military Service Providers (MSPs)		
NSPs Nonlethal Service Providers	**PSCs** Private Security Companies	**PMCs** Private Military Companies
Logistics & Supply Risk consulting	Industrial Site Protection Humanitarian Aid Protection Embassy Protection	Military Training Military Intelligence Offensive Combat
PA&E Brown & Root ICI of Oregon	ArmorGroup Wackenhut Gurkha Security Guards	Executive Outcomes (Active) Sandline International (Active) MPRI (Passive)

Tab. Source: BROOKS, D., *Protecting People: the PMC Potential*, cit., p. 3.

With regard to the first category, the Nonlethal Service Providers, we find a series of civil services related to the logistics and support of the Armed Forces in the field. Some of these companies can also take care of transporting troops, ammunition and fuel[34].

Moving on to the PSCs, there is a concentration on services closely related to protection (defensive and not offensive action). Companies of this kind can supervise state or private bodies, without forgetting to participate in humanitarian interventions. They are also used for planning in the struggles against terrorism and maritime piracy (a phenomenon that has grown in recent years). The PSCs can also operate in more strictly military sectors, dealing with strategic analysis and field training, also giving support from an administrative point of view[35].

[34] BROOKS, D., *Protecting People: the PMC Potential*, cit., p. 3.

[35] Ibidem.

Instead, as regards Private Military Companies, they operate certainly in a strategic way but in a strictly more military context. The same protection of prominent personalities occurs with the use of armed guards and is the same with regard to the protection of buildings and convoys. Some of these firms deal with de-mining and refueling of aircraft. In this sector of private companies there is a large number of specialists coming from the best military units worldwide[36].

However, the definitions above are not the only ones that outline the nature of private security companies. Over the years, scholars have coined a manifold variety of definitions attributable to the subject that we are studying and some of these are important not only for the further clarity on the topic but also because they contribute to delineate the position of the PMSCs in the legal field: indeed, the essential difference between private security companies and private military companies will serve us later to understand the current situation of the legal regulation of PMSCs in different contexts. In most European member states, for instance, there is greater regulation of Private Security Companies with a predominantly national focus that leaves companies exporting mainly military services, and therefore PMCs, in a more uncertain situation from a legal point of view[37]. As reported by Krahmann and Abzhaparova, among the categorizations of the PMSCs, there are those of a taxonomic nature such as that of Robert Mandel which divides by purpose, source, form and function, or as that used by Deborah Avant who prefers to use the contract as a unit of analysis for distinguish the activities carried out by the companies at national or international level[38].

[36] Ibidem.

[37] KRAHMANN, E. AND ABZHAPAROVA, A.,*" The Regulation of Private Military and Security Services in the European Union: Current Policies and Future Options",* EUROPEAN UNIVERSITY INSTITUTE, ACADEMY OF EUROPEAN LAW, EUI Working Papers AEL 2010/8, PRIV-WAR project

[38] Ibidem.

Tab.3 Military and Security Services[39]

Military services	Security services
Armed combat	Armed protection (close protection, property guarding, border guarding)
Military base guarding	Unarmed protection (door supervision, property guarding, border control)
Technical support for military or dual-use equipment (installation, maintenance, repair, use)	Technical support for security equipment (installation, maintenance, repair, use)
Procurement of military goods and services	Procurement of security equipment and services
Trafficking of military goods	Trafficking of security equipment
Brokering of military and dual-use goods	Brokering of security equipment
Explosive ordnance disposal	Cash and valuables in transit
Demobilization and disarmament	Surveillance (CCTV)
Military logistics	Management of prisons
Management of military bases	Crowd management (event security)
Management of military contractors	Security training
Military training	Security sector reform (police, judiciary)
Security sector reform (armed forces)	Security intelligence collection and analysis (risk assessment)
Military intelligence collection and analysis (risk assessment)	Counter-terrorism services
Interrogation of military prisoners	Anti-piracy services
Military consulting	Hijack/Kidnap services
	Crisis management
	Security consulting
	Investigative services

We have seen, therefore, that the monopoly of the use of force by the state in history is not the rule, but on the contrary is the exception. With the establishment of the state as the only legitimate holder of coercive power, the figure of the mercenary had to reinvent itself several times in order to remain in the game. It went from being a central figure in feudal and medieval Europe to being sidelined in the eighteenth century. With Colonialism, the mercenary had another moment of glory, soon vanished at the beginning of the new century with the outbreak of the Great War. For more than thirty years it remained in the shadows, until the advent of new neoliberal policies and the end of the Cold War. In the nineties private companies get rid of the label of mercenaries and begin their rebranding, making their way into the world of peacekeeping. The other incredible boom that has seen the private security industry develop within a few years comes at the beginning of the new millennium after the 9/11 attacks and the consequent declaration of war by the United States of America. With the explosion of war, Afghanistan saw not only regular troops arrive but also waves of private contractors that have multiplied

[39] E. KRAHMANN, E. AND ABZHAPAROVA, A., *"The Regulation of Private Military and Security Services in the European Union: Current Policies and Future Options",* EUROPEAN UNIVERSITY INSTITUTE, ACADEMY OF EUROPEAN LAW, EUI Working Papers AEL 2010/8, PRIV-WAR project

visibly in few times. This phenomenon, in Afghanistan, has had several consequences including the reduction of irregular militias. However, it has also brought critical issues, revealing the enormous lack of legal regulation of the subject at international level.

Chapter 2. HR concerns: damages and responsibility

2.1 Human Rights violations: one of the main features linked to PMSCs

In the first chapter, we analyzed the development of PMSCs through History and we also saw the different approaches and structures these companies had in respect to the socio-political and economic context. Now we want to add another element to our research, introducing Human Rights and consequent violations perpetrated by contractors over time. This critical issue is something that has always been part of the complex and unclear industry of Private Security and during these last decades there had been more and more attempts in order to better regulate the subject. For a full awareness of the problem we will have to wait for some time, until, at the beginning of the new millennium, too much striking facts will put the renewed private security companies under the spotlight, thus showing the enormous legal gap that prevented a proper regulation of these entities. The many attempts that tried to solve, at least partially, this lack of regulation, were made at different levels: both national and international. Precisely because the private security sector is constantly expanding and the outsourcing of specific military maneuvers by governments is increasingly common, and certainly it will not diminish over time, there is an increasing need to fill the legal vacuum in the field, trying to adapt the different levels of regulation, in order to have a regulatory management of the subject in a more or less uniform way at international level. We can trace back in time all the conventions and treaties that assessed something related to Private Security Industry starting from the early twentieth century with the Hague Convention of 1907 regarding Rights and Duties of Neutral Powers and Persons in Case of War on Land[40]. In this document we can find the assessment regarding the prohibition of assistance of States of Belligerents by Neutral States and, more specifically, these neutral states cannot allow the recruitment of mercenaries (still so defined at the time) on their own territory.

Subsequently, it is good to remember the Universal Declaration of Human Rights (1948)[41], although one of the key documents, central to the issue, is certainly the Geneva

[40] Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land. The Hague, 18 October 1907, International Committee of the Red Cross

[41] Universal Declaration of Human Rights, 1948, https://www.un.org/en/universal-declaration-human-rights/

Conventions of 1949[42] with the subsequent Additional Protocols of 1977[43]. The core of the Conventions is about the protection of wounded soldiers, prisoners of war and the civilian population in conflicts, while the Protocols regard the protection of all the victims involved in armed conflicts. In this context, the debate on the identification of contractors as combatants or as civil (non-combatant) personnel is certainly current as there is no specification in the conventions. We can find at the Article 75 of the Additional Protocol I the "fundamental guarantees"[44] that assess that, even if the combatant or the prisoner-of-war status are not recognized, mercenaries must be treated as non-combatants who have taken part in hostilities so they can have a certain level of protection within International Humanitarian Law[45]. In this regard, we want to specify the distinction between the latter and Human Rights Law. Indeed, "International Humanitarian Law and International Human Rights are two distinct but complementary bodies of law. They are both concerned with the protection of the life, health and dignity of individuals. IHL applies in armed conflict while HRL applies at all times, in peace and war"[46].

Another important document is certainly the 1984 Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment[47]. A convention linked especially to the conduct of security personnel and to the military one.

[42] IV *Geneva Convention relative to the protection of civilian persons in time of war* of 12 august 1949

[43] Protocol Additional of the Geneva Conventions of 12 august 1949, and *relating to the protection of victims of international armed conflicts* (PROTOCOL I), OF 8 JUNE 1977, International Committee of the Red Cross

[44] Ibidem.

[45] FALLAH, K., *The generation of International Legal Norms to regulate Private Military Violence*, University of Sidney, 2017

[46] ICRC- International Committee of the Red Cross, *IHL and Human Rights Law*, 2010

[47] UN GA, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted and opened for signature, ratification and accession by General Assembly resolution 39/46 of 10 December 1984, entry into force 26 June 1987, in accordance with article 27 (1)

During most of the last century the term mercenary remains, so much so that we can find it in some documents such as the already mentioned Additional Protocol I of the Geneva Conventions (1977) or the UN Resolution 44/34 of 1989[48].

All the documents mentioned above were approved in a period where security outsourcing was certainly in transformation but was still defined and thought of as mercenary and it is for this reason that most of these treaties and conventions cannot be seriously applied to the PMSCs, because the latter are a modern phenomenon, current and not associated with the contractors of the 70s, framed, in those years, as mercenaries indeed. Anyhow, it is certainly useful to understand at least the principal documents that started this process of attempted regulation, even if they were signed in a different context and the subject was in transformation. When the Additional Protocols and the UN Resolution define the mercenary, they use a series of factors that are, more or less, the same: for instance, both documents identify him as a recruited figure to participate directly in hostilities. This is difficult to apply to today's PMSCs as, as we have already seen, they give support in a large part of services that are not directly connected with hostilities on the field, therefore they mostly give indirect services. Moreover, the documents in question also use the factor of a higher or in any case significant private remuneration compared to the one of regular military services as identification for the figure of the mercenary. Being today's contractors framed in private and articulated agencies, it is quite difficult to associate them with the figure of the mercenary using this factor which in the past was seen as the main motivation for mercenary participation in conflicts. Furthermore, the Article 47, paragraph 1 of the AP I, provides that individuals who have been discovered to be mercenaries must be deprived of the rights of being considered as combatants or as prisoners of war[49]. In Article 47 (2) of the Additional Protocol I of the Geneva Conventions the mercenary is identified as an individual who:

(a) is specially recruited locally or abroad in order to fight in an armed conflict;

(b) does, in fact, take a direct part in the hostilities;

(c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised by or on behalf of a Party to the conflict material compensation

[48] UN GA, *International Convention against the Recruitment, Use, Financing and Training of Mercenaries*, General Assembly resolution 44/34, New York, 4 December 1989

[49] Article 47, Additional Protocol of the Geneva Convention, Paragraph 1, 1977

substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that Party;

(d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;

(e) is not a member of the armed forces of a Party to the conflict; and

(f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces[50].

The provisions of the Article 47, as we can see, are very specific and it is clear that these definitions cannot be applied, especially today, to find mercenary/contractors. At the time, the drafting of the article was made in order to not upset many important States (especially in Africa) who were against a broader definition of mercenaries[51].

What remains is the lack of uniformity between national and international regulations. Since the documents mentioned above are not globally recognized and, in any case very often not binding, there is therefore no comprehensive approach that makes the management of the phenomenon easier at an international level. In addition, there are other two main reasons that could explain this lack of regulation: there is often a fundamental dispute underlying these conventions and there is also the absence of the concrete production of a body of laws aimed at punishing the illegitimate behavior of contractors.

But what are the specific Human Rights violations that could be perpetrated by Private Military and Security Companies? The fact that during the last years the use of PMSCs increased in a massive way, especially in the US-led operations, brought to the consequent enlargement of Human Rights violations risk. Companies are bringing their high-level specialization at the service of governments, taking away from regular armies many tasks and responsibilities. The augmented risk of affecting Human Rights regards not only the individual rights, but also the collective ones. The first right to be taken into consideration is certainly that of the right to life which can also be thought of as a basis for all other successive and consequent rights. This fundamental right, as the HRC said, "is the supreme right from which no derogation is permitted even in time of public emergency

[50] Article 47, Additional Protocol of the Geneva Convention, Paragraph 2, 1977

[51] FALLAH, K., *The generation of International Legal Norms to regulate Private Military Violence*, University of Sidney, 2017

which threatens the life of the nation"[52]. To its opposite, then, there is the deprivation of the right to life, considered illegitimate and therefore arbitrary in most cases. There are also some exceptions where this deprivation is not arbitrary and therefore can be considered legitimate. The first case is that concerning the capital punishment issued after a regular trial and executed in a state where the death penalty is legal. The other case where there is the legitimacy of the deprivation of the right to life is that of self-defense, to the extent that it is proportionate, which mean if the only way to defend this right is to take the life of the offender. This situation is entirely plausible in the context of PMSCs, while the previous one of the death penalty is to be excluded as private security companies have no legal system. After these two conditions, there is a third one where killing is not considered arbitrary and it involves directly contractors. This situation occurs when hired private soldiers are considered as "a lawful combatant using lethal force within the limits allowed by applicable international human rights and humanitarian law"[53]. Anyway, this condition has been considered not sufficient when a PMSC act as a "state agent" because it is quite difficult to assess whether the contractor took a life in a legitimate way and this would also bring implications about state responsibility.

According to the African Commission on Human and Peoples' Rights, state responsibility is verified only when a PMSCs commits an extrajudicial execution while working for the government or while the latter do not open an investigation about it[54]. Subsequently, in connection with the fundamental right to life and, to its opposite, the deprivation of this, we then find a whole series of unbreakable rights such as the prohibition of torture and inhuman, cruel and degrading treatment[55] or as the right of physical and mental health (they can be concatenated). In this view, there are a lot of activities that would bring to violations of these fundamental rights by PMSCs employees. Among the most likely ones we can find counterterrorism activities in which PMSCs can be often involved[56]. In this

[52] The Human Rights Committee, General Comment on Art.6, 1982

[53] FRANCIONI, F. AND RONZITTI, N., *War by Contract: Human Rights, Humanitarian Law and Private Contractors*, Oxford Scholarship Online, 2011, Ch. 3

[54] Commission Nationale des Droits de l'Homme et des Libertés v. Chad, 1995: para.22.

[55] Article 3 of the European Convention on Human Rights (ECHR)

[56] ONO, K., Briefing memo, *The Trend of the Private Military & Security Companies (PMSCs) —Terrorist Threat and the Economic Point of View—,* NIDS NEWS December 2015

particular case, contractors must avoid any possible abuse of power that could violate HR. Even if they are fighting against a terrorist group they are not allowed, in any cases, to use torture and cruel, inhuman, or degrading treatment against their enemies. All these possible violations can be explained as these are all directly connected to the right of life: even if these types of breaches do not necessary imply the killing of the victim, they still are of primary importance because they attack the integrity of the human being either in a moral or in a physical way[57].

In addition, there are other many important rights connected in a more secondary way that could be breached by PMSCs during their activities. Contractors could commit many different violations during a detention activity or even during a phase of post-conflict where PMSCs, thanks to their high level of specializations, are employed in order to help to rebuild the areas ruined by the war[58].

Properly because PMSCs are capable to breach many important Human Rights in a lot of different situations, when these violations occur, it is legit to question about the responsibility for these actions. At first sight, we would probably say that the ones to account are the contractors involved in the breaches of HR, but most of the time the reality is much more complex than what it seems. From giving all the responsibilities to the individuals directly involved, we can then see that in many cases the responsibility may fall over the entire PMSC that employed the individuals involved. However, in many occasions, the burden of responsibility should fall over the state which it can have different roles with respect to the PMSCs employment. Indeed, states can assume different position in respect to the employment of private military and security companies: they can employ them so as to be defined as the Hiring State, or they can be the country where the PMSC has its legal and/or its physical base so as to be the so-called Home State. Finally the state can be defined as the Host State, that is the weaker position it can assume with respect to a PMSCs because it literally "host" a company or more when it does not have the power to maintain the order on its territories.

These are the three main distinction we have to take into account when we want know more about the responsibility of the state with regard to PMSCs' abuses and HR violations, however, responsibility can also fall on International Organizations due to

[57] Ibidem.
[58] Ibidem.

their increasing use of PMSCs in international operations. In the following paragraph, we will deepen this topic in order to better understand the complexity behind the employment of PMSCs and all the consequences related to it.

2.2 Who is to account?

2.2.1 the Home state

After having introduced the central theme of Human Rights and its possible consequent violations perpetrated by PMSCs, as a natural consequence, and as we have already mentioned at the end of the previous paragraph, now we want to deepen the topic, starting from a question as simple as fundamental: whose is the responsibility for such violations? As we have previously anticipated, the responsibility for violating fundamental rights such as the one to life may fall on the individual but also on the company of this one or the state or even on International Organizations. The state will be at the center of the analysis of this paragraph, in order to better understand the concept of responsibility linked to the breach of these rights in PMSCs context. In the book "*War by Contract: Human Rights, Humanitarian Law, and Private Contractors*" by Francesco Francioni and Natalino Ronzitti, we find a detailed analysis of the difference between the three types of state classified in relation to PMSCs: The Home state, the Host state and the Hiring one[59]. In the vast literature produced in recent years, we often find a predominant focus on what is called the Hiring state, or the state that hires a company of contractors to perform certain services for a fee. The latter is certainly decisive, especially if we want to understand the legal implications, but in this study, following the analysis of Francesco Francioni[60], we will start from the Home state that is the state where the PMSC has its physical and legal basis. The other important state that we will discuss later is the Host State, which in any case remains in a decidedly weaker position than the other two, as it is unable to guarantee security on its own territory. One of the first considerations regarding the Home state concerns the relevance attributed to it in International Law because, in its territory, it has complete control of all companies with registered offices within state borders. This means

[59] FRANCIONI, F. ET RONZITTI, N., *War by Contract: Human Rights, Humanitarian Law and Private Contractors*, Oxford Scholarship Online, 2011,

[60] FRANCIONI, F. ET RONZITTI, N., *War by Contract: Human Rights, Humanitarian Law and Private Contractors*, Oxford Scholarship Online, 2011, Ch. 5

that the Home state has a series of Human Rights obligations regarding the control of the PMSCs with its own nationality and that therefore it can exercise its power over these in order to monitor the observance of Human Rights[61]. An effective way for the government to control the outsourcing of PMSCs with a legal basis in its own territory is precisely to monitor the exports of services they carry out; just as the state controls all other exports of products and services from other industrial sectors, it can also supervise the activities of private security companies regarding the export of their services abroad. Furthermore, in last years, there has been the trend of concentrate many small security companies into larger ones[62] which are better equipped and with a close link between the parent company and its Home state. And it is precisely because of this strengthened link reached over the years that the Home State has gained greater importance in International Law, increasing its possibility of controlling regulation over PMSCs. One important consideration is about the intent of the International Law to transfer the responsibility for Human Rights violations from the State to "corporate actors operating across national boundaries"[63]. In the actual context of today it is quite difficult to realize such shift because of the complexity and multilevel regulation at international level. The direct application of International Humanitarian Law to private entities is something very complicated and, moreover, it is something that does not find a real "support by judicial practice"[64]. In addition to these features that make difficult the concrete application of HR obligations to contractors, there is the actual economic context that makes the process even harder. In an economic market characterized by the crisis of free trade, there is the need to strengthen the state presence and to guarantee its role in the regulation of Human Rights and collective security. In this light, it is important to fully understand the role of the Home state, especially in respect to responsibility of Human Rights violations perpetrated by PMSCs. Home state's responsibility can be analyzed from two main points of view: "the perspective of general international law on state responsibility for wrongful acts, and that of the substantive scope of the obligations incumbent upon the state to respect, to

[61] Ibidem.

[62] SINGER, P.W., C*orporate Warriors: the rise of the Privatized Military Industry*, 2003

[63] FRANCIONI, F. ET RONZITTI, N., *War by Contract: Human Rights, Humanitarian Law and Private Contractors*, Oxford Scholarship Online, 2011, Ch. 5

[64] Ibidem.

ensure respect, and promote human rights"[65]. To consider the acts committed by PMSCs as acts committed by the State, following the provisions of Article 4 of the International Law Commission (ILC) on state responsibility[66], the companies in question must be considered by the Home State as an integral part of their armed forces. Since this is very rare, it is quite difficult to consider the acts perpetrated by the company attributable to state responsibility, at least not with the parameters provided by the Article 4 of the ILC Draft. As a matter of facts, there are other benchmarks that are more effective in finding the responsibility of the Home state for HR violations by PMSCs. In particular, we want to mention the Article 5 of the ILC Draft which provides:

"The conduct of a person or entity which is not an organ of the State under article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law, provided the person or entity is acting in that capacity in the particular instance."[67]

This Article has been analyzed with special focuses on the meaning of the term "law" and "governmental authority". The comment to Article 5 says that:

"What is regarded 'governmental' depends on the particular society, its history and traditions. Of particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purpose for which they are to be exercised and the extent to which the entity is accountable to government for their exercise"[68].

If we want to interpret Article 5 following the comment above, it is clear that we will interpret the term "governmental authority" in a broader sense, thus finding different types of services that can be identified as delegation by the State and therefore with a certain degree of governmental authority. If this occurs, then there would be the concrete possibility of legitimizing State responsibility in relation to the offenses committed by the PMSC delegated by the State itself. However, this is not really enough since Article 5 sets various limits, excluding many cases in which the responsibility for certain illegal

[65] Ibidem
[66] Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, ILC

[67] Art.5 of the Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, ILC

[68] Paragraph 6 of the Comment to Art 5, ILC Report 2001, UN doc A/56/10, 92

acts made by private contractors may fall on the State. In fact, following Article 5, in order to attribute this responsibility to the Home State, there is a need for the unlawful act performed by the PMSC to take place within the functions performed by it as a direct delegate of the State. For instance, if a private contractor violates Human Rights outside his duties of public functions delegated by the State, the responsibility for this act cannot be associated with the Home state of the PMSC that hired the contractor. On the other hand, there are many situations were responsibility can be attributed to the State, even when the breach to the rights occurs in circumstances that are far from the ones of direct violence. It is the case of many indirect services outsourced by PMSCs that are basically of economic nature and sometimes the supervision of them by the Home state is an obligation of International Law[69]. Another Article of the ILC, much debated, on the responsibility of the Home State for violations of human rights by private security companies is Article 8 which assess that there is the "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."[70].

The main debate on this assessment is about the interpretation of the term "control" that could be read and used with different meanings. In addition to this, as for the other Articles, there are many situations that remain excluded even if these could be potentially due to the Home State's responsibility. Moreover, in addition to the rather restricted provisions given by the articles mentioned above there is a broader range of obligations on the part of the Home State regarding the violation of human rights by PMSCs.

Even if, at first sight, the home state should manage the PMSCs it has in its territories and the activities these perform at domestic level, we previously analyzed some of the Articles of the ILC because we want to reaffirm the concept expressed in the book *War by Contract*[71] by which the home state has HR obligations and it is responsible for PMSCs' breaches of HR even when these companies exports their services abroad,

[69] FRANCIONI, F. ET RONZITTI, N., *War by Contract: Human Rights, Humanitarian Law and Private Contractors*, Oxford Scholarship Online, 2011, Ch. 5

[70] Art.8 of the Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, ILC

[71] FRANCIONI, F. ET RONZITTI, N., *War by Contract: Human Rights, Humanitarian Law and Private Contractors*, Oxford Scholarship Online, 2011

committing their violations on a territory that is outside the home state's jurisdiction. The home state should behave with respect to PMSCs' breaches of HR committed abroad exactly the same as if these violations were perpetrated within its national borders. The fact that the company is registered at legal level within the jurisdiction of the state means that the home state has the complete authority over the company and it has it in the exactly same way it has it with other firms from other industrial sectors. Indeed, if a home state has the capabilities and the right to control over the exportations made by some hypothetical firm that is registered within its jurisdiction, for PMSCs should be exactly the same. The home state can and has the responsibility to watch over the exports made by its national companies and, in this view, if one of more of (the employees of) this firms commit a HR violation while it is conducting activities abroad, the home state has responsibilities with respect to these breaches, especially because it had the capabilities and the powers to prevent the escalation of violence by checking the activities the company exported outside its jurisdiction. For these reasons, the home state has positive obligations to fulfill at international level just like the hiring state. In this regard, the home state has the duty to prevent and avoid many activities the PMSCs could manage first on the national territory (recruitment, training) and then abroad (direct attacks against the sovereignty of another state)[72]. We must highlight that the home state has a certain level of discretion with regard having PMSCs on its territory, indeed, there are states that do not have at all PMSCs working within their borders. But, when these companies are present and they offer a series of services both nationally and abroad, it is important that the home state attempts to regulate and control the companies, starting from the definition of what kind of services can be supplied by the PMSCs and, at the opposite, what are prohibited. This is among the first steps the home state should do in order to define the direction that it wants to follow with regard the regulation of these types of companies. It is usual in these situations to assist to the implementation of systems of licensing. Through these tools, the home state can decide which kind of companies can work on its territory and abroad, if these obtain the license that allow them to export their services. In this regard, the home state should control even more the services its PMSCs want to export in order to avoid possible HR violations and other wrongful acts.

In conclusion as regards the home state, we have retraced the main peculiarities that can make the responsibility for human rights violations by PMSCs fall on the state. Initially

[72] Ibidem.

it was said that when a state incorporates PMSCs into the ranks of its regular troops, thus sending private companies to carry out direct activities in situations of armed conflict, it is directly responsible for the violent actions committed by contractors it hired. However, as this situation is unlikely to occur, given the practice of using PMSCs for more indirect activities regarding the conflict, we then analyzed the concept according to which the home state is called to respond to the violations of the PMSCs residing on its own territory precisely because it has the responsibility to control and regulate all the exercises under its jurisdiction even when these are exporting their services abroad.

2.2.2 The Hiring state

Going in order of importance, or at least following the incisiveness and the control that these categories have on the PMSCs, we go on in our research analyzing the concept of responsibility for the violation of Human Rights committed by PMSCs from the point of view of the Hiring state, or the State that assumes the company in order to obtain certain services in exchange for payment. A great part of the literature concerning the study of private security companies, especially from the point of view of regulation, has seen in the Hiring state a decisive figure that, according to many, would play a fundamental role in supervising PMSCs and in making them follow the International Law obligations. Following this concept, we can find a lot of judicial assessments in many important documents such as the ones of the International Covenant on Civil and Political Rights[73] or of the European Court of Human Rights. For instance, in the provisions of the Covenant about the fundamental right to life of every individual and the right to be not subjected to torture or cruel, inhuman or degrading treatment or punishment, all the positive obligations of the State to intervene is a direct consequence. It is a duty toward all "persons within its territory and to all persons subject to its jurisdiction"[74]. To pursue these duties, States have to find the right and proper "tools" necessaries to prevent but also to investigate and punish Human Rights violations. If we look to the General

[73] International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976

[74] FRANCIONI, F. ET RONZITTI, N., *War by Contract: Human Rights, Humanitarian Law and Private Contractors*, Oxford Scholarship Online, 2011, Ch. 6

Comment no.20 of the UN HRC[75], we can find the concept of prevention even when the breach of the right already occurred: it is about the idea to strengthen up the preventive measures in order to avoid other degeneration of misconduct in the future.

2.2.3 The Host state

Finally, in this paragraph, we will analyze the responsibility for the human rights violations perpetrated by PMSCs regarding the Host state, or the state that has on its territory the PMSCs that operate under contracts signed with another state (the Hiring one). Very often, the Host state is in what is called a weak position, as this is not able to maintain the control over the contractors present on its territory. Precisely because of this disadvantaged position, it is rather difficult for the Host state to fulfill its positive obligations regarding the respect for human rights. While for the Hiring and the Home states the compliance of Human Rights obligations is definitely easier, especially when the Hiring one has the full control over the PMSCs it contracted. In addition to this, in a context of conflict, instable situations, such as the one of transition of power, can lead to a void that put the Host state in an even more weak position with a consequent lack of control on Human Rights. The incapability of the state to comply to these obligations can have different degrees depending on the situation of the country. According to the Article 17(3) of the of the International Criminal Court (ICC) Statute:

"the Court shall consider whether, due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.[76]"

The ICC Statute made also a difference between the condition by which the State is unwilling to investigate and prosecute HR violations and the *incapability* of the State to do so. But in what situation the State is considered incapable? Generally, this possible condition can occur under two specific eventualities: the first one is when the Host state

[75]General Comment No. 20: Prohibition of torture or other cruel, inhuman or degrading treatment or punishment (article 7), 1992 (Adopted by the Human Rights Committee at the Forty-fourth Session, A/44/40, 10 March 1992)

[76] Art.17 para.3, Rome Statute of the International Criminal Court, Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, vol. 2187, No. 38544

is subject of a military occupation perpetrated by a third state, the second one is when there is not an occupation actuated by an army but however there is a third state that has the "effective control over (part of) the country"[77]. As we already seen in other cases, even here we can find some debates regarding the term "effective control" that could be interpreted in different ways.

2.3 From accidents to immoral behavior: some important cases of HR violations

Now that we have analyzed the concept of responsibility, as regards human rights violations by private military contractors, focusing on the three types of state on which it can fall (Home, Hiring, Host), in this paragraph we want to deepen this analysis looking at some famous cases that could be useful to further understand the concrete implications in practice. For what concern the first category, the Home state, there are two important cases that highlight the importance of interpretation of the main Articles related to our subject. In the *Nicaragua* case we can find the well-known debated Article 8 of the ILC's Draft that is about "The conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct."[78]. In this case, the ICJ had to determine if the Nicaragua's request of condemning the United States of America for having "devised the strategy and directed the tactics of the *contra* force and provided direct combat support for its military operations"[79] was legitimate[80]. Accordingly to the ICJ, the request of Nicaragua was not legitimate, so it can not be satisfied: the Court could not establish if every *contras*' operation "followed a strategy and tactics set by USA"[81], even if the financing and

[77] FRANCIONI, F. ET RONZITTI, N., *War by Contract: Human Rights, Humanitarian Law and Private Contractors,* Oxford Scholarship Online, 2011, Ch. 7

[78] ILC Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries 2001, Art.8

[79]NICARAGUA v. UNITED STATES OF AMERICA, *Case Concerning Military and Paramilitary Activities in and against Nicaragua*, Para. 102, merits judgement of 27 JUNE 1986

[80] CASSESE, A. *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, The European Journal of International Law Vol. 18 no. 4, 2007

[81] Ibidem.

training organized for *contras* by the United States was considered by the Court as a fact. In order to clarify this issue, the ICJ proceeded with the so-called "agency test" which was about the possibility to equalize contras to an organ of the US Government and, to verify the hypothesis, they focused on the concepts of control and dependence, assessing at the end that the support of USA to contras was fundamental but it was not sufficient to affirm that these groups were totally dependent from it[82]. Furthermore, the Court retained that even the control factor was not up to a point to consider contras acting as an organ of the State. The next step of the ICJ was the "effective control test" aimed to verify the possibility to retain responsible the US Government for the breaches of rights made by the contras[83]. Despite the negative response of the "agency test", indeed, the responsibility for the illicit activities of the counterrevolutionaries could still fall on United States because of the aids they gave to them. Therefore, in order to verify this hypothesis, the Court retained that it would be necessary to find a legitimate proof to demonstrate the "effective control" of the US Government over the contras groups while these ones committed violations. Finding evidences that could verify the test, in order to retain responsible the United States for contras' actions, it is something very difficult because it requires proofs such as "instructions, command or particular instances of State control over the acts in question"[84]. All these types of evidences are very unlikely to be found, precisely because these are the kind of measures that, when implemented, are not made public. Even if the US has been retained accountable for their behavior with the contras: they armed the counter-revolutionaries, financed them and supported all the military and paramilitary actions against Nicaragua, breaching "its obligation under customary international law not to use force against another State"[85]; despite all of that, the Court came to a negative conclusion, stating that none of those activities can be considered directly as acts of the United States. Notwithstanding the negative outcome of the "effective control" test in the case of Nicaragua, it still remains important as it has recognized the responsibility of a State at least as regards its behavior towards another

[82] Ibidem.
[83] Ibidem.

[84] ORTEGA, E. L. A., *The attribution of international responsibility to a State for conduct of private individuals within the territory of another State,* Universitat Pompeu Fabra, 2015

[85] NICARAGUA v. UNITED STATES OF AMERICA, *Case Concerning Military and Paramilitary Activities in and against Nicaragua,* Para. 4, merits judgement of 27 JUNE 1986

State, even if it does not fully attribute the acts committed by military and paramilitaries on Nicaraguan soil.

Another important case useful to further understand the difficult application of responsibility to states for breaches of rights made by individuals or groups that are not considered as an organ of the state, is the *Tadić* one. One of the main aspects that are remarkable in this case is the utilization of the so-called "Overall control" test which was adopted as a tool in order to determine whether the conflict was of international nature or not[86]. The conflict discussed in the *Tadić* case is the one that saw the Bosnians Muslims fighting with the Bosnians Serbs and this case, in particular, was to serve to determine whether the Bosnian Serbian military forces have acted on behalf of the Federal Republic of Serbia[87]. If this hypothesis had occurred, this would have meant that the conflict in question was of international nature, thus also entailing the applicability of some provisions of the Geneva Convention. To determine the internationality of a conflict it had to be proven that the conflict had taken place either between at least two different states or between a state and an individual or group who had acted on behalf of another state, therefore "belonging" to this latter. This meant that the Court had the task of determining when an individual acts against a state by "belonging" to another state[88]. In practice, it was a question of determining whether the individual in question had acted under the orders of another state, specifically the Serbian Federal Republic. According to the Appeal Chamber, therefore, they had to rely on the general rules on state responsibility to impute the actions of individuals to the state[89]. The ultimate goal was to prevent possible shortcomings of responsibility by states in the international arena regarding the irregular use of private individuals capable of accomplishing what the state could not. However, in order to prevent the individuals in question from using this accusation toward a state as a loophole to avoid their responsibility, International Law must prove the responsibility of the State and it does so through specific tests as in the case of Nicaragua. In the *Tadić* case two tests were applied: the "effective control" test and the so-called "overall control" test. Both tests were valid and both for IHL and for state responsibility.

[86] NYMAN, E., Overall Control, University of Lund, 2008

[87] CASSESE, A. *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia,* The European Journal of International Law Vol. 18 no. 4, 2007

[88] Ibidem.

[89] Ibidem.

However, it must be specified that the *Tadić* case focused on the question of the international nature of the conflict while Nicaragua was closely connected to the US state responsibility for the actions of the contras[90]. Although the cases relate to different imputations, both cases are important with regard to State responsibility and have contributed to the creation of practice concerning the matter, although the effectiveness of the tests used is to be verified in each specific case.

2.4 The Responsibility of International Organizations

Now that we have analyzed the different forms by which a state can be held responsible for HR violations made by PMSCs, we want to start to introduce another subject, that is at the center of this research, that can actually be held responsible as much as the state for a wrongful conduct of PMSCs: the International Organizations. In the first chapter we traced back the development that contractors experienced through time, facing also the advent of peacekeeping, an opportunity for them that allowed companies to expand their services but also their credibility. The expansion of this new kind of international missions gave the possibility to PMSCs to evolve, also gaining a lot of space in many sectors that used to be exclusively of regular troops. Indeed, the progressive reduction of involvement by states in international conflicts allowed PMSCs to grow, leaving also more space to IOs. After the end of the Cold War the UN re-gained a lot of importance on the international scene and many other IOs started to grow and develop. International Organizations became through time very relevant within the context of the International Law, gaining objective legal personality and, consequently, also the responsibility for violations of International Law. In this regard, at the end of the Nineties, we assisted to an incredible evolution of international conflicts, with an ever-increasing role of IOs. Thus, with this evolution, many started to question not only about the State Responsibility, and that of companies too, but also about the responsibility that IOs have for wrongful acts perpetrated in international contexts by those PMSCs hired by the IOs or by a state and then seconded to an International Organization to work in an international operation.

[90] Ibidem.

In the previous paragraphs we saw some of the Articles on State Responsibility for internationally wrongful acts[91] that can be applied as useful tools to define the responsibility that states have in respect of beaches of rights at international level. These articles can be used even when the violations are perpetrated by PMSCs, because, as we saw previously, states always play their role when there are companies deployed on a conflict area. Thus , during the first years of the new Millennium, the Articles on State Responsibility have been used as a starting point from which to develop and define the responsibility of IOs for internationally wrongful acts and, indeed, during its fifty-fourth session, in 2002, the ILC decided to develop the matter appointing Mr. Giorgio Gaja as Special Rapporteur and establishing a Working Group[92]. Between 2003 and 2008 there has been six Reports on the topic and, through these, the Commission "provisionally adopted draft articles from 1 to 53"[93]. Then, there have been many other amendments in the following Report of 2009, especially regarding the structure of the Draft and, after that, in 2011 the Draft Articles on Responsibility of International Organizations were then adopted with the aim to define in a more detailed way all the aspects concerning the responsibility that the IOs have in case of internationally wrongful acts.

However, there have been some criticisms, starting from the genesis of the Draft: indeed many scholars started to raise objections about the many differences between the State and IOs: in this regard, they assessed that the Draft Articles on the responsibility of International Organizations is almost a copy of that on State Responsibility and that the only main difference between the two documents rely on the fact that the terms used for defining the State were changed with those of IOs in the Draft of 2011[94]. In this regard, the Commission defined the IO as "[A]n organization established by a treaty or other instrument governed by international law and possessing its own legal personality"[95]. Of course, the two subjects are very different in many aspects and using the same tools to

[91]International Law Commission (ILC), *Draft Articles on Responsibility of International Organizations, with commentaries* (ILC Yearbook 2011), Vol. II, Part Two.

[92] Yearbook of ILC 2009 (Vol II, Part Two) Chapter IV
[93] Ibidem.

[94] MÖLDNER, M., *Responsibility of International Organizations – Introducing the ILC's DARIO*, Max Planck Yearbook of United International Law, Vol.16, 2012, p.281-329

[95] International Law Commission (ILC). *Draft Articles on Responsibility of International Organizations*, with commentaries. ILC Yearbook, 2011, Art.2(a).

define responsibility could raise some objections, especially regarding the differences between the many legal systems at state level and IOs.

In this regard, the Special Rapporteur Gaja, in the first Report, identified that for being held responsible for internationally wrongful acts the IOs must have "separate personality"[96]. In this view, not every IO has always had the latter; indeed, if the UN clarified their legal personality since 1949, on the contrary, the EU made it clear only in 2009 after the Treaty of Lisbon.[97] Moreover, to be held responsible of breaches of IL, an IO must be operational which means that it has to operate on the field in contexts of conflict in order to violate important provisions and norms recognized at international level[98]. Thus, once an International organization has the features of separate legal personality and that of being an operational organization, with these specificities, come also responsibilities. In recognizing these features, indeed, there is also the recognition of the IOs as a new non-state actor, an international subject as much as the State. And with all the powers these IOs have there are also a lot of responsibilities and obligations to fulfill. To cite White: "with constitutional development comes institutional responsibilities"[99].

The main IOs we think about, when looking to all these characteristics, are certainly the United Nations, the European Union and NATO. All of them are operational, they all participated in missions of peacekeeping and peacebuilding all over the world. In this research, we will focus on the first two, trying to develop the path of regulation these experienced for PMSCs and thus to better understand and delineate the responsibility they have with regard the breaches made by PMSCs. IOs can be held responsible either for wrongful acts made at international level by their "organs or agents" or by "organs of a State or organs or agents of an international organization placed at the disposal of another international organization"[100]. When it is the IO that directly hire contractors, so as to be defined as "organs or agents" working for the Organization in an international operation,

[96] WHITE, N.D., *Institutional Responsibility for Private Military and Security Companies,* EUROPEAN UNIVERSITY INSTITUTE, ACADEMY OF EUROPEAN LAW, EUI Working Paper AEL 2009/26
[97] Ibidem.
[98] Ibidem.
[99] Ibidem.

[100]International Law Commission (ILC), *Draft articles on the responsibility of international organizations* 2011, Art.7.

responsibility can be attributed to the IO in a more direct way. On the contrary, when PMSCs are hired by a state as an "organ or agent" and then seconded to another IO, things are definitely more complicated, so much to define a precise tool that can delineate when the IO has the responsibility for wrongful acts made by PMSCs, that have been hired by another state and then seconded to the IO to work on an international operation, namely peacekeeping and peace-building ones. The tool that the Working Group and the Special Rapporteur chose is that of the "effective control" test, the same that we have already seen in Nicaragua case, used to define state responsibility.

Defining what subject had "control" over the PMSC involved in an internationally wrongful act resulted to be the best way to find the responsible for the breach and the "effective control" test has been recognized in many occasions as the more suitable instrument[101]. With Art.7, the Draft accepted the validity of this tool as for the case of State Responsibility. However, the recognition of the "effective control" test as the main instrument for defining the responsibility of an IO for breaches of IL made by PMSCs hired by a state and then seconded to the IO is a choice that can be debated and, indeed, it was. Following the critics made by White, if we look at a peacekeeping operation in the UN context where many regular troops are deployed by multiple UN member states, thinking that the UN would have the "effective control" over every part of the mission, PMSCs hired by member states included, would result "unrealistic"[102]. International operations, such as peacekeeping ones, are, most of the time, very complex and many aspects are thus managed by the member states that participate to the operation.

With this in mind, White suggests that the tool of the "overall control" test would be a more suitable instrument. Indeed, an actual and strict control is more proper of governments: they have direct and more effective control over their troops and, for them, it is also easier to have this type of control over those PMSCs hired for working alongside their regular troops; while for an IO as the UN it is definitely more complicated.

Apart from these aspects connected to Art.7, the Draft Articles provide other useful tools regarding the responsibility and obligations that the IOs have, as, for instance, those concerning reparation. Indeed, IOs are obliged not only to interrupt any kind of violations and to prevent the repetition of these, but they are also called to comply with their duties

[101] c
[102] Ibidem

regarding the providing of adequate remedies to all the victims of the violations for which the IOs are retained responsible. This topic is formulated under Art.31 and then, from Art.34 to Art.37, there are the definitions of every specific form of reparation which are restitution: "an international organization responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution: (a) is not materially impossible; (b) does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation"[103]; compensation: "1. The international organization responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution. 2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established"[104]; satisfaction: "1. The international organization responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation. 2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality. 3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible international organization"[105].

All these Articles related to the concepts of reparation and remedies should be further developed in order to provide an easier access to justice for all the victims of internationally wrongful acts for which IOs are held responsible. Indeed, we will return on this aspect concerning reparation on the next chapters, to further develop the topic in relation to the UN and the EU.

Another section we want to report here from the ILC Draft Articles on the responsibility of IOs is the one concerning the preclusion of wrongfulness. In Chapter V of the second part of the Draft, indeed, we can find many articles concerning the eventualities for which an act should not be considered wrong. Art.20 is the first in this part, stating that "Valid

[103] International Law Commission (ILC), *Draft articles on the responsibility of international organizations 2011,* Art.35.

[104] International Law Commission (ILC), *Draft articles on the responsibility of international organizations 2011,* Art.36.

[105] International Law Commission (ILC), *Draft articles on the responsibility of international organizations 2011,* Art.37.

consent by a State or an international organization to the commission of a given act by another international organization precludes the wrongfulness of that act in relation to that State or the former organization to the extent that the act remains within the limits of that consent"[106]. As a matter of fact, the second article in this section is about self-defence[107], which is the first eventuality that comes to mind when thinking about Art.20. The other articles that deal with the possible eventualities that precludes wrongfulness of an act are from Art.22 to Art.25 and these are: countermeasures, *force majeure*, distress, necessity. Then, there is Art.26 which is about "Compliance with peremptory norms"[108] while in Art.27 "Consequences of invoking a circumstance precluding wrongfulness"[109] are defined. This section is important with regard PMSCs because even them can be involved in situations where the only possible act to do can be considered wrong. The case of self-defence, indeed, can be easily understood: if a contractor, in order to save his life, has to commit a wrongful act, then this act should not be considered wrong and, thus, there should not be repercussion on the responsibility of the act.

Despite all these provisions, the Draft received other criticisms as that concerning the variety of IOs that are very heterogenous among them. As we will see in the Chapter concerning the EU, the Working Group circumvented this problem by adding Art.64 which introduced the concept of *lex specialis* that allowed the Commission to broaden up its approach in relation to the many types of IOs[110].

Other important observations made about the Draft concern the lack of sufficient *practice* and also the fact that, within this context, a third party capable to verify the responsibility and make effective compliance also with the consequent obligations that came after an internationally wrongful act is not contemplated[111]. Indeed, one may think, that the

[106] International Law Commission (ILC), *Draft articles on the responsibility of international organizations 2011*, Art.20.
[107] International Law Commission (ILC), *Draft articles on the responsibility of international organizations 2011*, Art.21.
[108] International Law Commission (ILC), *Draft articles on the responsibility of international organizations 2011*, Art.26.
[109] International Law Commission (ILC), *Draft articles on the responsibility of international organizations 2011*, Art.27.
[110] International Law Commission (ILC), *Draft articles on the responsibility of international organizations 2011*, Art.64.

[111] DAUGIRDAS, K., *Reputation and the Responsibility of International Organizations*, The European Journal of International Law Vol. 25 no. 4 EJIL (2014), 991–1018, 2015.

shortcoming that derive from the non-existence of a dispute settlement mechanism, in case of HR violations, could be circumvented by the victims by trying to address the IO considered responsible for those violations through national and domestic courts, but, however, it is known that in these contexts International Organizations have the immunity from jurisdiction and enforcement[112].

Following this criticisms, we could recall the fact that the UN General Assembly limited itself to taking note of the Draft, postponing for the future the possibility of developing a Convention, and an International Agreement, that could have a more stringent impact on the responsibility of the Organizations for internationally wrongful acts and on their obligations connected to it. However, at least for now, the development of a Convention in this direction seems to be far from being started.[113]

Therefore, following this wave of criticism, it is legit to question about to what extent the Draft Articles on responsibility of IOs can really affect these Organizations. The big question is, indeed, why should the IOs comply with the obligations defined within the Draft?

The point of the issue is understandable by reporting Article 4 of the Draft which defines that "There is an internationally wrongful act of an international organization when conduct consisting of an action or omission: (a) is attributable to that organization under international law; and (b) constitutes a breach of an international obligation of that organization"[114]. In this regard, returning to our subject, the PMSC, if this commit a HR violation while it was working for an IO, to consider responsible the IO, even before establishing if the "effective control"[115] test holds, it must be proved that the breach in question is a violation of an international obligation *of that organization*. Thus, within the contexts chosen for this research, the UN and the EU, in order to consider the two Organizations responsible for HR violations perpetrated by PMSCs, it must be proved that the compliance with Human Rights principles is considered an international

[112] SCHMITT, P., *Access to Justice and International organizations: The case of individual victims of Human Rights violations*, Leuven Global Governance Series, 2017
[113] Ibidem.
[114] International Law Commission (ILC), *Draft articles on the responsibility of international organizations 2011*, Art.4.

[115] International Law Commission (ILC), *Draft articles on the responsibility of international organizations 2011*, Art.7.

obligation by the two IOs. Instead, concerning the first part of the Article, in the case of an IHL violation, this could fall over the IO as it is part of IL. Reporting from the Commentary of the Draft, following the "International Court of Justice on its advisory opinion on the Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, international organizations are"[116]:

"bound by any obligations incumbent upon them under general rules of international law, under their constitutions or under international agreements to which they are parties"[117]

Most of the IOs, however, are not bound by a Human Rights treaty. Therefore, in order to find HR obligations for IOs, other sources should be taken into consideration.

The UN, through the UN Charter and the Universal Declaration of Human Rights, have as main objectives those of maintaining international peace and security, protecting human rights, delivering humanitarian aid, promoting sustainable development, and upholding international law[118], also, the main scope of the Organization is that of making the member states to comply with the obligations that derive from these objectives. However, stating that the UN itself could breach these obligations can be much more complicated, also because there is not an impartial third party that could define if the UN is responsible for an internationally wrongful act. In particular, looking to the case of PMSCs and HR violations, in order to justify Art.4 of the ILC Articles on responsibility of IOs, an international obligation of HR of the organization in question should be breached and, thus, the UN should have HR obligations in its internal order. It is quite difficult to assess the positivity of this hypothesis, but, in this view, we want to report the following statement:

"The legal bases upon which human rights are applicable to all UN activities can be derived first of all from the inherent nature of human rights. Human rights are part of

[116] International Law Commission (ILC). *Draft Articles on Responsibility of International Organizations*, with commentaries. ILC Yearbook, 2011
[117] Ibidem.

[118] UN Security Council, *Purposes and principles of the Charter of the United Nations, Part III*, Repertoire of the Practice of the Security Council, 21st Supplement, 2018

being a human being and therefore such rights are automatically part of the legal framework applicable to those with power to affect the enjoyment of those rights."[119]

Starting from this, therefore, we want to assume that the Articles on the responsibility of the IOs adopted in 2011, despite the lack of development in an International Convention and treaty, can still impact on International Organizations, even on the UN itself. Despite the lack of an internal written text that serves as a basis for human rights obligations of the UN, many have suggested that compliance with them is implicit and, moreover, some have argued that compliance with the Articles adopted by the Commission also depends on the reputation concept[120]. According to this hypothesis, in fact, the IOs would make sure to respect the Articles, and therefore the International Law, but also their internal obligations, in order to keep intact their reputation to which their legitimacy is also connected[121]. From this point of view, indeed, the concept of legitimization of such relevant Organizations should not be underestimated and if they did not respect the general rules of International Law, they would risk damaging their reputation, thus undermining their legitimacy.

Within the European context, searching for sources by which the EU could be bound to HR obligations, we wanted to look at the Fundamental Rights of the Union that can be found within the Charter that takes as fundamental rights those present inside the European Convention of Human Rights.

Even though, at its origin, the European Community treaties did not include explicit references to human rights, the EU has historically developed its obligations towards human rights within its legal order[122]. Starting from the Charter of Fundamental Rights, which provides for the respect of these not only by the member states but also by the EU itself. With the advent of Lisbon, this Charter became a binding source of primary law,

---

[119] WHITE, N.D., '*Towards a Strategy for Human Rights Protection in Post-Conflict Situations*', in N. White and D. Klaasen (eds), *The UN, Human Rights and Post Conflict Situations* (2005), at 463, 464.

[120] - DAUGIRDAS, K., *Reputation and the Responsibility of International Organizations*, The European Journal of International Law Vol. 25 no. 4 EJIL (2014), 991–1018, 2015.

[121] Ibidem.

[122] TAWHIDA, A. et BUTLER, I., *The European Union and Human Rights: An International Law Perspective*, The European Journal of International Law Vol. 17 no.4 EJIL, 2006

thus acquiring direct effect. Following this approach, the Union has the primary obligation not to breach Human Rights when it operates. Moreover, the fundamental rights that has to respect are those present in the European Convention on Human Rights[123]. Based on these general principles, a human rights basis can be found which foresees EU compliance with these principles, making it possible for the Articles on IOs responsibility adopted in 2011 to be taken into account when the conduct of an EU "organ or agent"[124], or of an "organs of a state or organs or agents of an international organization placed at the disposal of"[125] the EU, is recognized as an internationally wrongful act. Taking into account the principles of fundamental rights within the European legal order, albeit limited, can be considered as a basis when the EU's responsibility obligations as an International Organization are raised in the face of an illegal act at international level.

In this view, we want to assume that the Draft can still have an impact on the responsibility of IOs regarding HR breaches, at least theoretically, despite the lack of a dispute settlement mechanism and of an International Treaty capable to bind the IOs.

In the next chapters we will return on the issue of responsibility and on the Articles on the responsibility of International Organizations adopted by the ILC; we will also see some of the articles, and the relevance these have, in a more detailed way, within the contexts of the United Nations and the European Union regarding the PMSCs.

[123] Ibidem.

[124] International Law Commission (ILC), *Draft articles on the responsibility of international organizations 2011*, Art.6.

[125] International Law Commission (ILC), *Draft articles on the responsibility of international organizations 2011*, Art.7.

Chapter 3. The UN approach to PMSCs.

3.1 The development of the UN's utilization of PMSCs through time

We already said that PMSCs are often hired not only by states but also by International Organizations, NGOs and private companies (e.g. ENI). In this chapter we want to analyze the use that the United Nations make of private military and security companies, starting from the first approaches of the IO to this renewed phenomenon. In recent years there has been a lot of production of literature about PMSCs and many scholars focused their attention on the utilization of contractors in peacekeeping operations. During these last two decades, the United Nations employed in many peacekeeping operations private contractors, even if these were not used in direct military actions, providing, indeed, in most of the cases, a wide range of indirect paramilitary services, especially in relation to the protection of convoys and personnel[126]. The UN started to hire PMSCs since 1990, especially because of the scarce will of the states to get involved into conflicts after the end of the Cold War[127]. Regarding the legal basis, if we look to the UN Charter, we will not find an Article about private military and security companies nor about peacekeeping. For this reason, the operations in question are often referred as the Chapter VI ½ (Chapter VI and Chapter VII regard respectively the pacific settlement of disputes and the action with respect to threats to the peace, breaches of peace and acts of aggressions[128]) and, as their legal basis, there has been a lot of utilization of the so-called implied power doctrine by which "under international law, the Organization must be deemed to have those powers which, though not expressly provided in the Charter, are conferred upon it by necessary implication, as being essential to the performance of its duties"[129]. During the

[126] PINGEOT, L., *Contracting Insecurity Private military and security companies and the future of the United Nations*, February 2014

[127] CROWE, J. ET JOHN, A., *The Status of Private Military Security Companies in United Nations Peacekeeping Operations under the International Law of Armed Conflict,* 18 Melbourne J. of Int'l Law 16, 2017

[128] United Nations, *Charter of the United Nations*, 1945

[129] LINTI, T., *UN's Use of Private Military and Security Companies in Peacekeeping Operations - Is There a Legal Basis?,* Politikon: IAPSS Political Science Journal Vol. 29

last thirty years, peacekeeping has been increasingly used and developed and together with it there has been the growth and specialization of PMSCs. As we already said, in these operations contractors are mostly used in indirect way but this does not mean that they do not have any sort of influence in the mission[130]. In addition to the protection of convoys, logistics and personnel, private military companies are often in charge of training peacekeepers. All of this can happen only through two procedures: PMSCs can be contracted by a UN member state and then seconded to the UN, it is the case of the US hiring DynCorp as the sole supplier of civilian police to the State Department with the consequence that "every US police officer taking part in UN Civilian Police (UNCIVPOL) was in fact a DynCorp employee"[131], or they can be directly hired by the United Nations. In this chapter we want to focus on the direct way by which the United Nations hire private companies for using their paramilitary services in peacekeeping operations. For what concern the use of armed private security companies, on November 2012, the UN Department of Safety and Security approved a Policy on Armed Private Security Companies which assess the possibility to engage armed contractors "only on exceptional basis"[132] that is "when there is no possible provision of adequate and appropriate armed security from the host Government, alternate member State(s), or internal United Nations system resources'[133]. The aim of this policy was about the recommendation of "a more responsible and coherent PMSCs contracting practices"[134]. However, the support given by private companies during operations is gradually expanding and specializing, given also the complexity of the missions and the decrease of regular troops given by the member states. But before coming to the analysis of the modern peacekeeping operations carried out by the United Nations and the consequent development of PMSCs, it is good to remember that this relationship between the two subjects in question has not always been so collaborative, indeed, on the contrary,

[130] GHAZI, J. M., *The Legality of the Use of Private Military and Security Companies in UN Peacekeeping and Peace Enforcement Operations,* Journal of International Humanitarian Legal Studies,147-187,*2015*

[131] ØSTENSEN, Å., *UN Use of Private Military and Security Companies: Practices and Policies*, 2011

[132] SOSSAI, M., *The Legal Framework for the Armed Forces and the regulation of Private Security*, Routledge Handbook of Private Security Studies, 2015

[133] Ibidem.

[134] ØSTENSEN, Å., *UN Use of Private Military and Security Companies: Practices and Policies*, 2011

initially, as previously mentioned in the first chapters, the United Nations has had many reservations about the world of private security, especially regarding the use of this in a strictly military field. Some of the first actions taken by the United Nations against mercenary practice date back to the middle of the last century, very often concerning the decolonization process in Africa. These were mainly resolutions that generally went to target the specific case such as the one for actions in Congo[135] or that of Portugal[136]. Over time, however, the Organization has broadened its scope of action with regard to the phenomenon, starting to devise broader resolutions aimed at regulating mercenary activity. One of the first actions initiated by the United Nations regarding PMSCs, dates back to the 1989 approval by the General Assembly of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries[137]. This Convention was drafted in order to determine the parameters to identify the mercenary and to decide the practices for the eradication of mercenarism. Clearly, the first thing you notice is the use of the term mercenary, which, given the year of the convention, is completely understandable, as the private companies in question are not yet recognized as PMSCs and having not yet reached that level of specialization and professionalism that then detached them from the term in use in the convention. At this stage, there was still no positive opinion about the private security industry precisely because it still carried the mercenary label with it. Therefore, the initial approach of the United Nations towards this phenomenon was not at all positive, so much so that the resolution aimed precisely at eliminating the subject. It is important to understand that this first step, even if negative, is the consequence of a very precise historical period, at the end of the Cold War which played a fundamental role, influencing the member states not a little. What remains in evidence of the Convention is the lack of will of the member states to ratify it, due to the too strict definitions of the figure of the mercenary that prevent a real use of the document to prosecute possible mercenaries (it entered into force only on October 2001[138]). The definition used in the Convention to identify the mercenary is divided into two parts: with

[135] UN Security Council, *Security Council resolution 169 (1961) [The Congo Question]*, 24 November 1961, S/RES/169 (1961)

[136] UNGA 20; A/RES/2395 (XXIII) (29 November 1968)

[137] UNGA, *International Convention against the Recruitment, Use, Financing and Training of Mercenaries*, General Assembly resolution 44/34, New York, 4 December 1989

[138] Ibidem.

regard to the first part of the document, there is an important similarity with Article 47 (2) of the Additional Protocols I of the Geneva Convention, even if it remains, however, a substantial difference because "it excludes the requirement that the non-national recruit 'does in fact take a direct part in the hostilities'"[139]. Concerning the second part of the Convention, there is the reference to the "context within which mercenary activities may take place to include 'any other situation' in which any non-national is recruited to participate in 'a concerted act of violence aimed at (i) overthrowing a Government or otherwise undermining the constitutional order of a state; or (ii) undermining the territorial integrity of a State'[140]; and is 'motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation'[141]. If we look at these last aspects, we will note that the Convention makes no difference between the involvement of a mercenary in an international armed conflict and in a non-international one. Moreover, the UN Convention defines that the "recruitment, use, financing, or training of mercenaries an offence under international law, whether perpetrated by mercenaries themselves or by any other person"[142]. These and other requirements make almost impossible the application of the Convention:

> A mercenary is also any person who, in any other situation [that is, not in the context of an armed conflict]:
> (a) is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:
> (i) overthrowing a Government or otherwise undermining the constitutional order of a State; or
> (ii) undermining the territorial integrity of a State;
> (b) is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;
> (c) is neither a national nor a resident of the State against which such an act is

[139] FRANCIONI, F. and RONZITTI, N., *War by Contract: Human Rights, Humanitarian Law and Private Contractors*, Oxford Scholarship Online, 2011, Ch. 16

[140] UNGA, *International Convention against the Recruitment, Use, Financing and Training of Mercenaries*, General Assembly resolution 44/34, New York, 4 December 1989

[141] FRANCIONI, F. and RONZITTI, N., *War by Contract: Human Rights, Humanitarian Law and Private Contractors*, Oxford Scholarship Online, 2011, Ch. 16

[142] UNGA, *International Convention against the Recruitment, Use, Financing and Training of Mercenaries*, General Assembly resolution 44/34, New York, 4 December 1989

directed;

(d) has not been sent by a State on official duty; and

(e) is not a member of the armed forces of the State on whose territory the act is undertaken[143].

Among the main critics of the document, there is the claim by which the "profit-motive" used as an essential part to define the mercenary should not be taken into account: there are other reasons that could incentive mercenaries in taking part to a conflict. Plus, many of them are interested in getting involved into hostilities because of their political ideas or their thirst of adventure and using just the gain of profits as a parameter for recognizing them could exclude all those mercenaries moved by other objectives[144].

As we already said, the 1989 Convention was just the starting point of the UN relations with PMSCs. The Organization, indeed, modified and developed its approach to the matter just in few years and, of course, the turning point of these changes was the end of the Cold War. Thanks to the less and less interest of the member states in being involved in international conflicts and the development of peacekeeping, the PMSCs have been able to renew themselves in the nineties, quickly becoming the first commercial partner of the United Nations. With the increase in the involvement of private security companies in peacekeeping operations carried out by the International Organization, the demand for greater regulation of the phenomenon has also grown. At the same time, the security industry lobbies have developed a lot, pushing for more space in these 2.0 operations. In addition, many member states, including the major superpowers, have pushed hard for an ever-greater delegation to PMSCs in peacekeeping in order to have less and less responsibility in international conflicts, while remaining in the game with their contractors and protecting their reputation[145]. However, it is worth underlining that despite these pressures for a greater delegation to companies such as DynCorp or Aegis (both very used by the UN in its operations), the complete reliance of peacekeeping (and

[143] Ibidem.

[144] FALLAH, K., *The generation of International Legal Norms to regulate Private Military Violence*, University of Sidney, 2017

[145] CROWE, J. ET JOHN, A., *The Status of Private Military Security Companies in United Nations Peacekeeping Operations under the International Law of Armed Conflict*, 18 Melbourne J. of Int'l Law 16, 2017

increasingly also peacebuilding) on private contractors it is something that remain very far from reality.

Another important step that the United Nations made in order to further regulate and deal with the phenomenon of the PMSCs is the establishment of the UN Working Group in 2005. This organ replaced the office of the special rapporteur on the use of mercenaries, existed between 1987 and 2004, and it is formed by five independent experts[146]. It operates "under the auspices of the UN Human Rights Council"[147]. Initially, the UN Working Group dealt not only with mercenarism, working also to:

"monitor and study the effects of the activities of private companies offering military assistance, consultancy and security services on the international market on the enjoyment of human rights, particularly the right of peoples to self-determination, and to provide draft international basic principles that encourage respect for human rights on the part of those companies in their activities." (UN Doc E/CN.4/RES/2005/2[148])

Also, in 2009, the Human Rights Council decided to further enlarge the tasks of the UN Working Group, starting a series of consultations in order to set out the "content and scope of a possible draft convention on private companies offering military assistance, consultancy and other military security-related services on the international market (UN Doc A/HRC/10/11, 13a) and to circulate among member States the 'elements for a possible draft convention on private military and security companies, to request their input on the content and scope of such a convention" (UN Doc A/HRC/10/11, 13b)[149] .

As a consequence, in 2010, the Draft of a possible Convention on PMSCs was presented to the Human Rights Council with the scope to increase the promotion of "transparency

[146] MARCHETTI, E., *Private Military and Security Companies: Il caso italiano nel Contesto Internazionale*, Quaderni IAI, 2013

[147] FALLAH, K., *The generation of International Legal Norms to regulate Private Military Violence, University of Sidney*, 2017

[148] Human Rights Resolution 2005/2: The Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination

[149] Ibidem.

and responsibility"[150] among all the Member States that use Private Military and Security Companies and also in order to set out more efficient services of rehabilitation for victims involved in these kind of dynamics[151]. What remains ambiguous of this Draft is the double direction it tried to pursue. They looked, at the same time, for a "dramatic prohibition on military and security contracting"[152] and also for a complex system of regulation. The Draft Convention deals with state responsibility by setting obligations for the home and host states, also adding that states that hire PMSCs must ensure that they have been properly trained with respect to respect for human rights and the IHL[153]. The draft would then require states to control and supervise the PMSCs at home, also establishing an internal licensing system. However, the draft remains in many respects vague, failing to specify many important aspects regarding the control and possible punishment for a PMSC. The problem arises from the fact that, despite the reporting mechanisms and the establishment of an Oversight Committee, it makes use of the due diligence obligations of each country which potentially, and really, can be very different from each other. To avoid a heterogeneous application in the licensing systems, above all, the Committee should establish general guidelines so as to be able to standardize the internal procedures of the states. Within the draft, however, many discrepancies remain which would lead to the failure to sign by many disagreeing states: for example, the services of the PMSCs recognized within the Draft Convention are rather limited and this would lead to a failure ratification by those states that make extensive use of multiple services made available by private companies. For these reasons a lot of Member States found many difficulties in signing the Draft. Despite the ambivalent nature of the Draft Convention, if it was ratified it would become binding, contributing significantly to the legal management of PMSCs internationally and in the context of the United Nations.

[150] Ibidem.

[151] FALLAH, K., *The generation of International Legal Norms to regulate Private Military Violence, University of Sidney*, 2017

[152] Ibidem.

[153] MARCHETTI, E., *Private Military and Security Companies: Il caso italiano nel Contesto Internazionale*, Quaderni IAI, 2013

3.2. The increasing use of PMSCs in UN peacekeeping operations

Now we want to analyze in more detail the gradual growth of the use of PMSCs in UN peacekeeping operations, focusing on those operations that were then found to be of greater importance in the subject. Despite the critics on PMSCs made by the UN Working Group on the use of Mercenaries, the United Nations gradually increased their reliance on these companies for many peacekeeping operations around the World. One of the reasons behind the increase in private contractors in these operations lies precisely in the change that peacekeeping has undergone in the last thirty years: if peacekeeping initially developed more on a defensive strategy, within few years, it evolved into something more "robust"[154], arriving at what is called 2.0 peacekeeping, where the implementation of force in order to bring and establish peace is now an instrument to all effects. During the last decade, the UN peacekeeping personnel started to become a target on the field, therefore the use of PMSCs intensified, even if they were implemented for non-armed activities. In 2014, as many as 30 private, armed and non-armed, security companies were UN employees. The organization has employed unarmed contractors in 11 peacekeeping and support operations, while those armed were involved in other two important missions: MINUSTAH[155] and UNAMA[156]. However, in most of these operations, the UN has principally used paramilitary services such as the use of reconnaissance drones during the MONUSCO[157] mission in Congo in order to better manage the complexity of the mission[158]. One of the first UN operations that saw the involvement of PMSCs was the

[154] CROWE, J. ET JOHN, A., *The Status of Private Military Security Companies in United Nations Peacekeeping Operations under the International Law of A*rmed Conflict, 18 Melbourne J. of Int'l Law 16, 2017

[155]UN Security Council, *United Nations Stabilization Mission in Haiti (MINUSTAH)*, UN SC Resolution 1542 (2004)

[156]UN Security Council, *United Nations Assistance Mission in Afghanistan (UNAMA)*, UN SC Resolution 1401 (28 March 2002)

[157] United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO,) United Nations Security Council Resolution 1925 (2010)

[158] LINTI, T., *UN's Use of Private Military and Security Companies in Peacekeeping*

one in Bosnia-Herzegovina (UNPROFOR[159]) in 1992. The Organization employed five companies and, among of them, there were DSL and DynCorp, two of the most known PMSCs. The involvement of these firms in the mission then reached a point at which they covered several important sectors for the operation. DSL has provided specialists of all kinds, from the risk management field to architects and mechanics. During UNPROFOR, but also in other missions, the presence of contractors has continued over time, arriving in certain cases where private personnel remained in the field instead of peacekeepers, which have become targets in most of the conflicts[160]. Corporations such as DSL took part in other important missions such as ONUMOZ[161] and UNAVEM[162] (respectively Mozambique and Angola). An interesting aspect regarding the involvement of the PMSCs in the peacekeeping carried out by the United Nations, is that these have arrived at all levels of the Organization. The UN, indeed, also employed private security companies for services intended for the management and security of its departments. Thus, within a few years, these companies have developed a multitude of services that very often have evolved according to the needs of their employer, in this case the UN, and while these have made their way starting from the new complex peacekeeping operations , the Organization itself has developed a kind of dependence on these, partly because of the strategic and political direction of the member states and partly because of the shortage of regular troops.

If we want to understand precisely the wide range of services that the major PMSCs have offered or offer in all UN missions, peacekeeping and not, it is interesting to report the list made by Felipe Daza in the book *Public International Law and Human Rights Violations Private Military and Security Companies*[163]:

---

[159] UN Security Council, *United Nations Protection Force (UNPROFOR),* UN Security Council Resolution 743 (1992)

[160] ØSTENSEN, Å., *UN Use of Private Military and Security Companies: Practices and Policies*, 2011.

[161] UN Security Council, *United Nations Operation in Mozambique (ONUMOZ),* UN Security Council Resolution 797 (1992).

[162] UN Security Council, *United Nations Angola Verification Mission I (UNAVEM I),* United Nations Security Council Resolution 626 on December 20, 1988.

[163] TORROJA, H., *Public International Law and Human Rights Violations by Private Military and Security Companies, 2017.*

1. security and protection;
2. intelligence;
3. consulting and training for police;
4. military operational support;
5. construction and maintenance of military infrastructure;
6. military logistics support;
7. maritime security;
8. provision, maintenance, and disposal of weapons/explosives;
9. other (legal support, hijacking management, etc.);
10. military assistance;
11. mine clearance and demining;
12. quasi-police tasks;
13. humanitarian aid;
14. provision and maintenance of surveillance systems, remote control;
15. combat and military operations.[164]

One of the longest and most complex conflicts that fully testifies to the change in peacekeeping operations over the years, and which has also seen the development and evolution of PMSCs from being mercenaries to recognized private companies, is certainly that of the Congo. Since 1960, with the ONUC[165] mission, the regular troops of the United Nations have dealt with mercenaries, albeit in a completely different way than today. The contractors, at the time, were in the pay of those who financed the rebellion and secession of the Katanga region, while the UN was trying to stabilize the country by implementing one of the first peacekeeping missions[166]. In addition to the problem of secession, the United Nations and the ONUC mission had to manage the decolonization process from Belgium and this made the operation even more complex. This first phase lasted only a few years as after the withdrawal of the blue helmets in 1964 the Congo was

[164] Ibidem.

[165] UN Security Council, *United Nations Operation in the Congo (ONUC),* United Nations Security Council Resolution 143 of 14 July 1960.

[166] Ibidem.

the scene of continuous internal conflicts for more than thirty years. Only at the end of the nineties do we see the UN return, this time with a completely different approach to peacekeeping. Initially with the task of monitoring the situation and then expanding the operation (MONUC[167]), embracing the new type of peace enforcement, the UN has expanded its activities and with the growing conflict it has had to adapt and diversify tasks, thus arriving to assume the PMSCs. During the MONUC mission the UN has hired several private security companies that have carried out a wide range of activities: from the supply of fuel and food to the protection of strategic points for the operation, also taking care of logistics. Among the most important PMSCs present in the mission we find PAE that has carried out most of the services already listed and which then proved to be essential during the protests that degenerated in 2005, which then led to attacks on peacekeepers, deemed incapable of managing the massacres that occurred[168]. In this situation of incredible tension, PAE has been able to organize the protection and extraction of all the personnel of the mission, remaining then longer in the area in order to quell the disorders[169]. Despite the many failures, the Security Council has then decided in 2010 to further integrate the mission until it reaches an evolution aimed at stabilizing the country: MONUSCO[170]. At this stage, the operation took an even more "robust" approach, engaging private security companies from the rather dubious past. The crisis, however, persisted despite all the efforts made by regular troops and not, for this reason in 2013 the Security Council approved the Resolution 2098[171] in order to strengthen the space for maneuver of the mission and for the establishment of an "Intervention Brigade" enabled for interventions particularly violent in order to protect civilians and eradicate the rebels. In this scenario, we find the implementation of the drones already mentioned above, built by an Italian company (Selex Es) hired directly by the mission for the creation

[167] United Nations Organization Mission in the Democratic Republic of the Congo (MONUC), United Nations Security Council Resolution 1279 (1999)

[168] BIANCHETTI, O., *The Role of Private Military Security Companies in the New Generation of UN Peacekeeping Missions,* Université de Lausanne / Universität Zürich, 2016.

[169] Ibidem.

[170] United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO,) United Nations Security Council Resolution 1925 (2010)

[171] United Nations Security Council Resolution 2098 (2013) on the extension of the mandate of the MONUSCO until 31 Mar. 2014.

of a special program aimed at surveillance of hot spots and monitoring of migration flows due to continuous massacres[172]. The prolonged presence of the United Nations in Congo is one of the cases that can best show the evolution of peacekeeping from the sixties to today, showing also, consequently, the development of the relationship between the UN and the PMSCs that, from destabilizing mercenaries, they then became a key partner in the peace enforcement process.

In addition to the painful experience of the Democratic Republic of the Congo, there have been other important peacekeeping missions that have marked and modified the relationship between PMSCs and the UN. The private security company DynCorp contributed to the UN-sanctioned International Force in East Timor by offering air support through helicopter transport, also guaranteeing communication systems with satellite networks[173]. In the same context, the private DSL has provided logistics and intelligence support for local troops. The aforementioned PAE, instead, closed another contract regarding the supply of logistics in the UN mission in Sierra Leone[174].

3.2.1 legal gaps and the need of a further regulation

As we have previously seen, most of the services offered by PMSCs in peacekeeping operations mainly involve technical and paramilitary support activities where contractors are not armed. The companies can be hired directly by the UN or they can be under the contract of a member state which then sends the contractors as part of their troops assigned to the mission of the United Nations. What has always led to objections regarding the involvement of PMSCs in peacekeeping operations is their possible violent escalation that could happen even in contexts where they operate without weapons. They could find themselves in situations where the conflict becomes inevitable for their own protection or that of the civilians and this could subsequently lead to a degeneration and

[172] BIANCHETTI, O., *The Role of Private Military Security Companies in the New Generation of UN Peacekeeping Missions,* Université de Lausanne / Universität Zürich, 2016

[173] Ibidem.

[174] ØSTENSEN, Å., *UN Use of Private Military and Security Companies: Practices and Policies*, 2011

therefore to possible violations of human rights. The problem of the use of contractors in this type of missions lies precisely in this eventuality since in the case of violations of human rights the lack of regulation and rules at international level could cause the guilty parties belonging to a private company to avoid any possible sentence. All the documents concerning the regulation of the phenomenon previously mentioned in this analysis are often not ratified or in any case not binding; many of these define the "mercenary" with a range of definitions that are so specific and different from each other that it would be almost impossible to fall into all of them. To follow this concept, Singer reports a commentator's judgment within the private security industry which sums up the idea very well: "...anyone who manages actually to get prosecuted under the existing anti-mercenary laws actually deserves to 'be shot and their lawyer beside them'"[175]. Most of the disputes in question take place in the context of an armed conflict that is internationally regulated by international humanitarian law. This poses various problems in relation to PMSCs as generally the personnel of the UN peacekeeping missions enjoy different immunities at international level and a possible extension to private companies would generate many consequences. In addition, under the IHL, we find the important division between "combatants" and "civilians" that in the case of PMSCs has generated much discussion. Since these latter are treated as civilians, they, according to Article 43 (2) of the Additional Protocols I to the Geneva Conventions of 1949[176], could in no way take part in hostilities except by self-defense. For this prohibitive view of the status of civilians the PMSCs can in no way take part in the armed conflict by attacking other combatants directly[177]. If, on the other hand, the contractors were considered at full level as the regular fighters, these could open fire against the other party, but, in turn, would lose the status of civilian and therefore also the protection that comes from it.

[175] SINGER, P.W., C*orporate Warriors: the rise of the Privatized Military Industry*, 2003

[176] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (PROTOCOL I), of 8 June of 1977, International Committee of the Red Cross

[177] CROWE, J. ET JOHN, A., *The Status of Private Military Security Companies in United Nations Peacekeeping Operations under the International Law of Armed Conflict*, 18 Melbourne J. of Int'l Law 16, 2017

3.3 The responsibility of the United Nations for damage caused by PMSCs

In the previous paragraphs we traced the development of PMSCs within the UN context through time, describing also the increasing relevance that these companies obtained in the sector of peacekeeping operations, growing and adapting themselves alongside the changes that these kind of operations experienced during these years. Now we want to analyze another essential aspect of the utilization of PMSCs in UN-led operations: the responsibility for wrongful acts made by PMSCs hired for working in a UN mission. We already saw the reasons that push the United Nations in relying in an ever increasing way on these private companies and we also affirmed that a more controlled system for the employment of PMSCs could allow to use these in a clearer and more direct way, with the consequent decreasing of the need to rely on regular troops putted at disposal by member states. We then said that a greater employment of PMSCs would also certainly lead to the increasing of wrongful acts concerning HR by contractors hired by the United Nations. It is exactly for this kind of breaches within the context of UN operations that the question of responsibility arises spontaneously. Indeed, in the case of the deployment of regular troops, when violations of HR emerge, even in international operations such as the peacekeeping ones, the responsibility can be directly attributed to their governments. But when PMSCs are hired by the UN or by member states for working in a UN-led operation it is more complicated to assess whose the responsibility it is. As the state has always been considered as the principal subject of International Law, the growing complexity at international level entailed the emergence of new non-state actors, IOs *in primis*.[178] The former developed and achieved an important role on the international scene and their utilization of PMSCs, another non-state actor, led to the increasing of questions about the responsibility the IOs may have, despite the centrality of the sovereign state at the international level. The latter could also gradually lose its fundamental role on the military and defense field due to the progressive direct use of PMSCs by IOs. Also, with their gradual development, starting from the middle of the twentieth century, some important IOs achieved the legal status of international subject, thus also acquiring the responsibilities for violations of HRL and IHL. For these reasons, we now want to further analyze the abovementioned Draft Articles on the responsibility of International

[178] FRANCIONI, F. ET RONZITTI, N., *War by Contract: Human Rights, Humanitarian Law and Private Contractors*, Oxford Scholarship Online, 2011, Ch. 19

Organizations adopted by the International Law Commission in 2011 with the precise purpose of defining the responsibility obligations that IOs have for "an internationally wrongful act"[179]. In the Art.2 of the Draft there are the definitions that specify the meaning of the main subjects of the document which are:

(a) "international organization" means an organization established by a treaty or other instrument governed by international law and possessing its own international legal personality. International organizations may include as members, in addition to States, other entities;

(b) "rules of the organization" means, in particular, the constituent instruments, decisions, resolutions and other acts of the international organization adopted in accordance with those instruments, and established practice of the organization;

(c) "organ of an international organization" means any person or entity which has that status in accordance with the rules of the organization;

(d) "agent of an international organization" means an official or other person or entity, other than an organ, who is charged by the organization with carrying out, or helping to carry out, one of its functions, and thus through whom the organization acts.[180]

In addition, we then find Art.4 where there are the criteria that delineate when an internationally wrongful act of an international organization occurs. These criteria are fulfilled "when conduct consisting of an action or omission:

(a) is attributable to that organization under international law; and

(b) constitutes a breach of an international obligation of that organization."[181]

These Articles are part of the first chapter of the Draft, and they are useful to understand the framework and the main subjects of what this document is about. Subsequently, for

[179]International Law Commission (ILC), *Draft Articles on Responsibility of International Organizations, with commentaries* (ILC Yearbook 2011), Vol. II, Part Two.

[180] International Law Commission (ILC), *Draft articles on the responsibility of international organizations* 2011, Art.2.

[181] International Law Commission (ILC), *Draft articles on the responsibility of international organizations* 2011, Art.4.

our research, it is important to dwell on Art.6 that define the "Conduct of organs or agents of an International Organization"[182] and it specifies that:

"1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization.

2. The rules of the organization apply in the determination of the functions of its organs and agents.[183]"

In relation to the UN, Art.6 is important because can be applied when PMSCs are employed by UN and act as an "agent" of the IO. However, this situation can be more complex when the PMSCs is not directly hired by the IO, but it is hired by a state and then it is "at disposal of another IO"[184]. In this case, Art.7 of the Draft apply the tool of the "effective control" test to recognize when the IO has the responsibility for wrongful acts committed by "organs of a State or organs or agents"[185] of another IO.

Among the many Articles of the Draft adopted in 2011 by the ILC, the ones presented above are those that could fit more the case of responsibility of the United Nations for wrongful acts made by PMSCs employed for bringing services in UN-led operations, especially in peacekeeping and peacebuilding ones. However, in the Draft, there are other articles concerning the responsibility of the IOs with respect to other duties such as that of reparation. Indeed, in the Part III of the document there is Art.31 that defines the obligations the IOs have in terms of reparation which are:

1. The responsible international organization is under an obligation to make full reparation for the injury caused by the internationally wrongful act.

2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of an international organization.[186]

---

[182] International Law Commission (ILC), *Draft articles on the responsibility of international organizations 2011*, Art.6.
[183] Ibidem.
[184] International Law Commission (ILC), *Draft articles on the responsibility of international organizations 2011*, Art.7.
[185] Ibidem.
[186] International Law Commission (ILC), *Draft articles on the responsibility of international organizations 2011*, Art.31.

Then in Chapter II of this part of the Draft we can find Art.34 that describe the specific features of every form of reparation which are "restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this Chapter[187]".

This part confirms that IOs have responsibility not only for breaches of HR perpetrated by PMSCs hired by them, but also for ensuring all the necessary remedies to the victims of these violations. Moreover, following the assumption posed in chapter 2 of this work, we can say that these articles can actually affect the IOs, and the UN itself, even if the document in question has not been developed in an International Treaty. Therefore, even if without a dispute settlement mechanism, it could be said that the most important function that the Articles on the responsibility of IOs can perform is that of preventing internationally wrongful acts, also due to the concept of reputation expressed in the previous chapter.

[187] International Law Commission (ILC), *Draft articles on the responsibility of international organizations 2011*, Art.34.

Chapter 4. The EU approach to PMSCs.

4.1 The lack of harmonization at the EU level

The first thing to say when we want to discuss about PMSCs at the EU level is that the actual regulation and legal basis are almost inconsistent. All the measures taken until now can do little in ensuring human rights and IHL compliance by PMSCs. One of the main problems is the current lack of harmonization among the Member States of the European Union. The differences, indeed, are so deep that in some states there is the prohibition of PMSCs while in others the use of contractors is something usual and regulated. Even if there is the need at the EU level of a further regulation capable to ensure human rights and IHL compliance by contractors, it is useful to analyze some of the provisions attempted until now, especially because these are considered by many a point of start by which the EU can move forward and create a clearer legal basis. Most countries within the European Union tend to treat the issue from the point of view of the Home State and thus to ensure that any regulations deal more with the control of private security activities within the country that holds the legal registration (and physical basis) of private companies connected to these activities. Among the member states that use this type of approach we find Italy, France, Spain and Germany; while a non-European Union country that tends to regulate these companies from the point of view of the Home State is the Russian Federation[188]. Remaining in the EU instead, even if by now it is more outside than in, the United Kingdom stands out among the other member states also as regards the approach to PMSCs. Indeed, although starting from a regulation with the home state approach, it then expanded with the Green Paper on PMCs as regards the services performed at international level, so as to apply the national regulation also to the host state[189]. Essentially, we could divide the member states of the Union into two macro-categories: those with a clearer and more delineated regulation and those that adopt a more laissez-faire policy, even if, in recent years, even these countries have begun to become more aware of the need to further regulate the subject in question[190]. Outside the

[188] BAKKER, C. ET SOSSAI, M," *Multilevel Regulation of Military and Security Contractors: The Interplay between International, European and Domestic Norms*", 2012, Hart Publishing Ltd, Chapter 5
[189] Ibidem.
[190] Ibidem.

European Union there are very few states that have started a regulatory process on private security companies, even less on those that are strictly military. We have already met the United States before and in addition to these we must mention South Africa. But returning to our two major categories, it is good to analyze in a more detailed way some key countries of the European Union that can show the main trends and, also, the anomalies present. Since the regulation at national level is almost always present as regards the services of the PSCs (the PMCs are much less present), there is therefore the need for further regulation at the level of the European Union, especially in relation to the export of activities carried out by the PSCs in third countries. In addition, most of these companies operate nationally in unarmed contexts (private or public security) while abroad the implementation of services with armed contractors increases, these being often employed in third states with armed conflicts. Furthermore, the European arms exportation regulation does not deal with the export of security services, leaving them within the internal policies of the member states[191]. It is precisely in this context that private companies are poorly regulated and therefore the risk of a violation of human rights becomes more concrete. For these reasons, a supranational development at a European level that better controls the export of private security services would seem more than necessary, also considering the growing use of such corporations.

4.1.1 Italy

The first European country we want to analyze is Italy. The development of norms capable of regulating PMSCs is controversial. If on the one hand we find different norms dealing with private security companies (PSCs), on the other hand, with regard to private military companies (PMCs), we find an important legal vacuum which causes the PMSCs macro area to be regulated in a very general way[192]. One of the reasons why we find only regulations regarding the PSCs concerns the fact that these were written before the very advent of the PMSCs and therefore of the most military component. Moreover, the present rules have been drafted with the function of managing the companies operating in the

[191] Ibidem.

[192] BAKKER, C. ET SOSSAI, M," *Multilevel Regulation of Military and Security Contractors: The Interplay between International, European and Domestic Norms*", 2012, Hart Publishing Ltd, Chapter 11

territory, thus not envisaging a future export of these services to third countries, developed above all with the birth of peacekeeping. With regards to the export of a certain range of private security services, such as consultancy, a step forward was made in 2007, with the law (29 March 2007, No. 38[193]) that allowed the temporary use of some PSCs in Afghanistan, Lebanon and Sudan subject to authorization by the Ministry of Foreign Affairs which in turn had to be authorized by law[194]. However, this procedure operates in a rather restricted range, given the specific cases of the three countries mentioned and the necessary authorizations and cannot therefore be applied for all other cases of possible export of services offered by PSCs. Another cause is to be found in the aforementioned Weberian monopoly on the use of force which, in Italy, is particularly centralized, given the historical and legal development of the country. In any case, in this context, PMSCs remain in a sort of limbo because PMCs are not incorporated into the Italian legal system and are not present in the country. Moreover, remaining in Italy, it is good to remember the prohibition of mercenarism and the consequent possibility of prohibiting PMSCs. Here comes into play the so-called "qualified link theory"[195] which envisages the application of certain criminal rules to PMSCs when a link between a PMSC and a foreign state is demonstrated. Following the analysis of Atteritano in the book "*Multilevel Regulation of Military and Security Contractors*", accordingly to the Tribunale del Riesame, the Article 288 of the Italian Criminal Code (cp) that "punishes the recruitment of persons for the purpose of fighting on behalf of a foreign state or an insurrectional group"[196] may be applied if a "special link" between the PMSC and the foreign state is demonstrated[197]. This particular case concerned the recruitment of three Italian citizens by a foreign private company in order to employ them in Iraq as bodyguards. During the

[193] Legge 29 Marzo 2007, n.38, Conversione in legge, con modificazioni del decreto-legge 31 gennaio 2007, n.4, recante proroga della partecipazione italiana a missioni umanitarie e internazionali (GU n.76 del 31-01-2007)

[194]BAKKER, C. ET SOSSAI, M," *Multilevel Regulation of Military and Security Contractors: The Interplay between International, European and Domestic Norms*", 2012, Hart Publishing Ltd, Chapter 11

[195] Ibidem.

[196] Articolo 288, Gazzetta Ufficiale Repubblica Italiana, 26 ottobre 1930, n.251, Codice Penale, approvato con R.D. 19 ottobre 1930.

[197]BAKKER, C. ET SOSSAI, M," *Multilevel Regulation of Military and Security Contractors: The Interplay between International, European and Domestic Norms*", 2012, Hart Publishing Ltd, Chapter 11

second instance it was clarified that the Article 288 (cp) can be applied only when the case "concerns persons recruited with the purpose of performing military activities on behalf of a foreigner"[198]. The three citizens were employed as bodyguards; therefore, they could not be considered involved in military activities. In addition, the link between the private company (DTS) and a foreign country (in this case the Anglo-American forces) could not be proved[199]. Even if the "qualified link theory" was not confirmed, this case is important because it asserts that a PMC can be accused of Mercenarism when there are evidences that confirm the existence of this link.

In this view, regarding the responsibility for PMSCs' actions, it is important to remark the fact that Italy is part of that group of European States that uses the Home State approach and not the Hiring one.

4.1.2 Germany

Another European country that we want to analyze about the use and regulation of PMSCs is Germany. As for Italy, in the German Federation we do not find specific laws able to regulate the PMCs, while we find the presence on the territory of many private security companies, even if the latter, in order to exercise, require a license issued by the competent authorities[200]. The procedure for obtaining this authorization is rather long and detailed and requires a certain level of preparation for the person who intends to obtain the license[201]. Although the latter does not foresee it, it is still possible for PSC employees with authorization to be trained for combat and to hold weapons. This particular aspect is regulated by another law which however remains general and therefore behaves in the same way with all German citizens. As for the employment of private security companies abroad, (the military are not mentioned) they are mainly hired by the Government to lighten the tasks normally entrusted to the Armed Forces[202]. The activities carried out by

[198] Ibidem.
[199] Ibidem.

[200] BAKKER, C. ET SOSSAI, M," *Multilevel Regulation of Military and Security Contractors: The Interplay between International, European and Domestic Norms*", 2012, Hart Publishing Ltd, Chapter 10
[201] Ibidem.

[202] Ibidem.

the PSCs in foreign territory essentially revolve around the tasks of logistics and purely non-military support and are therefore only indirectly involved with the work carried out by the Armed Forces. Although the presence of German PMCs remains unsubstantiated, there were exceptions where some PSCs would try to carry out purely military training activities abroad. This behavior has been blocked by the German Government as it is in contrast with its own legislation[203]. Above all, the employees of these companies are considered in any case with the status of civilian, thus being deprived of the status of prisoner of war attributable to the combatants, but still enjoying the rights reserved for civilians. Precisely because of this gap, when the PSCs decide to start military activities, the employees could avoid regulation by their own country as military activities are managed by the Military Law, but since these are PSCs, they are governed by commercial laws[204]. All these forms of control exercised over private security companies make us well understand the Home State approach used by the German State as a method to regulate the activities carried out by all these firms that have their registered and physical offices in Germany.

4.1.3 United Kingdom

Now we want to move on to the country that, given the recent developments, is less and less part of the European context, but that over the last twenty years has repeatedly developed a regulation of PMSCs, alternating phases with a more rigorous approach to lighter phases where the self-regulation and reliance on international models have played a leading role. The United Kingdom leaves behind a conspicuous legacy regarding the development and use of private (and military) security companies, so much so that the first documents of attempted control over what were then mercenary companies date back to the nineteenth century. Some of the largest and most relevant PMSCs, such as Aegis or G4S, have their registered office and bases in the UK and many of them have participated in international operations, thus not only operating on the national

[203] Ibidem.
[204] Ibidem.

territory[205]. For this reason, the UK has tried to regulate this phenomenon on several occasions, although not always with good results. The change of approach in managing PMSCs also depended on the different political changes that have occurred throughout the various historical periods of the country. If, in fact, at the beginning of the twenty-first century, the British government sought to better control corporations through a national licensing system, within nine years the government had turned to an approach aimed at self-regulation of PMSCs with at the same time a gradual integration of international regulations such as the Montreux Document[206]. Since the 1990s, the British government has attempted to carry out a control through a license system promoted also by important documents such as the 2002 Green Paper and the 2003 Ninth Report[207]. What really changed the balance, however, is the advent of the wars in Iraq and Afghanistan which have seen the gradual increase in the use of English PMSCs by the United Kingdom. At this stage, the government decided to relax its hold on the contractor companies, both because the aforementioned contexts were rather difficult to control, and also to give immunity from host state prosecution, such as in Iraq, to the employees of such firms[208].

4.2 From the first EU policies to some important tools

4.2.1 First EU Policies

We have already said that the European context with regard to PMSCs is quite varied, covering a range that goes from countries with more rigid and delineated control of contractors to states that adopt a more laissez-faire approach, passing through Member States that even prohibit use of PMSCs. What is certain, however, is that all the different degrees of regulation between one European state and the other deal almost exclusively

[205] BAKKER, C. ET SOSSAI, M.," *Multilevel Regulation of Military and Security Contractors: The Interplay between International, European and Domestic Norms*", 2012, Hart Publishing Ltd, Chapter 15

[206] 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"*, Geneva: International Committee of the Red Cross, Swiss Federal Department of Foreign Affairs, 2008

[207] BAKKER, C. ET SOSSAI, M.," *Multilevel Regulation of Military and Security Contractors: The Interplay between International, European and Domestic Norms*", 2012, Hart Publishing Ltd, Chapter 15

[208] Ibidem.

with the PSCs, thus focusing on internal management and regulating much less the export outside their borders of many services, most often by PMCs. However, despite innumerable differences, in recent years the EU has tried to produce more policies and recommendations regarding the regulation of private security and military companies, focusing more and more not only on the offer within the member states but also on the export of a large number of services offered by these companies. Following the analysis of Krahmann and Abzhaparova, we can report the policies and regulations already present by dividing them into three categories in order to be able to schematically exemplify the European production of PMSCs policies. In the first category we find the Council "Regulations" which are very important because these can be applied directly to the Member States of the Union. In this category we can find the Council Regulation (EC) No. 428/2009[209] setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items"[210]. In the second category there are the Council "Common Positions" that are "binding legal acts which have to be implemented into national laws or practices"[211]. Among the most important, there is the Council Common Position 2008/944 / CFSP[212] established to replace the EU Code of Conduct on Arms Exports. The third category concerns the Council 'Joint Actions', "i.e. legal acts defining common actions such as the Common Foreign and Security Policies (CFSP) on technical assistance related to weapons of mass destruction (WMDs)[213] and to embargoed

[209] COUNCIL REGULATION (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, Official Journal of the European Union, L 134/1

[210] KRAHMANN, E. AND ABZHAPAROVA, A., *The Regulation of Private Military and Security Services in the European Union: Current Policies and Future Options*, EUROPEAN UNIVERSITY INSTITUTE, ACADEMY OF EUROPEAN LAW, EUI Working Papers AEL 2010/8, PRIV-WAR project

[211] Ibidem.

[212] Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, eur-lex.europa.eu

[213] COUNCIL DECISION (CFSP) 2018/299 of 26 February 2018 promoting the European network of independent non-proliferation and disarmament think tanks in support of the implementation of the EU Strategy against proliferation of weapons of mass destruction, Official Journal of the European Union, L 56/46

destinations, and the export of small arms and light weapons"[214]. One of the first approaches to the world of PMSCs by the European Union takes place in the early years of the new millennium with the first attempts at regulation for the exported dual-use technological materials (civil and military)[215]. From now on, the EU has slowly updated this type of regulation with various amendments, but it remains important because through the control and limitation of various technological devices, a process, albeit still weak, of controlling PMSCs has been initiated. In connection with the export of dual use technologies, we then find the development of a regulation on the export of armaments[216]. This theme had already been introduced at the end of the nineties and has gradually developed and evolved over the years, increasingly involving PMSCs, also due to their growing use in Iraq and Afghanistan. In addition, with the introduction of the Council Common Position 2008/944 / CFSP[217], export control has further extended to a whole series of services which can often be attributed to private security companies[218]. Further progress has been made through other policies that have included various issues such as armament brokering, the embargo on some countries regarding some military services and activities, and others. Among the common policies approved by the EU we also find that for small arms and light weapons[219] which over the years has been renewed in order to make control over this type of exports increasingly strict and controlled. Despite all these policies introduced in the first decade of the new millennium, the process of regulating PMSCs at European level is still rather slow. On several occasions, the European Parliament has shown that it has the will to harmonize regulation between member states, yet there have been few progresses until 2010. However, towards the end

[214] KRAHMANN, E. AND ABZHAPAROVA, A., *The Regulation of Private Military and Security Services in the European Union: Current Policies and Future Options,* EUROPEAN UNIVERSITY INSTITUTE, ACADEMY OF EUROPEAN LAW, EUI Working Papers AEL 2010/8, PRIV-WAR project.
[215] Ibidem.
[216] Ibidem.

[217] Council Common Position 2008/944/CFSP of 8 December 2008 defining common rules governing control of exports of military technology and equipment, eur-lex.europa.eu

[218] KRAHMANN, E. AND ABZHAPAROVA, A., *The Regulation of Private Military and Security Services in the European Union: Current Policies and Future Options,* EUROPEAN UNIVERSITY INSTITUTE, ACADEMY OF EUROPEAN LAW, EUI Working Papers AEL 2010/8, PRIV-WAR project.

[219] COUNCIL DECISION (CFSP) 2018/2010 of 17 December 2018 in support of countering illicit proliferation and trafficking of small arms, light weapons (SALW) and ammunition and their impact in Latin America and the Caribbean in the framework of the EU Strategy against Illicit Firearms, Small Arms & Light Weapons and their Ammunition 'Securing Arms, Protecting Citizens', Official Journal of the European Union, L 322/27

of this decade, several important developments followed. In subsequent paragraphs, we will analyze some crucial documents that have made it possible to make further progress on the regulation of PMSCs at European level. The Montreux Document is the most striking example of this new phase of development, but in addition to this, the International Code of Conduct for Private Security Service Providers should not be underestimated (although this has not yet been adhered to by most European countries). Then, we will face a central research, the Priv. War project, which has been able to draw up important recommendations regarding the future of PMSCs in the European and international legal sphere. Finally, after having framed all these important instruments, we will try to approach the topic of responsibility of IOs within the EU context, as we already did for the United Nations.

4.2.2 The Montreux Document

As already mentioned in the previous chapters, the variety of approach in the regulation of PMSCs means that the State is still the most important international subject, but this does not entail a reduction in transnational coordination, but on the contrary, incentives to find and improve an inter-dependent relationship that facilitates the control of PMSCs at the international level. The three countries analyzed in this chapter show some of the main trends within the European Union, but it is clear that there are still different approaches to these ones. For this reason, in recent years, Member States have tried to converge internationally, adopting common measures that make it easier to manage and control such a transversal and transnational subject as that of the PMSCs. One of the most important international documents concerning the regulation of PMSCs is certainly the Montreux Document, signed not only by as many as 54 countries but also by International Organizations of fundamental importance such as NATO, OSCE and EU. This document is the result of a collaboration between the Swiss Government, the International Committee of the Red Cross and 19 other countries and it was signed on 17 September 2008[220]. In the first page of the document we can read the specific aims of this text which are "On pertinent international legal obligations and good practices for States related to

[220] 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"*, Geneva: International Committee of the Red Cross, Swiss Federal Department of Foreign Affairs, 2008

operations of private military and security companies during armed conflict"[221]. At the structural level it was divided into two sections: in the first there is the intent to define the legal obligations at an international level that the states have regarding the PMSCs, the second section instead is made up of as many as 73 "good practices" in order to outline a common direction among the signatories of the document[222]. The main goal of the Montreux Document, however, is to arrive at providing a common guide that can help to manage the obligations of countries with respect to regulation in International Humanitarian Law and Human Rights Law. However, it should be emphasized that although this document is important in the development of a regulation of PMSCs, it remains non-binding and therefore can only suggest guidelines but cannot force the signatories to follow these. During the various meetings that led to the drafting of the final draft of the document, it was discussed whether it was better to establish a code of conduct for the private companies in question or whether it was better to look for an exemplification of the rules already present in a transnational way to adjust the subject. However, the question of non-mandatory status remains crucial: it is in fact the result of a tug-of-war that arose at the end of the drafting of the first draft, that initially aimed to be much more decisive and also outlined with regard to Human Rights. The two main strands saw opposing the less "binding" vision, especially with regard to Human Rights and obligations regarding above all jurisdiction abroad, with the more rigorous one approving the mandatory nature of the text in order to make the regulation more linear at the international level and to adopt a more strict utilization of Human Rights language[223]. In the first group we find the United States to dictate this line of thought while in the second there was a plurality of actors, especially non-state ones, as Amnesty International (e.g. NGOs). At the end of this contraposition, as can be seen from the final draft, the line that prevailed was that of the US-led group, that is, the line that pointed to a decidedly lighter approach from the point of view of obligations for Human Rights and also the

[221] Ibidem.

[222] 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, Geneva: International Committee of the Red Cross, Swiss Federal Department of Foreign Affairs, 2008, p.16

[223] COCKAYNE, J., "Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document", Journal of Conflict and Security Law, 2009, Vol. 13, No. 3, p.402-428

obligatory nature of the document. The result was that the idea initially conceived underwent a clear change, going in a direction far removed from that expected[224]. Although the Montreux Document is a non-binding text, it has nevertheless contributed to the development of international regulation and remains fundamental in certain aspects. It also led to the drafting of an International Code of Conduct for PMSCs, a document that many aspired to even before drafting the Montreux Document.

What the Montreux Document really manages to do is to delineate and exemplify that there are already some laws that can be applied in particular circumstances relating to PMSCs[225]. This mechanism is affirmed above all through the already mentioned "good practices", also having a process of normalization of the PMSCs. However, the text in question deals only with specific situations concerning private security companies and military personnel, or scenarios where employees of such corporations operate in contexts of armed conflict[226]. This clearly restricts the scope of the document which leaves out a whole series of context where the use of contractors remains frequent (e.g. post-conflict scenarios, privacy).

Despite the non-binding nature of the Montreux Document, the European Union, being among the signatories of this document, confirms its position in wanting to move towards the harmonization of the legal regulation of the PMSCs phenomenon at international and European level. The following steps, as already mentioned, will be the International Code of Conduct and the development of the Priv. War Project which we will analyze later.

4.2.3 The International Code of Conduct

As previously stated in the last paragraph, the International Code of Conduct for Private Security Service Providers (ICoC) is the "natural" consequence of the Montreux

[224] Ibidem.

[225] COCKAYNE, J., "Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document", Journal of Conflict and Security Law, 2009, Vol. 13, No. 3, Introduction

[226] 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*, Geneva: International Committee of the Red Cross, Swiss Federal Department of Foreign Affairs, 2008

Document, always developed thanks to the Swiss Government but, in this case, with the help of the Geneva Centre for the Democratic Control of Armed Forces (DCAF) which has taken the place of the International Committee of the Red Cross[227]. The Code is created for private companies in the first place and is signed by them, even if the basis of this text is the collaboration of several actors, state and non-state. However, although the European Union is not among the signatories, and there are only two European member states that signed the Code which are Sweden and UK(with the Brexit officialized on the 31 of January 2020, now it is just one member state), we wanted to include the ICoC in this chapter mainly for two reasons: on the one hand, the Code stems from the further development of the Montreux Document and since this has been signed not only by the EU but also by other important International Organizations, the Code of Conduct remains important, so much so that, and here we come to the second reason, several proposals put forward at the European Parliament have pushed for involvement and the adhesion to the code by the EU or at least by a greater number of European member states.

The main purpose of the ICoC is to make the obligations that PSCs have at an international level more harmonized, especially regarding the respect of Human Rights Law and International Humanitarian Law. With this code, in fact, the signatory corporations undertake to follow certain standards concerning the respect of rules that place limits on the contractors' activities. Through this document, efforts have been made to standardize what at the start were only principles which have therefore become duties accepted willingly by all the signatory companies which, starting from November 2010 (when the code was adopted), have been have gradually increased so much as to include maritime security companies that do not fall within the parameters of the Code on the list of members[228]. Furthermore, after the approval of the Code, some of the states that contributed to its implementation, such as the United Kingdom and the United States, committed themselves to requesting the companies of their country to join the ICoC. Simultaneously with the implementation of the Code of Conduct, the various contributing actors have decided to establish a Steering Committee made up of three groups of

[227] FALLAH, K., "*The generation of International Legal Norms to regulate Private Military Violence"*, University of Sidney, 2017, p.135

[228] FALLAH, K.," *The generation of International Legal Norms to regulate Private Military Violence"*, University of Sidney, 2017, p.136

corporations, states and civil society. This Committee was created with the aim of supervising the evolution of the self-regulation carried out by the Code, especially in the beginning phase. Specifically, in the first two years the Committee carries out consultations for the "oversight mechanism" which closed on 31 March 2012. In the text of the ICoC we can find various provisions which deal in detail with the conduct of personnel, management and governance of PSCs. In these provisions we find many rules regarding the use of force, detention and arrest, the prohibition of torture, trafficking in human beings, slavery and forced labor[229], and the selection, training and vetting of personnel or subcontractors[230]. Subsequently, in October 2013, the International Code of Conduct for Private Security Service Providers' Association (ICoCA) was established with the aim of managing and controlling the correct implementation of the Code of Conduct, making certifications and resolutions. More specifically, as we can read at the Article 2 of the Association, its main goal "is to promote, govern and oversee implementation of the International Code of Conduct for Private Security Service Providers (hereinafter "ICoC" or "Code") and to promote the responsible provision of security services and respect for human rights and national and international law in accordance with the Code"[231]. Its participatory system is crucial because it requires the members to frequently report their activities in order to monitor the correct implementation of the Code and the possible shortcomings. According to the latest ICoCA Membership Update report of October-December 2019, the Association has a mixed component, divided between member states and, above all, many PSCs, together with different organizations of civil society[232]. In addition, with recent developments, the Association decided that the companies that signed the Code but did not apply for the Membership are not fulfilling their commitment. Also, starting from January 2020 it will

[229] International Code of Conduct for Private Security Service Providers (9 November 2010) ('ICoC'), [28]-[43]

[230] International Code of Conduct for Private Security Service Providers (9 November 2010) ('ICoC'), [44]-[69]

[231] International Code of Conduct for Private Security Service Providers' Association (ICoCA), Articles of the Association, Art. 2.2

[232] ICoCA Membership Update October - December 2019

foresee a new participatory structure, including a new category of "Affiliates" that will go alongside the already existing Certified and Transitional Member Categories[233].

Returning to the Code, although this is an important document that demonstrates the willingness to make progress, it is in any case not without shortcomings. In fact, what is really missing is the management and possible punishment of the companies that do not maintain their commitment to the rules of the Code approved and signed by them. In essence, there remains a gap regarding the consequences of a possible violation carried out by a PSC. Precisely for this reason, the ICoCA was created and before that, thanks to the willingness of the members, an Oversight Mechanism was introduced aimed precisely at controlling the compliance of the signatories. The basic idea was that the Code was a good starting point, certainly not the arrival, and that thanks to this it will be possible in the future to gradually achieve harmonization as regards the regulation of the PSCs and, hopefully, also of the PMCs.

For these reasons and for others that we will see in the following paragraph, the European Union and its members should adhere to the Code of Conduct in order to get closer and closer to that much desired harmonization. Since the Code was born as a consequence of the Montreux Document, in fact, it would seem logical that it should be approved by the EU member states. This initiative has also been included in a proposal approved in the European Parliament which we will discuss in more detail in the following paragraph.

4.3 The Priv. War Project

In the previous paragraphs we introduced the European context regarding the regulation of PMSCs. We have seen some approaches from three central EU countries (although one is now more outside than inside) and then move on to the analysis of the Montreux Document, an important text for the development of European regulation on the subject, and the possibility of joining the ICoC and its Association as a natural consequence of the progress made in the EU as regards the use and regulation of PMSCs, and therefore also of the attribution of responsibility for possible violations of the HRL and IHL by these companies. In the same years of the Montreux Document, an important study has been developed on this subject, financed by the EU Seventh Framework Program for

[233] Ibidem.

Research. The three-years project Priv.-War, born from a collaboration between LUISS Guido Carli (Rome) and other institutes (Justus Liebig Universität Giessen; Riga Graduate School of Law; Université Panthéon-Assas (Paris II), Centre Thucydide; University of Sheffield and Utrecht University) and managed by the European University Institute through the Academy of European Law, has sought to outline the development and impact of the growing use of private contractors especially in contexts of armed conflict[234]. Analyzing the international and European regulatory framework, the project then drafted a series of recommendations for the EU with the aim of suggesting some provisions that could improve compliance with the IHL and the HRL. This project started in January 2008 and ended in August 2011[235]. Among the main objectives of the study there are the promotion of a clearer understanding of the Private Security Industry, with therefore a more precise formulation of what PMSCs are, and an in-depth analysis of the main activities carried out by these companies and the reasons that drive countries and IOs to use them[236]. What is really important of the Priv. War Project is that it has examined an already existing regulation at several levels, thus affirming that, as regards the PMSCs, there is no real legal vacuum but that what is really missing is an effective mechanism of enforcement[237]. Also, with regard to the European context, for researchers, it is essential to start from the already existing rules in order to then be able to develop a possible enforcement model that allow the phenomenon to be managed in a more structured and harmonized way. One of the aims of the study, in fact, is precisely to demonstrate the central role of the European Union and how much this one could affect the regulation of PMSCs, applying more comprehensive and standardized monitoring. With this in mind, maintaining the centrality of the IHL and HRL, as a result of the project, we therefore find the outlines of possible approaches and legal instruments, such as "licensing" and "registration", in the form of recommendations aimed above all at the EU.

Following these recommendations in the book "*Multilevel Regulation of Military and Security Contractors: the Interplay between International, European and Domestic*

[234] PRIV WAR Project, priv-war.eui.eu

[235] Ibidem.
[236] Ibidem.
[237] Ibidem.

Norms"[238] by Bakker and Sossai, and keeping in mind all the considerations made at the beginning, including that for which, before or then, the whole European legal framework "should address the due diligence obligations under HRL and IHL of EU member states in their capacity as hiring states and home states of PMSCs"[239], we can make a distinction between what would be binding and non-binding. In the project conclusions, at point 3 of the Recommendations, there is the suggestion of both the idea of making the regulation of the PMSCs among the European member states more harmonized (3a) and of managing the outsourcing outside the EU through the CFSP (3c)[240]. Both options are binding, but, however, as alternatives, alongside them, there are two non-binding proposals that promote the possibility of setting up tools, such as a Council, so that this can draw up guidelines regarding the internal regulation (Recommendation Council) and also for the export of PMSCs services to Third Countries (Council Strategy Document) and the use of the companies by the EU[241]. Another important measure suggested in the Recommendations concerns the fact that the EU should adopt a regulatory system for **"**the establishment, registration, licensing and monitoring of PMSCs located within the jurisdiction of EU Member States or hired by these States or other entities and organizations for the delivery of services, including in third States, and for reporting to competent authorities on violations of applicable law by such companies and their personnel and sub-contractors."[242] and the Recommendation specifies that this measure should include: " compliance with HRL and IHL; training in HRL and IHL, including on women's and children's rights and the specific protective measures that are required; vetting of PMSC personnel; technical training for example on gun use and policies; specific conditions according to the situation in which the services will be provided;

[238] BAKKER, C. ET SOSSAI, M.," *Multilevel Regulation of Military and Security Contractors: The Interplay between International, European and Domestic Norms*", 2012, Hart Publishing Ltd.

[239] BAKKER, C. ET SOSSAI, M.," *Multilevel Regulation of Military and Security Contractors: The Interplay between International, European and Domestic Norms*", 2012, Hart Publishing Ltd, *Annex: PRIV-WAR Recommendations, Rec. N.5*

[240] BAKKER, C. ET SOSSAI, M.," *Multilevel Regulation of Military and Security Contractors: The Interplay between International, European and Domestic Norms*", 2012, Hart Publishing Ltd, *Annex: PRIV-WAR Recommendations, Rec. N.3*

[241] Ibidem.

[242] BAKKER, C. ET SOSSAI, M.," *Multilevel Regulation of Military and Security Contractors: The Interplay between International, European and Domestic Norms*", 2012, Hart Publishing Ltd, *Annex: PRIV-WAR Recommendations, Rec. N.4*

compliance with EU policies in the areas of security and foreign policy; satisfactory reporting requirements; adequate insurance and remedial provision"[243]. This suggestion is important because it specifies that the licensing system provided by member states should guarantee certain standards regarding compliance with the HRL and IHL, including also the education to HRL and IHL of contractors and also a whole series of civil rights and rules to be strictly respected if you want to maintain the license that allows you to exercise the services in question[244]. Recommendation N.6, on the other hand, is important because it suggests inserting a minimum level of control and any eventual sanctions to member states into the regulatory system. Member States could also adopt self-regulation mechanisms in order to better control the companies and their employees[245]. There is also the Recommendation N.8 which suggests either the use of a Decision based on Article 29 TEU or the use of a non-binding instrument such as a Code of Conduct that can regulate the use of PMSCs by the EU itself "in the context of its CFSP operations"[246]. Recalling therefore the previous paragraph, the adherence to a Code of Conduct, specifically the ICoC, would make the EU taking a significant step forward in the development of the regulation of PMSCs. The ICoC was created primarily for private military and security companies, but, like the Montreux Document, it can also be joined by other actors. In a proposal for a resolution of the European Parliament, approved on May 2, 2017, there is the will to make member states join the ICoC, adding however that this must be strengthened and made totally independent for this to work efficiently[247]. This accession is important as through it the EU could act more uniformly also as regards the control of PMSCs used in Third States. Certainly, the ICoC remains a self-regulation tool, however it has a considerable importance, being this a useful instrument in order to proceed with the development of the European regulation. The next step, in fact, would

[243] Ibidem.
[244] Ibidem.

[245]BAKKER, C. ET SOSSAI, M.," *Multilevel Regulation of Military and Security Contractors: The Interplay between International, European and Domestic Norms*", 2012, Hart Publishing Ltd, *Annex: PRIV-WAR Recommendations, Rec. N.6*

[246]BAKKER, C. ET SOSSAI, M.," *Multilevel Regulation of Military and Security Contractors: The Interplay between International, European and Domestic Norms*", 2012, Hart Publishing Ltd, *Annex: PRIV-WAR Recommendations, Rec. N.8*

[247] EU Parliament Report on private security companies (2016/2238(INI))

be, as suggested in Recommendation n.8 of the Priv. War Project, that of creating a European CoC that could therefore set standards also as regards the use of PMSCs by the EU at the level of CFDP operations[248]. Then, following Recommendation n.9 for which "EU regulatory measures" should draw up provisions to regulate the use of PMSCs in humanitarian aid operations managed by the European Union[249], we then find at number 10 the recommendation according to which the EU it should also ensure that the victims, in this type of operation and not only, of any erroneous behavior by PMSCs are effectively assisted according to justice, guaranteeing remedies both from home and hiring state or even from the PSMC involved, always, however, according to their due diligence obligations[250]. Finally, in the latest Recommendations of the Priv. War Project, the scholars want to emphasize the importance of international concertation, thus opening up to dialogue with Third States and suggesting the possibility of advancing new international initiatives. Therefore, always keeping Human Rights in mind, the EU should try to satisfactorily regulate the use of PMSCs by third countries, also including clauses in international agreements that can bind these countries to respect the HRL and IHL and, with these ones, their PMSCs[251]. It is important to underline the fact that, not only has the Priv. War Project contributed significantly with these thirteen binding and non-binding instruments proposed in these recommendations and with all the research work reported in several publications, it also takes into consideration the possibility that the European Union itself may contract PMSCs in Common Security and Defense Policy contexts. In addition to this, in one of his articles, Sossai reaffirms the concept expressed in the Project according to which "EU regulatory action should cover at least three different areas: the provision of private military and security services in peacetime on member States' own

[248] BAKKER, C. ET SOSSAI, M.," *Multilevel Regulation of Military and Security Contractors: The Interplay between International, European and Domestic Norms*", 2012, Hart Publishing Ltd, *Annex: PRIV-WAR Recommendations, Rec. N.8*

[249]BAKKER, C. ET SOSSAI, M.," *Multilevel Regulation of Military and Security Contractors: The Interplay between International, European and Domestic Norms*", 2012, Hart Publishing Ltd, *Annex: PRIV-WAR Recommendations, Rec. N.9*

[250] BAKKER, C. ET SOSSAI, M.," *Multilevel Regulation of Military and Security Contractors: The Interplay between International, European and Domestic Norms*", 2012, Hart Publishing Ltd, *Annex: PRIV-WAR Recommendations, Rec. N.10*

[251]BAKKER, C. ET SOSSAI, M.," *Multilevel Regulation of Military and Security Contractors: The Interplay between International, European and Domestic Norms*", 2012, Hart Publishing Ltd, *Annex: PRIV-WAR Recommendations, Rec. N.11*

territory, including training activities; the employment of PMSCs by the EU itself (for example, through the EU force Commander or the Head of Mission) and by the member States in the framework of an EU-led crisis management operation; and the resort to PMSCs in the same context by third States participating in the missions"[252].

4.4 The Responsibility of the EU for damage caused by PMSCs

Previously, we tried to frame the current situation of PMSCs and their regulation at EU level, analyzing the lack of harmonization that persists, the different policies provided within the EU and CSDP context and we have also seen some important tools, such as the Montreux Document and the ICoC, developed to reach a more harmonized regulation of PMSCs within the international and European context, focusing also on the important Recommendations within the Priv.-War Project. We have already said that the EU has undertaken a lot of international operations within the context of the CSDP. This kind of missions has always been framed in a comprehensive approach in cooperation with the EU Delegations and within the EU regional policies[253]. In chapters 2 and 3 we discussed about the Responsibility of IOs for internationally wrongful acts, introducing the tool of the Draft Articles adopted in 2011 by the ILC and, also, trying to delineate what are the most suitable Articles in the UN context in relation to PMSCs. Now we want to recall the responsibility issue, but with the intent to frame it within the EU context, also paying attention to CSDP and CFSP areas. Article 1 of the Draft says that "the present draft articles apply to the international responsibility of an international organization for an internationally wrongful act"[254] and then in Art.2, as we have already seen in Chapter 3,

[252] SOSSAI, M., «A European Approach to the Regulation of PMSCs », Proceedings of the Annual Meeting (American Society of International Law), 2013, Vol. 107, International Law in a Multipolar World, p. 207 Washington D.C.: American Society of International Law.

[253] European Union External Actions, *Military and civilian missions and operations*, eeas.europa.eu

[254] International Law Commission (ILC*), Draft articles on the responsibility of international organizations 2011*, Art.1.

there are the definitions of the main subjects used in the Draft[255]. In addition, in Art.3[256] and 4[257] we can find the clarification about the meaning of an internationally wrongful act and when this occurs. These first part of the Draft, alongside with Art.5, Art.6, Art.7, Art.8, Art.9, is important to define and understand what and when IOs are responsible for wrongful acts at international level and, for this research, it is also remarkable because it can make us question about the specific features of the EU and, in this view, if this can be fully considered as the subject reported in the Draft Articles adopted in 2011.

Indeed, if we compare the legal status of personality between the UN and the EU we can easily see some differences: The United Nations obtained the recognition of this status in 1949 while the nature of the EU was not so clear until the Treaty of Lisbon in 2009. Following Art.6 of the ILC Draft: "1. The conduct of an organ or agent of an international organization in the performance of functions of that organ or agent shall be considered an act of that organization under international law, whatever position the organ or agent holds in respect of the organization. 2. The rules of the organization apply in the determination of the functions of its organs and agents."[258], we can assess that the acts made by "organs" of the IO are on the responsibility of the Organization and if we look to the structure of the EU we could associate the term "organs" with the institutions and other agencies within the Union. In this view, we then move to Art.7 and its "effective control" test. Indeed, as we have already seen in chapter 3, when "The conduct of an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization shall be considered under international law an act of the latter organization if the organization exercises effective control over that conduct"[259] and this means that when an European member state hires a PMSC for working in an European mission, if the PMSC commits a breach of HR, to assess that the responsibility is on the EU it must be proved that the Union had the "effective control"

[255] International Law Commission (ILC), *Draft articles on the responsibility of international organizations 2011*, Art.2.
[256] International Law Commission (ILC), *Draft articles on the responsibility of international organizations 2011*, Art.3.
[257] International Law Commission (ILC), *Draft articles on the responsibility of international organizations 2011*, Art.4.
[258]International Law Commission (ILC), *Draft articles on the responsibility of international organizations 2011*, Art.6.
[259] International Law Commission (ILC), *Draft articles on the responsibility of international organizations 2011*, Art.7.

over the operation and thus over the PMSC hired by the EU member state. With this in mind, we could recall the critics made by White about the utilization of the "effective control" test and the suggestion to apply the "overall control" test, as an alternative, which is broader but certainly easier to apply to this kind of situations[260]. Once again, it would be unrealistic to think that the EU has the total and effective control over all its missions, PMSCs hired by its member states included. With this tool, it would be very difficult to call for its responsibilities the European Union, in case of HR violations perpetrated by PMSCs hired by a European member state. In this view, we then must consider the contexts of CSDP and CFSP because the "effective control" test would certainly be applied in one of these two areas as these are the framework where the EU missions take form. The European Union has always been described as an international organization *sui generis*, especially for all its development phase which took place until 2009, the year in which it closed the old three-pillar structure and became a Union with the approval of the two treaties: TEU and TFEU. From that moment, everything that concerns the operational aspects passes through the CFSP and CSDP, which means that the control that the Union should implement on aspects related to operations and possible violations of human rights should be done in this context. However, the idea of applying a type of effective control over each component present in each mission remains difficult and impractical. We firstly discussed about the implications that Art.7 would have in the case of a HR breach by a PMSC because, especially within the EU context, it is more likely that these type of companies are mainly hired by member states and then used in a CFSP/CSDP context. Indeed, we have discussed in the previous paragraphs, within the Priv.-War Project Recommendations, the possibility of a direct hiring of PMSCs by the EU itself. In this case it would certainly be easier to assess when the responsibility for a wrongful act made by a hired PMSC falls on the IO, thus on the EU.

However, in addition to the criticism brought by White, there is another issue raised by many that should be considered. It is about the heterogeneity among the IOs. As a matter of fact, International Organizations can be very different one from another and some of them are more different than the others. It is the case of the European Union that, despite its clarification about its position at international level in 2009, can occur in some

[260] WHITE, N.D., *Institutional Responsibility for Private Military and Security Companies*, EUROPEAN UNIVERSITY INSTITUTE, ACADEMY OF EUROPEAN LAW, EUI Working Paper AEL 2009/26

problems with respect to the Draft[261]. It is the case of when a European member state commits a violation for which the EU can be held responsible[262]. In this regard, when there is too much differentiation, as in the case of the EU, the Commission decided to adopt the Art.64 by which the "draft articles do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content or implementation of the international responsibility of an international organization, or of a State in connection with the conduct of an international organization, are governed by special rules of international law. Such special rules of international law may be contained in the rules of the organization applicable to the relations between an international organization and its members"[263]. With this provision, the Commission wanted to include, with the tool of the *lex specialis,* also the IOs that result to be more different, as in the case of the EU. In doing so, the ILC opened up to the intent of a more developed and detailed differentiation of IOs[264].

The articles presented in this paragraph are those within the Draft that find most relevance in relation with PMSCs. The "effective control" aspect remains a key element as it plausibly reflects the recruitment of PMSCs by EU member states in order to be able to implement them in operational missions of an international nature and under European aegis. However, within the Draft there are other articles essential for coding the responsibility obligations of IOs such as those related to remedies and reparation of violations. As in the case of the UN, in fact, the EU is equally required to respect its duties regarding the right contribution of justice which must be accessible to all victims of violations of rights for which the Organization is held responsible. However, access to remedies for such violations is not always guaranteed for all victims. In fact, there have often been cases where the victims in question have failed to access sufficiently to the necessary remedies that should be guaranteed. In the European context, for example, access to the European Court of Justice is not always possible: in cases where the victims

[261] MÖLDNER, M., *Responsibility of International Organizations – Introducing the ILC's DARIO,* Max Planck Yearbook of United International Law, Vol.16, 2012, p.281-329
[262] Ibidem.

[263] International Law Commission (ILC), *Draft articles on the responsibility of international organizations 2011,* Art.64.

[264] [264] MÖLDNER, M., *Responsibility of International Organizations – Introducing the ILC's DARIO,* Max Planck Yearbook of United International Law, Vol.16, 2012, p.281-329

of human rights violations by International Organizations are not European, but still reside in areas where there are missions managed by the EU, there is still a debate about whether these operations are in areas outside the EU and therefore the applicability of responsibility obligations also with regard to reparation is being questioned[265].

[265] WHITE, N.D., *Institutional Responsibility for Private Military and Security Companies*, EUROPEAN UNIVERSITY INSTITUTE, ACADEMY OF EUROPEAN LAW, EUI Working Paper AEL 2009/26

Chapter 5. Possible future strategy: what can be done to further regulate these companies in a HR perspective and what would be the best strategy for ensuring the compliance with responsibility obligations

5.1 Current situation and future perspectives

In the previous chapters of this analysis, we have tried to outline the complexity of a particular subject: the PMSCs. During this research we have seen the historical and social development that private military and security companies have had and, above all, we have attempted to define the impact that these have had, especially as regards the sphere of human rights and the consequent need of a clearer and more effective legal regulation, especially by looking at the role of IOs. At the international level there is a variety of approaches to the problem that are outlined in different degrees of regulation: we have mainly analyzed the home, hiring and host state approaches regarding the responsibility for humanitarian violations perpetrated by PMSCs. In addition to these three fundamental approaches, attempts have been made to trace the various types of internal regulation of countries, especially in Europe. Control systems at home level vary widely, going from those with a more "laissez-faire" and self-regulation approach, to more rigorous ones in the management of the phenomenon, up to some cases where the country in question prohibits privatization of security. As a matter of fact, starting from the concept of state responsibility, we then shifted our focus over the responsibility that International Organizations have when PMSCs commit an internationally wrongful act within an IOs' operation. Therefore, if at international level we have witnessed important developments such as the Montreux Document, which is also important in the European context, it is good to remember the evolution of the issue also at the UN level where we passed from the first resolutions condemning mercenary up to the employment of private security companies (always for activities indirectly related to the hostilities) in the context of peacekeeping operations. In this precise framework, the lack of a sufficient regulation of PMSCs at an international level intersects with that of the UN. The biggest problem, indeed, would arise precisely in peacekeeping contexts where the possibility of an escalation of violence, and a trespassing of their limits as civilians, by PMSCs is completely plausible and, not having a uniform standardization at international and UN level, the possibility that those responsible for such violations get away without

punishments, avoiding any type of sanction, is all too likely. This eventuality can occur even when the responsibility for PMSCs' violations is upon an IO.

Subsequently, we tried to frame the current European context, starting from an analysis of some European member states and then analyzing the regulatory development within the European Union. In addition to the European policies already present, we have moved towards the analysis of two important documents for the legal evolution of the issue in the European context: the Montreux Document and the ICoC. The first represents a significant step forward in the matter and, although its not-binding in nature, it is signed not only by the Member States but by the EU itself, together with other important IOs. The Montreux Document remains central not only in the European context but also in the international one, having this as its main objective the harmonization of the regulation of PMSCs among all the signatory actors. However, we have already stressed the impossibility of the Montreux Document in forcing signatories to respect the document, being this one non-binding. We subsequently wanted to analyze the ICoC, although this was only adopted by two European Member States (namely Sweden and the UK). This Code represents a further development towards the evolution of a self-regulation system that can give the right contribution in the process of regulating the phenomenon of PMSCs. The adoption of the ICoC has meant that many signatory actors have given proactive impetus on the subject, encouraging research for international harmonization. Although even this document is of a non-binding nature, it remains central and the accession to this by several European member states, if not by the EU itself, would further help the internal regulatory system of the Union, possibly bringing, as suggested in the Priv. War Project's Recommendations, to the consequent development of a European Code of Conduct capable of regulating both internally and in third countries, also managing the direct implementation of PMSCs by the EU itself in the operations framed in the CSDP context. In this regard, it is good to underline the importance of the Priv. War Project and its final Recommendations, aimed above all at delineating the impact of the growing use of PMSCs in multiple contexts, especially in those of armed conflict, drawing up in conclusion thirteen Recommendations for the EU on the most appropriate tools necessary to improve the compliance of the IHL and the HRL by the PMSCs and for managing these ones in a more harmonized way. Alongside with these key points, we have also developed, in this framework, the concept of responsibility that IOs have as much as states with regard internationally wrongful acts, taking into consideration the

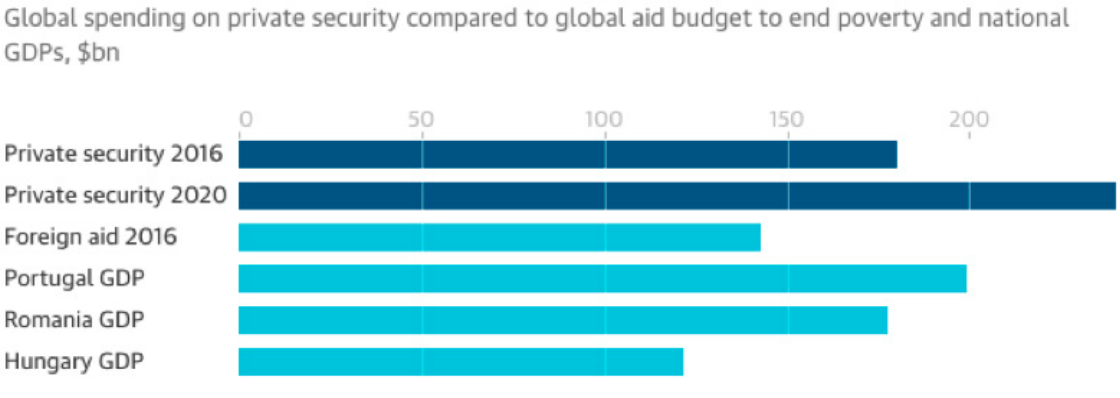
Draft Articles on responsibility of International Organizations adopted in 2011 as the main document from which to analyze and develop this topic in the UN and EU contexts.

We also want to emphasize that relying on the use of services provided by PMSCs is far from being considered a temporary phenomenon. The tendency of the states to try to intervene in the conflicts in an increasingly less direct way, in fact, has only increased in recent years and, although the conflicts that see the direct involvement of regular troops are still frequent, the structural, strategic and geographical composition of today's wars is becoming more and more complex, showing a diversification and a plurality of actors in constant growth. The trend that started in the post-Cold War phase, and subsequently increased and evolved with the wars of the new Millennium, according to which States would seek less and less direct involvement in conflicts and the "return" of the UN from the beginning of the nineties, with further development in the field of human rights, has seen the reliance on PMSCs growing, as this was also a way to lighten the responsibilities of States regarding the evolution of a given conflict. However, we have seen how a massive use of PMSCs has become a double-edged sword: both as regards the responsibility of states and IOs, and for the growing awareness of Human Rights. Although progress has been made in this regard, it is quite clear that the path is still long and that the development for adequate regulation and control is still halfway, if not at the beginning. In the decade that has just ended, we have seen several researches appear and the literature on the topic of PMSCs has expanded considerably. In this new phase, it is therefore necessary to take a step forward, making use of all the knowledge produced in recent years, in order to face the future evolutions of the subject due to the multiple changes that today's society presents to us. Having made this important premise, in this perspective, the need for more scrupulous regulatory system regarding the use of PMSCs seems more than urgent, given the continuous changes that are taking place in the strategic and military, but also political, field. Today's geopolitics and the ways of managing new types of conflict suggest that the complexity that has gradually formed on the battlefield will only increase, presenting scenarios with an increasingly varied and vast plurality of actors. The development of the cyber world, moreover, has contributed to the decrease of regular troops deployed in battle, leaving less work for the soldiers and making the remaining jobs in many cases entrusted to private contractors. If we look at the latest developments in Afghanistan, for instance, there are many clear examples of this strategic and foreign policy direction: if on the one hand we witnessed the announcement of the

President of the United States of America Donald Trump about the progressive withdrawal of troops from Afghan territory, on the other hand, the US decision to retain several thousand of contractors employed by companies under a US contract was mentioned much more less[266].

This foreshadows an ever more frequent privatization in the military and security sphere, bringing with it, consequences that should not be underestimated. In this perspective, the academic and research world, in synergy with the political one, will have to make an additional effort to develop new proposals that can make an effective and current contribution in the world of legal regulation of PMSCs. The table below shows a forecast for what the use of PMSCs will be in 2020. According to various forecasts, in fact, the trend will continue to grow, making corporations specialize further in new sectors and thus contributing to a possible decline , also from the training point of view, in the use of troops of regular armies, going increasingly towards a huge privatization of the sector. This certainly cannot go unnoticed and it is fundamental to reiterate the importance of greater regulation of the subject which should be always up to date and which should prevent any abuse and violation by contractors.

In this regard, we would like to list below alternatives proposals to those already presented in the previous chapters. These options will then be outlined more effectively in the subsequent paragraphs in order to frame, together with those already mentioned, the possible solutions to be implemented internationally and especially in the UN and EU, taking also into account the responsibility these ones have in this regard.



Source: Freedonia 2017, OECD 2017; World Bank 2017

[266] Orizio, P., *Afghanistan e Siria: contractors alla ribalta?,* Analisi Difesa, *2019*

5.2 What are the best instruments in UN and international context and what are the possible future strategies

5.2.1 The instruments we already have

In the international and UN context, we have already found several documents that, in a different way, have attempted an approach regarding the control and sanctions that can be used in the PMSCs area. During the past century, the United Nations approach to security outsourcing has evolved a lot, going from conventions explicitly condemning the practice of mercenary up to the use of private security companies in the new context of peacekeeping operations. Precisely this area has seen the relationship between the UN and PMSCs grow and develop, also showing two different ways of hiring companies, direct and non-direct. If some argue that PMSCs operate in a legal vacuum, others, as we have analyzed in the previous chapters, are rather of the idea that the regulations present at international and national level are not sufficient or in any case remain too different from each other, creating a disharmony on the international plan that leads to paralysis when it comes to managing problems and violations that arise from the use of private companies. Since in fact there is no real legal basis in the United Nations, among the proposals listed in chapter 3, there is also that relating to the doctrine of implied powers which seeks to compensate for the lack of guidelines on the use of PMSCs in peacekeeping operations(the so-called Chapter VI ½). As regards the tools that the UN could put in place, in our opinion, it is good to underline the importance of the UN Draft Convention and the UN Working Group established in 2005[267]. Even if this convention has never entered into force, it, if ever approved, could significantly affect the matter. If it was possible to agree on the contents of the draft, once signed, it would become binding, thus affecting internationally the control and regulation of PMSCs. To be truly effective, this document should make several changes, expanding the recognized services provided by PMSCs and outlining a well-defined strategy regarding what to do in the event of irregularities and violations committed by these companies. If clear and uniform guidelines were established, the Convention could act in a more homogeneous way, going beyond the regulatory differences at national level. The UN Working Group could be a

[267] UN GA *Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination*, Human Rights Council Fifteenth session, Agenda item 3, 2 July 2010

good basis for a body that supervises and regulates in a more effective and standardized way, also making use of the Oversight Committee. The latter could play an essential role at an international level, but to achieve this, the development of the Draft Convention is crucial. This document should go in one direction only, that is, the one that fully recognizes the role and importance of PMSCs, in order to be able to regulate these, leaving behind the ambivalence that saw on one hand this desire for regulation, albeit in a complex way, on the other the prohibition of the use of contractors[268]. This internal contradiction has in fact only curbed the development of the document and its possible approval. To move forward, it is essential that the text takes a single path and that it pursues it clearly from every point of view. This approach would fall into the category of those instruments considered binding, while, as an alternative to these, as in the division of the Recommendations within the Priv. War Project, non-binding options may be considered which, however, can contribute significantly to the regulation of PMSCs, if used in the right way. If in what is considered the Hard Law category we wanted to reiterate the importance of the UN Draft Convention and the role that the Oversight Committee could play, now we want to move on to what we believe may be the best tools in the context of Soft Law , therefore precisely non-binding, which aim more at self-regulation.

Although the tools that we are going to present now as possible solutions in the international and United Nations contexts have been previously analyzed in the European context, we believe that both options can be valid bases on which to develop a more effective self-regulation mechanism, up to a mix that includes obligations for both states and PMSCs, but also for IOs, and Soft Law guidelines. Indeed, in the Chapter relating to the European Union, in addition to its policies, we have outlined the main features of the Montreux Document and the International Code of Conduct, stating that both represent an important step forward in the development of regulation of PMSCs. The first has a mixed component, dividing into a decidedly more "hard law" first part which provides for different obligations for the signatory actors and a second part consisting of 73 "good practices" of a much “softer” nature. In the first part, the Document mainly deals with outlining the obligations of the states, especially with regard to the compliance of the IHL and HRL by the PMSCs, also making the necessary differences between home, hiring and host state. The development of both parts of the text makes the Montreux Document

[268] Ibidem.

extremely important, but, as previously highlighted in Chapter 4, it is and remains a non-binding tool and for this reason it remains less effective than its counterparts of binding nature. In addition to this, the Document mainly deals only with the context of armed conflict, without taking into consideration the phases before and after the conflict (PMSCs are often employed for activities necessary for the post-conflict period). Furthermore, the document focuses more on the role and obligations of states, leaving aside the direct responsibilities of the PMSCs. However, the Montreux Document, has not only received the support of more than fifty states, but also that of fundamental International Organizations such as NATO, OSCE and, also, indeed, EU. Therefore, this document is of international relevance and, thus, it should be taken into greater consideration also in the UN context.

The other important document to consider, which links to the Montreux Document, is the International Code of Conduct for Private Security Services Providers, the ICoC. This too has been previously analyzed in the European context, although it has not been adopted by the EU. If the Montreux Document takes a closer approach to states and their obligations, the ICoC mainly refers to PMSCs and receives most of the feedback from them, even if it also receives support from other actors. This Code aims to achieve efficient self-regulation of PMSCs and indeed it made a good step forward in this direction. One of the main differences with the Montreux Document concerns the context: in fact, the Code refers to "complex environments"[269], which means that it also considers the pre and post conflict phase, in order to be more comprehensive. In our opinion, as it has been said with regard to the EU, this Code should also be taken into greater consideration by the United Nations, as this is an important basis for the self-regulation of PMSCs from which the UN can then develop additional and updated provisions. If this happens, the UN member states would push to encourage PMSCs with their registered office within their borders to follow and adhere to the obligations expressed in the Code, thus leading to a more uniform self-regulation mechanism. What is certain is that, even by signing the document, this does not mean that the violations of Human Rights and IHL by PMSCs would no longer occur, also because the ICoC is still a non-binding document, however the expansion of supporters and adherents is not to be underestimated as it can

[269] -*International Code of Conduct for Private Security Service Providers* (9 November 2010) ('ICoC')

be a good springboard towards a further development. Remaining in the ICoC area, its subsequent development, which took place in 2013 with the establishment of its Association, the ICoCA, is perhaps even more important. Through the latter, in fact, there was the intent to control and supervise compliance with the Code by the signatories, mainly PMSCs. Furthermore, after setting up the ICoCA, an Oversight Mechanism was introduced to improve control of compliance with the provisions of the Code. Adherence to the Code and its Association would therefore be a good starting point for the structure at the legal basis of PMSCs in the UN context.

5.2.2 Alternative solutions and future developments

In the previous paragraph, we presented some of the options analyzed in the other chapters, considering these to be among the best provisions to be used and extended in the international and UN context. Alternatively, however, we want to describe below different options or that in any case are only partially inspired by the provisions already presented. If among the binding-type solutions we have hypothesized the possible application of a revised and duly modified UN Draft Convention on PMSCs, while regarding the non-binding options we have proposed the hypothesis of using now established instruments at international level such as Montreux Document and the ICoC, in this section we want to propose another possibility: that of developing a document that proposes non-binding guidelines and therefore takes inspiration from Montreux Document and ICoC, thus addressing both Member States of the United Nations, and the PMSCs signatories. Although not binding, this document, if approved, would significantly standardize the regulation of PMSCs internationally. Following the example of the Montreux Document, it would provide provisions capable of contributing effectively to the compliance of the Member States, always maintaining the division between home, hiring and host state. The second part of the document would be more similar to the ICoC and all the provisions contained in it would therefore be adopted not only by the UN Member States but also by the PMSCs themselves (perhaps encouraged by the Member States themselves). Another key element to add to this document would be that relating to an Oversight Mechanism capable of monitoring compliance by all the signatory parties with the provisions and guidelines within the document. Therefore, despite its non-binding nature, it would be an important contribution for the regulation of

PMSCs in the UN context. Unlike the only 54 signatory states of the Montreux Document, once approved, it would include all the Member States of the United Nations, greatly expanding the scope of the provisions. In addition to this, the text we hypothesized could in any case be accompanied by that of a binding nature of a modified and revised UN Draft Convention, in order to have a more substantial and detailed legal basis within the United Nations context. The other essential element that should be added in this regard, is that of ensuring more control and respect of HR and IHL not only on the member states and PMSCs, but on IOs too. As a matter of fact, responsibility of IOs for internationally wrongful acts, as we already stated in the previous chapters, it is something that should not be underestimated and the development of a document and a mechanism, of a more binding nature, capable to check on the IOs as much as on the states could really improve the responsibility issue for the violations committed by PMSCs in international contexts. Indeed, this particular aspect of responsibility will be discussed in more detail subsequently, at the end of this chapter. Instead, in the next paragraph, a discussion on the best tools and the future strategy of the EU will be developed.

5.3 What are the best options in the EU context and what are the possible future strategies

In Chapter 4 we started from the basic idea by which the regulation of PMSCs in the European Union is characterized by a general lack of harmonization among the member states and this concept is the reason of all the attempts made until now to further regulate the subject at a supranational level, within the borders of the EU. Moreover, the policies present at national level are, most of the time, about PSCs and their internal regulation, while all the services exported abroad, especially those ones offered by PMCs, are often left without a proper management with the risk of creating legal vacuums. We saw that the current policies already in use among the member states can be divided in three main categories: The Council “Regulation”, the Council “Common Position” and the Council

"Joint Action"[270]. In this context we analyzed the development of new instruments that are very important for the European process of regulation of PMSCs. The two principal documents we studied are the Montreux Document and the ICoC; we assessed that the latter, even if for now there are only two member states that signed it, would be of fundamental importance for the EU. In the previous paragraph we affirmed that both the Montreux Document and the ICoC could be relevant also in the UN context and now we want to reiterate that these two documents could be very useful too in the EU context. Starting from the Montreux Document, that the EU already signed, we then moved to the ICoC that, in our opinion, as a natural consequence, the Union should sign too. The signing of the Montreux Document by the EU can be seen as a good starting point from which the Union can evolve and develop its path toward a good regulation. The consequent adhesion to the ICoC and its Association can be explained with many reasons. As a matter of fact, the Montreux Document deals in a limited way with regard to many aspects: for instance, it manages only a restricted range of services offered by contractors exclusively in contexts of armed conflict[271]. The ICoC broadened these limitations and, moreover, it not only address to PMSCs, but also to other different actors such as states and others from civil society[272]. The ICoC is important for many reasons: one is its Association and its Oversight Mechanism: another one is about the base it can create for the development of another Code of Conduct, a European one. In this regard we want to reiterate the centrality of the Priv. War Project and its Recommendations. Starting from the policies that already exist, indeed, the Project developed a series of Recommendations which are divided between the binding and non-binding solutions. After the analysis of most of these Recommendations, now we want to indulge on some of them, also in light of what we have assessed about the Montreux Document and the ICoC. Among the Priv. War Project Recommendations, indeed, there are some that, in our regard, need to be

[270] KRAHMANN, E. AND ABZHAPAROVA, A., *The Regulation of Private Military and Security Services in the European Union: Current Policies and Future Options,* EUROPEAN UNIVERSITY INSTITUTE, ACADEMY OF EUROPEAN LAW, EUI Working Papers AEL 2010/8, PRIV-WAR project

[271] 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, Geneva: International Committee of the Red Cross, Swiss Federal Department of Foreign Affairs, 2008

[272] International Code of Conduct for Private Security Service Providers (9 November 2010) ('ICoC')

highlighted because these could be very practical instruments capable to further the development the EU needs with regard to PMSCs regulation. The Recommendation n.3 remarks the fundamentality of a parallel growth between the domestic regulation of the companies and the control over the activities those ones export abroad, within the context of CSDP, in Third States[273]. Keeping this important duality in mind, the Recommendation n.3 suggests solutions that are both binding and non-binding. The basic idea is that of making the internal regulation among Member States more harmonized while at the same time controlling and regulating also the exportations of PMSCs. The non-binding alternative would be about the creation of specific tools in the shape of Councils in order to give guidelines about these critical issues and also about the direct use of PMSCs by the EU itself[274]. In our opinion, a binding solution would bring a greater impact, but, at the same time, it would be more difficult to approve it. Maybe a non-binding alternative would be more suitable for the moment, also useful for preparing the path for a more binding approach in the future. Another important Recommendation is the one at n.4 which is about the guarantee of certain standard regarding the compliance with IHL and HRL in the domestic licensing systems[275]. In this Recommendation, we also find the proposal to include an education for PMSCs with regard IHL, HRL and other many rights. Introducing these provisions and rules in the internal licensing systems would be very useful because it would bring harmonization among the Member States with regard minimum standard guaranteed for the compliance of IHL and HRL. The last Recommendation of the Priv. War Project we want to remark in our analysis is the n.8. This proposal is, for some aspects, linked to our initial idea presented in Chapter 4, and then here, of making the EU adhere to the ICoC. Indeed, if for the binding tool, the Recommendation n.8 suggests the implementation of the Decision based on the Art. 29 TEU, for the non-binding solution the scholars suggested the introduction of a European Code of Conduct, also capable to regulate the use of PMSCs by the EU itself in "the

[273] BAKKER, C. ET SOSSAI, M.," *Multilevel Regulation of Military and Security Contractors: The Interplay between International, European and Domestic Norms*", 2012, Hart Publishing Ltd, *Annex: PRIV-WAR Recommendations, Rec. N.3*

[274] Ibidem.

[275] BAKKER, C. ET SOSSAI, M.," *Multilevel Regulation of Military and Security Contractors: The Interplay between International, European and Domestic Norms*", 2012, Hart Publishing Ltd, *Annex: PRIV-WAR Recommendations, Rec. N.4*

context of its CFSP operations"[276]. For this reason, we have previously suggested the possibility of an EU adhesion to the ICoC as a first step toward the creation of an EU Code of Conduct. The main difference would be that in the EU version suggested in the Priv. War Project there would be some provisions capable to control and regulate the direct hiring of PMSCs by the Union and this aspect should not be underestimated because a uniform control in this direction could pave the way for a more harmonized domestic rules among the Member States, and it could also bring improvements in relation to the responsibility issue. Moreover, a European Code of Conduct could incentivize the creation of an Oversight Mechanism similar to the one present in the ICoCA system and through this structure the Union could further manage the respect of the provisions assessed in the Code. The final remarks we want to highlight about the Priv. War Project are about the centrality the Project gives to the international concertation and cooperation, also with the aim to open dialogue with Third States in order to make the them sign possible future agreements that would include important standard of compliance with regard to IHL and HRL.

After all these remarks, which in our opinion were essential as these are among the best solutions for a further regulation of PMSCs in the EU context, now we want to add other possible instruments that could help to speed up the process. In one of their researches, Krahmann and Abzhaparova proposed a series of policy options that could be implemented as practical solutions in the EU context. The policy option n.3, which is about the export of military and security services, could be a very concrete provision because it is defined as a "Council Common Position on the export control of military and security service included in the EU Common Military List"[277]. This option, indeed, deals with the export of all the services brought abroad in Third States by PMSCs: these activities would be better controlled because they should be authorized, after being included in the Common Military List. The inclusion of a specific range of services in

[276] BAKKER, C. ET SOSSAI, M.," *Multilevel Regulation of Military and Security Contractors: The Interplay between International, European and Domestic Norms*", 2012, Hart Publishing Ltd, *Annex: PRIV-WAR Recommendations, Rec. N.8*

[277] KRAHMANN, E. AND ABZHAPAROVA, A., *The Regulation of Private Military and Security Services in the European Union: Current Policies and Future Options",* EUROPEAN UNIVERSITY INSTITUTE, ACADEMY OF EUROPEAN LAW, EUI Working Papers AEL 2010/8, PRIV-WAR project, p.21

this list could be a wise move because the Common Military List is cyclically controlled and approved by the Member States and, in addition to this, could further the development toward a more regulated and defined framework for PMSCs. According to the authors, the services that should be included at a minimum level are those that could endanger public security, in case of abuse. The most likely to be abused in this sense are "armed combat, interrogation, military and security training, counter-terrorism and crisis management"[278]. Therefore, the implementation of this Council Common Position could trigger the effect of having a uniform control over the exportations of military and security services from the European Union to Third States. Furthermore, all the states within the EU could benefit from a more exemplified system so they could leave aside the necessity to have their own list of services. The last important aspects of this possible policy are about the central role of "transparency, accountability and control[279]" that, with this Council Common Position and therefore through the utilization of a licensing system, would be expanded and well defined, especially with regards to the implementation of certain services abroad, in Third States, especially the weak or failing ones. With the inclusion of these activities exported in the List, the EU would promote accountability and transparency, making easier the control over the role of the PMSCs abroad.

Following this proposal, there is another instrument connected to it among the options provided by Krahmann and Abzahaparova: the policy option n.5 could be considered a consequence of the policy option n.3, indeed, because it entails another Council Common Position on the control of military and security exports but it is specified "to embargoed destinations or individuals"[280]. The idea behind the utilization of this tool is that of requiring an authorization at domestic level for the exportations of military and security services in countries that are under embargoes. With this Common Position there would be more control over those areas of conflict affected by wrongful acts and HR violations, also bringing more specifications and harmonization in the EU context, especially for what concern the sanctioning of those violations[281]. The main problem with this option is about the fact that it would put some limitations on the controls because it would take into consideration only the areas that are already reported. So this Common Position should

[278] Ibidem.
[279] Ibidem.

[280] Ibidem.
[281] Ibidem.

be in addition to the n.3 because it would add some specifications about the importance of controlling the exports of certain services towards embargoed countries or individual, avoiding the eventuality to focus all the control over these particular situations and letting aside the other cases where violations could occur. The last policy option we want to report among those proposed by Krahmann and Abzhaparova is the n.9 and it is called "Inclusion of military and security services into an International Arms Treaty"[282]. This option is suggested in *Council Decision 2009/42/CFSP*[283] and it would allow to enlarge the controls over the PMSCs services even outside the EU borders. The main goals of this option would be a stricter control over those companies that try to avoid sanctions by moving their legal base from a European country to a non-European one. However, even with this instrument there could be disadvantages, especially with regards to the range of services that should be controlled in the treaty. If there are many difficulties in finding a coherent path to follow among the EU Member States, at international level it is clear that the situation is even worse.

In this paragraph we tried to highlight what could be in our opinion the best instruments to use in order to upgrade the current regulation of PMSCs at the EU level. We remarked the importance of alternative tools such as the Montreux Document and the ICoC, but we also indulged on the importance that the Priv. War Project has, especially with regards to its final Recommendations. After the reaffirmation of the fundamentality these instruments have, we then wanted to suggest other possible options that could be useful too. In this view some of the Policy Options proposed by Krahmann and Abzhaparova looked, in our opinion, exactly as some of the provisions we were looking for: policies that are practical, concrete and, hopefully, realistic and effective.
Finally we will discuss about the responsibility of IOs for internationally wrongful acts, starting from the concepts already expressed in the previous chapters, and from the Draft

[282] KRAHMANN, E. AND ABZHAPAROVA, A., *The Regulation of Private Military and Security Services in the European Union: Current Policies and Future Options",* EUROPEAN UNIVERSITY INSTITUTE, ACADEMY OF EUROPEAN LAW, EUI Working Papers AEL 2010/8, PRIV-WAR project, p.23

[283] COUNCIL DECISION 2009/42/CFSP of 19 January 2009 on support for EU activities in order to promote among third countries the process leading towards an Arms Trade Treaty, in the framework of the European Security Strategy.

Articles on responsibility of the International organizations adopted in 2011, in order to assess a possible future strategy and a further development in this matter.

5.4 Ensuring Responsibility of IOs in the future

In this research we tried to frame the subject of PMSCs in the international legal context, focusing more on the UN and EU areas. In addition to having analyzed the development of the subject, with the advantages and the negative sides of this, we then saw the evolution that it has gone through, especially with regard to its international recognition and its use in contexts completely different from those in which it operated until a few decades ago. In this analysis, an attempt was also made to summarize what the legal evolution of the subject was, describing the adaptation implemented by the IOs and institutions in order to better regulate the PMSCs phenomenon. In this context, we then inserted the responsibility that IOs have, given the new role of PMSCs in the contexts of peacekeeping and peacebuilding. The increasing use of these in UN and EU (but also NATO) missions has meant that since the early 2000s a greater awareness has been created and developed regarding the responsibility and obligations that Organizations have regarding cases of internationally wrongful acts that can be perpetrated either by "an organ of a State or an organ or agent of an international organization that is placed at the disposal of another international organization"[284].

Starting from Draft articles on Responsibility of States for Internationally Wrongful Acts, the ILC and the Working Group, created later, then gradually developed a body of articles aimed at defining the question of the responsibility of the IOs in case of violations of International Law. These Articles, report after report, have been modified and amended several times until their adoption in 2011. We have therefore highlighted the importance of some of them for the PMSCs theme, especially those grouped in Part One of the Draft. In fact, Art.6 and Art.7 are of crucial importance in this matter since they define the "conduct of an organ or agent of an international organization"[285] and of "organs of a

[284] International Law Commission (ILC), *Draft articles on the responsibility of international organizations 2011*, Art.6.
[285] Ibidem.

State or organs or agents of an international organization placed at the disposal of another international organization"[286]. In particular, the latter has been highlighted several times as it fits perfectly in the area of international operations, such as peacekeeping, where member states of IOs hire PMSCs to work alongside regular troops in international contexts. The Article specifies that in order attribute responsibility to the International Organization it is necessary to demonstrate that it had "effective control" of the operation and of the agents, therefore also of the PMSC, which operated within it. Therefore, if a PMSC hired by a UN Member State has committed violations of International Law in the context of a UN operation, in order to demonstrate that the responsibility lies with the Organization, the "effective control" test must be carried out. However, this Article has not been immune from receiving criticisms such as that brought by White where, in his opinion, this test is not suitable for complex contexts of operations such as peacekeeping. In this context, the "overall control" test would seem more appropriate as it does not require the IO to have applied a type of strict control in every part of the operation and therefore would facilitate the application of the responsibility obligations which otherwise, in similar situations, would have risked not being applied.

Another aspect to consider regarding the Draft is certainly the one related to the reparation and the remedies that the IOs considered responsible for wrongful acts at international level must respect. We have seen that ensuring the necessary access to justice channels does not always occur and, in many cases, victims receive only partial compensation. The articles in question, for these reasons, specify very well the different forms of reparation that IOs must follow.

Another important part of the Draft that we discussed is that of precluding the wrongfulness of the acts in question. Indeed, there are some situations where the breaches can be justified as there were no alternatives to implement in the context.

Having taken into consideration some of the most significant aspects of the Draft Articles on the responsibility of International Organizations, with its strengths and also with some controversial elements, we now ask ourselves what will be the next step to ensure that the responsibility of the IOs in case of internationally wrongful acts is even more developed and affirmed in order to ensure that Organizations and States respect their obligations in

[286] International Law Commission (ILC*), Draft articles on the responsibility of international organizations 2011,* Art.7.

this regard. Certainly, the adoption of the Draft Articles has led to a development in International Law, recognizing the importance that IOs have as subjects of IL with legal personality and, therefore, agreeing that they also have obligations deriving from their status. The ILC, with the Working Group and the Special Rapporteurs, have contributed positively to this topic, however the articles as they are, although adopted by the ILC, remain non-binding in nature and this has a significant impact on their scope.

In this perspective, indeed, one could think about the evolving of the Draft into something new, with binding nature, in order to affect much more in the context of international responsibility. As a matter of fact, the Draft Articles can be considered more towards the direction of the progressive development of International Law than being a real codification of the matter, since there have not yet been many precedents or doctrines regarding the topic and also many of the Articles inside the Draft were considered by the ILC itself being more part of the progressive development of the IL[287]. The creation of an International Agreement or a Convention promoted by the ILC and approved by the General Assembly would make it easier to comply with the obligations that IOs have regarding internationally wrongful acts. Indeed, even if there was the intent to further develop the articles in this direction, for now, as we previously said in chapter 2, the GA has only took note of the Draft, postponing to the future the possibility to take in more consideration the Articles in order to develop a Convention[288].

In addition, in the framework of a possible treaty, an oversight mechanism could be established in order to control the compliance with the Articles and to make the procedures more transparent, also ensuring even more the possibility of access to appropriate remedies and reparation by the victims. All of this would mean an important step forward, of course, but the implementation of a similar treaty or convention is well known to be not so simple. Even the adoption of the Draft Articles in 2011 was certainly not a simple and fast process and it required the effort of many actors who had to reach many compromises and amend several articles in order to get a satisfactory result.

This is a slow process that requires time and for now the Draft Articles on responsibility of International Organizations are not about to evolve in something else. Hopefully, with

[287] RAGAZZI, M., *Responsibility of the International Organizations: essays in memory of Sir Ian Brownlie*, Koninklijke Brill NV, 2013
[288] Ibidem.

time, there will be another step forward in this direction in order to ensure the compliance of IOs with their responsibility obligations relating to internationally wrongful acts.

Conclusions and final remarks

In this research, we have tried to frame the phenomenon of PMSCs and their situation in the legal framework at several levels, focusing mainly on the concepts of responsibility for violations of Human Rights and IHL. Indeed, at the core of this issue, there is the legal regulation of the subject in question and, in this research, an attempt has been made to outline the current situation in this regard, focusing more on international contexts, especially those of the UN and the EU. We wanted to start from the historical development of those who were born as mercenaries, companions of fortune in the pay of powerful lords, kings and popes. We have seen how, in reality, the monopoly of the use of force is the exception in history and not the rule, which instead is represented by privatization of military and security services.

Taking knowledge of the historical development of the subject, we then moved on to the new millennium where we witnessed a progressive awareness for the need of an effective management at a legal level of the PMSCs phenomenon. The new wars in the Middle East have contributed considerably in making the regulatory deficiencies concerning these private companies known globally, causing more and more literature to be produced in this regard and increasing the questions about responsibility. Many backdated documents refer to the subject using parameters that are no longer adequate and the process for obtaining the most suitable rules is rather slow. But the real problem arises when trying to regulate a breach to HR involving multiple states or otherwise involving cross-cutting organizations that see the participation of multiple countries. We talked about peacekeeping and how this type of operations has imposed itself on the international scene since the nineties. PMSCs have greatly expanded their capabilities within this sector, going to work more and more abroad, very often precisely for the UN itself. In these peacekeeping contexts, conflict areas are not always managed transparently and, very often, contractors hired for roles not directly involved in the conflict have committed violations, especially as regards Human Rights and IHL. The lack of transparency and control in these contexts has certainly facilitated the violations of HR, for example the illegal activities carried out in Afghanistan, which has been the scene of many violations perpetrated by contractors.

We then dealt with the topic of State Responsibility, reporting the categorization of states in Home, Hiring and Host one. This distinction is decidedly important because it makes us understand more specifically the responsibilities that states have, or in any case should have, towards the PMSCs, making the right differences in each specific case. Then we tried to delineate the fundamental key points at the base of the concept of responsibility of IOs for internationally wrongful acts: we started, indeed, by the Draft Articles on the responsibility of International Organizations, with the attempt to focus on the main aspects that concern HR violations perpetrated by PMSCs. Subsequently, we developed the topic, trying to indulge more on the specific articles that concerned the most the case of PMSCs.

The lack of uniform regulation has manifested itself in multiple contexts and at several levels: we have seen how this situation has emerged in peacekeeping operations managed by the United Nations and how therefore the ever increasing use of PMSCs by the UN has resulted in the pressure from many sides to implement a more stringent regulatory system that can well outline the obligations and responsibilities of member states, PMSCs and International Organizations.

After having tried to outline the complexities generated by the use of PMSCs in contexts of peacekeeping operations under the aegis of the UN, and having attempted to describe the most important Draft Articles on the responsibility of the IOs in the case of the UN, we then moved towards the analysis of a parallel context, albeit more restricted.

The EU is presented as a disharmonized context, often defined as a *sui generis* IO. European member states have very different provisions among each other, especially in the case of violations of human rights and the IHL by PMSCs. In recent years the EU has become increasingly aware of a necessary development in the legal field as regards the use of PMSCs and the possible sanctions in case of violations by them. The Montreux Document marked an important, albeit not decisive, step, as it testifies to the intent of the countries to want to properly regulate the phenomenon of PMSCs. However, this tool is and remains non-binding, significantly limiting its power. Another limitation of the document in question, on the other hand, lies in the fact that the Montreux Document refers to situations where PMSCs operate specifically in contexts of armed conflict, setting aside many other phases where PMSCs could violate the HRL and the IHL as for example in post-conflict periods.

Precisely on this particular aspect we can find a differentiation with the International Code of Conduct for Private Security Service Providers which, even if it is not signed by the European Union, presents itself as an important tool that could potentially contribute to the development of the European regulatory process of PMSCs. In our opinion, the ICoC should be supported by the European Union also because it has been at the center of the European scene several times as it could give a further boost to the process of regulation that the EU is trying to carry out. With the Code, in fact, an attempt was made to make the management of PMSCs more harmonized, especially with regard to the violations of Human Rights perpetrated by contractors, starting precisely from the self-regulation of the companies which, by adhering to the document, undertook to comply with the provisions inside the Code. We also want to emphasize the importance of the ICoC because, in our opinion, it could give an important impetus in the European framework, leading to the possible subsequent implementation of an exclusively European Code of Conduct such as the one proposed within the final Recommendations of the Priv.-War Project .

At this point we want to emphasize the centrality of the latter which, through a three-year research, then released important conclusions, through various publications, giving fundamental recommendations aimed above all at the European Union and its regulatory development in the topic of PMSCs. These recommendations were made with the ultimate aim of preventing what are the violations carried out by contractors, especially regarding human rights and the IHL, in contexts of armed conflict. The project is fundamental in stressing the importance of the laws that are already present, and which therefore demonstrate in a certain sense that there is no a real legal vacuum regarding PMSCs, but on the contrary, it underlines a lack of a capable enforcement that could effectively manage the PMSCs, thus also dealing with the consequences of the actions taken by them.

After illustrating many important tools, we finally tried to frame which of all those described are the most suitable at the international, UN and EU level. We hypothesized a possible implementation of a revised UN Draft on PMSCs as a binding tool within the context of the United Nations, while alongside this, as non-binding alternatives, we proposed the possibility of applying the Montreux Document and the ICoC, despite having mentioned these previously in the European context. Then, as regards the context of the European Union, we added to the already mentioned options of the Montreux

Document, the ICoC and the Priv. War Project, some provisions proposed by Krahmann and Abzhaparova which in our opinion would be to be taken into consideration in order to make the regulatory development of PMSCs at a European level more delineated and detailed. As a matter of fact, what is certain is that the disappearance of certain gray areas, with somewhat vague policies, also entails greater difficulty in obtaining total approval for the designated instrument, especially if we look at large forums such as that of the European Union.

The final key element we want to remark is that of responsibility of IOs. We developed this topic through the analysis of some of the main Draft Articles adopted by the ILC in 2011, trying to frame them within the United Nations and the EU contexts. Despite the criticisms, these articles are very important in defining the obligations that the IOs have in case of damage caused by PMSCs, but, still, these are not binding, therefore we hypothesized the possible development of the Draft in something more stringent like an International Agreement or a Convention with an oversight mechanism.

Having acknowledged the fact that IOs will rely in an ever-increasing way on PMSCs, there is the concrete need of a regulation and of a control over responsibility for the violations caused by these non-state actors. Therefore, there should be a further development either for what concerns the regulation at multiple levels of the phenomenon and also in the sense of a greater control on responsibility obligations. Starting from the Draft Articles on responsibility of International Organizations, the ILC and the Working Group should develop the topic, trying to converge into something more binding for the IOs in order to check on the compliance of these ones. The idea of a possible introduction of an oversight mechanism is exactly based on this concept: if it is applied a structure capable to ensure the compliance of the obligations that IOs have in case of internationally wrongful acts, there would also be a larger access to remedies and reparation for the victims of these breaches. Thus, the creation of a mechanism that could impartially allow victims to access to justice in a proper way, with the power to control and sanction IOs for the internationally wrongful acts for which these are held responsible, could bring a substantial development in the matter. However, as we already anticipated before, this is a process that requires a lot of compromises between many actors involved and, thus, it will take a long time to arrive at a satisfactory result.

BIBLIOGRAPHY

-ABRAHAMSEN, R ET WILLIAMS, M.C., (2007) *"Selling security: Assessing the impact of military privatization"*, Review of International Political Economy, 15:1, 131-146

-AIKINS, M., *Contracting the Commanders: Transition & the Political Economy of Afghanistan's Private Security Industry*, the NYU Center on International Cooperation (CIC) October 2012

-AVANT, D., The market for force: the consequences of privatizing security, 2005

-BAKKER, C. ET SOSSAI, M," *Multilevel Regulation of Military and Security Contractors: The Interplay between International, European and Domestic Norms*", 2012, Hart Publishing Ltd

-BIANCHETTI, O., *The Role of Private Military Security Companies in the New Generation of UN Peacekeeping Missions*, Université de Lausanne / Universität Zürich, 2016

-BROOKS, D., *Protecting People: the PMC Potential Comments and Suggestions for the UK Green Paper on Regulating Private Military Services*, 25 July 2002

-CASSESE, A. *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, The European Journal of International Law Vol. 18 no. 4, 2007

-COCKAYNE, J., "Regulating Private Military and Security Companies: The Content, Negotiation, Weaknesses and Promise of the Montreux Document", Journal of Conflict and Security Law, 2009, Vol. 13, No. 3

-CROWE, J. ET JOHN, A., *The Status of Private Military Security Companies in United Nations Peacekeeping Operations under the International Law of Armed Conflict*, 18 Melbourne J. of Int'l Law 16, 2017

-DAUGIRDAS, K., *Reputation and the Responsibility of International Organizations*, The European Journal of International Law Vol. 25 no. 4 EJIL (2014), 991–1018, 2015.

-ETTINGER, A., *Neoliberalism and the rise of private military industry*, International Journal, 2011

-FALLAH, K., *The generation of International Legal Norms to regulate Private Military Violence*, University of Sidney, 2017

-FRANCIONI, F. AND RONZITTI, N., *War by Contract: Human Rights, Humanitarian Law and Private Contractors*, Oxford Scholarship Online, 2011.

-Freedonia 2017, OECD 2017; World Bank 2017

-GHAZI, J. M., *The Legality of the Use of Private Military and Security Companies in UN Peacekeeping and Peace Enforcement Operations,* JOURNAL OF INTERNATIONAL HUMANITARIAN LEGALSTUDIES,147-187,*2015*

-GODFREY & AL. Richard Godfrey, Jo Brewis, Jo Grady and Chris Grocott, "*The private military industry and neoliberal imperialism: Mapping the terrain",* 2014, SAGE

-HUSKEY, K. A. ET SULLIVAN, S. M., *The American Way: Private Military Contractors & U.S. Law After 9/11*, the University of Texas School of Law, December 2008, National Reports Series 02/08, PRIV-WAR Report- The United States of America

-ICRC- International Committee of the Red Cross, *IHL and Human Rights Law*, 2010

-KRAHMANN, E., *States, Citizens and the Privatization of Security*, Cambridge, 2010

-KRAHMANN, E. AND ABZHAPAROVA, A., *The Regulation of Private Military and Security Services in the European Union: Current Policies and Future Options",*

EUROPEAN UNIVERSITY INSTITUTE, ACADEMY OF EUROPEAN LAW, EUI Working Papers AEL 2010/8, PRIV-WAR project

-LINTI, T., *UN's Use of Private Military and Security Companies in Peacekeeping Operations - Is There a Legal Basis?,* Politikon: IAPSS Political Science Journal Vol. 29

-MARCHETTI, E., *Private Military and Security Companies: Il caso italiano nel Contesto Internazionale,* Quaderni IAI, 2013

-MÖLDNER, M., *Responsibility of International Organizations – Introducing the ILC's DARIO,* Max Planck Yearbook of United International Law, Vol.16, 2012, p.281-329

-NYMAN, E., Overall Control, Master thesis, University of Lund, 2008

-ONO, K. Briefing memo, *The Trend of the Private Military & Security Companies (PMSCs) ―Terrorist Threat and the Economic Point of View―,* NIDS NEWS December 2015

-ORIZIO, P., *Afghanistan e Siria: contractors alla ribalta?,* Analisi Difesa, *2019*

-ORTEGA, E. L. A., *The attribution of international responsibility to a State for conduct of private individuals within the territory of another State,* Universitat Pompeu Fabra, 2015

-ØSTENSEN, Å., *UN Use of Private Military and Security Companies: Practices and Policies,* 2011

-PIETERSE, J. N., *Neoliberal Empire,* Theory, Culture & Society 21(3), 2004. SAGE

-PINGEOT, L., *Contracting Insecurity Private military and security companies and the future of the United Nations*, February 2014

-RAGAZZI, M., *Responsibility of the International Organizations: essays in memory of Sir Ian Brownlie,* Koninklijke Brill NV, 2013

-SCHMITT, P., *Access to Justice and International organizations: The case of individual victims of Human Rights violations*, Leuven Global Governance Series, 2017

-SCHREIER, F. ET CAPARINI, M., *Privatising Security: Law, Practice and Governance of Private Military and Security Companies,* DCAF Occasional Paper n.6, Geneva, 2005

-SINGER, P.W., C*orporate Warriors: the rise of the Privatized Military Industry*, 2003

-SOSSAI, M., «*A European Approach to the Regulation of PMSCs* », Proceedings of the Annual Meeting (American Society of International Law), 2013, Vol. 107, International Law in a Multipolar World, p. 207 Washington D.C.: American Society of International Law.

-SOSSAI, M., *The Legal Framework for the Armed Forces and the regulation of Private Security*, Routledge Handbook of Private Security Studies, 2015

-TAWHIDA, A. et BUTLER, I., *The European Union and Human Rights: An International Law Perspective,* The European Journal of International Law Vol. 17 no.4 EJIL, 2006

-TORROJA, H., *Public International Law and Human Rights Violations by Private Military and Security Companies, 2017*

-VIGNARCA, F., *Mercenari S.p.A.*, Milano, BUR, 2004

-WHITE, N.D., *Institutional Responsibility for Private Military and Security Companies,* EUROPEAN UNIVERSITY INSTITUTE, ACADEMY OF EUROPEAN LAW, EUI Working Paper AEL 2009/26

-WHITE, N.D., '*Towards a Strategy for Human Rights Protection in Post-Conflict Situations'*, in N. White and D. Klaasen (eds), *The UN, Human Rights and Post Conflict Situations* (2005), at 463, 464.

-YELDA KAYA, S., *Private contractors in war from the 1990s to the present A review essay*, Fighting for a Living A Comparative Study of Military Labour 1500-2000, Erik-Jan Zürcher, Amsterdam University Press. (2013)

INTERNATIONAL CONVENTIONS, TREATIES AND GUIDELINES

-*Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted and opened for signature, ratification and accession by the UN General Assembly resolution 39/46 of 10 December 1984, entry into force 26 June 1987, in accordance with article 27 (1)

-*Convention (V) respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land*. The Hague, 18 October 1907, International Committee of the Red Cross, (https://ihl-databases.icrc.org/ihl/INTRO/200?OpenDocument)

-COUNCIL DECISION 2009/42/CFSP of 19 January 2009 on support for EU activities in order to promote among third countries the process leading towards an Arms Trade Treaty, in the framework of the European Security Strategy.

-COUNCIL DECISION (CFSP) 2018/2010 of 17 December 2018 in support of countering illicit proliferation and trafficking of small arms, light weapons (SALW) and ammunition and their impact in Latin America and the Caribbean in the framework of the EU Strategy against Illicit Firearms, Small Arms & Light Weapons and their Ammunition 'Securing Arms, Protecting Citizens', Official Journal of the European Union, L 322/27

-COUNCIL REGULATION (EC) No 428/2009 of 5 May 2009 setting up a Community regime for the control of exports, transfer, brokering and transit of dual-use items, Official Journal of the European Union, L 134/1

-General Comment No. 20: *Prohibition of torture or other cruel, inhuman or degrading treatment or punishment* (article 7), 1992, adopted by the Human Rights Committee at the Forty-fourth Session, A/44/40, 10 March 1992.

-*IV Geneva Convention relative to the protection of civilian persons in time of war*, 12 august 1949.

-Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of international armed conflicts (PROTOCOL I), of 8 June of 1977, International Committee of the Red Cross.

-International Code of Conduct for Private Security Service Providers (9 November 2010) ('ICoC').

-International Code of Conduct for Private Security Service Providers' Association (ICoCA), Articles of the Association, Art. 2.2.

-*International Covenant on Civil and Political Rights*, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976.

-ICoCA Membership Update October - December 2019.

-International Law Commission (ILC). *Draft Articles on Responsibility of International Organizations*, with commentaries. ILC Yearbook, 2011.

-International Law Commission (ILC). *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, with commentaries. ILC Yearbook, 2001.

-Legge 29 Marzo 2007, n.38, Conversione in legge, con modificazioni del decreto-legge 31 gennaio 2007, n.4, recante proroga della partecipazione italiana a missioni umanitarie e internazionali (GU n.76 del 31-01-2007).

-Rome Statute of the International Criminal Court, Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, vol. 2187, No. 38544.

-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, Geneva: International Committee of the Red Cross, Swiss Federal Department of Foreign Affairs, 2008.

-UN GA *Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination*, Human Rights Council Fifteenth session, Agenda item 3, 2 July 2010.

- UN Security Council, *Purposes and principles of the Charter of the United Nations, Part III*, Repertoire of the Practice of the Security Council, 21st Supplement, 2018.

UNITED NATIONS RESOLUTIONS

-*UN General Assembly Resolution* 20; UN Doc. A/RES/2395 (XXIII) (29 November 1968).

-*UN General Assembly Resolution* 44/34 of 4 December 1989 - International Convention against the Recruitment, Use, Financing and Training of Mercenaries.

-*UN Commission on Human Rights Resolution* 2005/2, UN Doc. E/CN.4/RES/2005/2 (7 April 2005).

-*UN Security Council resolution 169*, UN Doc. S/RES/169 (1961).

-*UN Security Council Resolution* 743, UN Doc. S/RES/743 (1992).

-*UN Security Council Resolution* 1279, UN Doc. S/RES/1279 (1999).

-*UN Security Council Resolution* 1401, UN Doc. S/RES/1401 (28 March 2002).

-*UN Security Council Resolution* 1542, UN Doc. S/RES/1542 (2004).

-*UN Security Council Resolution* 2098, UN Doc. S/RES/2098 (2013).

INTERNATIONAL LAW CASES

-*Case Concerning Military and Paramilitary Activities in and against Nicaragua* (NICARAGUA v. UNITED STATES OF AMERICA), merits judgement of 27 JUNE 1986

-Commission Nationale des Droits de l'Homme et des Libertés *v. Chad*, 1995

Websites

https://eeas.europa.eu/headquarters/headquarters-homepage/430/military-and-civilian-missions-and-operations_en

http://www.europarl.europa.eu/doceo/document/A-8-2017-0191_IT.html?redirect

https://www.icoca.ch/

https://www.icrc.org/en

http://www.legislation.gov.uk/eudn/2009/42

https://priv-war.eui.eu/

https://www.refworld.org/docid/3b00f1be4c.html%20[accessed%2022%20January%202020]

https://www.un.org/en/charter-united-nations/

https://www.un.org/en/sections/un-charter/chapter-vi/index.html

https://www.un.org/en/sections/un-charter/chapter-vii/index.html

http://www.worldlii.org/int/other/UNGA/1968/

SUMMARY

Private Military and Security Companies have become nowadays among the most discussed non-state actors in relation to warfare. These companies have faced many phases during their development, starting from being mercenaries without law, up to become complex corporations with business-like structure. In the last forty years, they quickly developed, finding new contexts where to bring their specialized services. In this phase, they started to work in Peacekeeping operations, offering services to states but also to International Organizations. The reliance on these type of corporations by states and IOs has raised many doubts and questions, especially because of the several cases of Human Rights violations where PMSCs were involved. In this situation, two main issues developed during the last twenty years: one concerning the regulation of PMSCs and the other about the Responsibility for the violations perpetrated by these debated companies.

In this regard, the main purpose of this work is to analyze, in a comprehensive approach, the key elements of the responsibility that International Organizations have for internationally wrongful acts perpetrated by PMSCs, describing also the many attempts that has been made with regard a better and more harmonized regulation of the phenomenon at international level. To better address the question of responsibility we want to analyze some of the main Articles included in the Draft Articles on responsibility of the International Organizations adopted by the ILC in 2011, trying to frame these in the context of two of the most important IOs: the United Nations and the European Union.

The decision to focus on these two specific IOs resides on the fact that, during last years, both the Organizations increased their operational commitment, especially in the field of peacekeeping, thus giving in an ever-increasing way more space to PMSCs. It is interesting to dwell on these two IOs, also because their missions have always had as the main objective the maintenance of peace, therefore, an increasing utilization of private contractors in this kind of operations could, and had, raise many objections, given the image of PMSCs among the public opinion and also because of the many controversial accidents concerning HR violations in which these companies were involved. Following this concept, we want to try to delineate what are the key elements of the ILC Draft Articles on responsibility of International Organizations adopted in 2011 in relation to PMSCs, trying to understand if this draft can really affect IOs and what could be further

done in order to assure the compliance with the Articles. Within this framework, there is also an attempt to define the development of the legal regulation of PMSCs, trying to highlight the best tools present on the international field.

Starting from the historical development of PMSCs, indeed, the companies of fortune have gone through every phase of history, confirming that the real exception is the monopoly of the use of force by the state. National sovereignty as we understand it today, of Weberian conception, is a truly recent phenomenon compared to the constant presence of the mercenary in history. The ongoing conflicts over the centuries have been a breeding ground for security outsourcing.

Fighting for remuneration can be considered one of the oldest jobs in the world and precisely for this reason the loyalty of the subjects in question could very often be questioned as they were loyal only to gold. Throughout the medieval period, the figure of the mercenary acquired an increasingly negative reputation as the more they were feared the more they were hired by the courts for their wars. The first turning point for these warriors, however, took place in 1648 with the Peace of Westphalia, which laid the foundations for a modern conception of state. From then on, the mercenary category had ups and downs, going through both phases of misfortune where society rejected them, and phases of rebirth such as those which occurred in the era of Colonialism or as the much more recent one that exploded with the neoliberal wave of the Eighties and consolidated after the collapse of the Berlin Wall.

At the end of the last century, what in the collective imagination was classified in the category of soldiers of fortune, of mercenaries without law and without loyalty, changed its skin, being reborn in the form of corporations, driven by the neoliberal wave and almost completely freed from the old label they have always had on. In this phase, the companies try to clean themselves up, to take a more professional turn, becoming part of a branch of that privatized market so much supported by the neoliberal ideology.

During these years, there is a key element that greatly helps these companies to be recognized and accepted as professional corporations operating in the private security sector: peacekeeping operations are among the great protagonists of the nineties, they are the tangible proof of a United Nations rebirth in the post-Cold War era and also of the simultaneous reluctance of states to participate in new conflicts, meaning that the new private security companies have created their own space within peacekeeping, bringing

with them their high level of specialization and facilitating the role of states in many respects. If the advent of peacekeeping operations contributed to the revival of the image of what are now the new private military and security companies, the other event that instead allowed the growth of these subjects from an economic point of view, leading to a proliferation of companies, is certainly the one linked to the phase following the 9/11 disaster.

The war in Afghanistan has opened the doors to this new subject, allowing it to develop, also bringing various problems with it. The conflict economy that arose in this period has greatly benefited the growth of the companies in question and, moreover, they have been able to demonstrate a certain versatility, gradually expanding their relations with the US Department of Defense. After few years, indeed, between the two actors, a kind of interdependence developed and not only on the Afghan soil. However, what stands out most in this period are the facts that have awakened in the public opinion a renewed interest for private contractors, which are all those inglorious events, such as that of Fallujah, that triggered in the world, especially in the academic one, a series of questions about the regulation of this subject that, until then, had remained more or less in the shadows. Precisely in the period contemporary to the wars of the new millennium, especially those in the Middle East, the literature on the PMSCs phenomenon began to expand, trying to answer a whole series of questions that arose at the moment of maximum growth of the private security sector. Many began to wonder about the responsibility of the actions committed by the contractors and, with the various infamous cases, such as that of Blackwater in Fallujah or that in Nisoor square in Baghdad where some contractors employed by Blackwater were involved in the accidental killing of 17 civilians, under the spotlight, the desire to produce systems and guidelines capable of regulating, and eventually sanctioning , illegal acts committed by contractors has increased more and more, showing different lines of thought also on the responsibilities of states and of International Organizations that may have to do with PMSCs in multiple ways.

Of course, this does not mean that during the twentieth century there have been no attempts to stem this phenomenon from a legal point of view, but there is no doubt that the events that have brought PMSCs to the fore in recent years have contributed to pursuing a growing awareness and a constant search for an updated and adequate system

capable of regulating the subject. Moreover, all the documents produced in the last century are now far too backward, especially regarding the terminology used.

What at the time was defined as a mercenary, today has a completely another meaning: indeed, in the past, the mercenary was hired to be directly involved in hostilities and therefore on the battlefield, while now it has to do with a whole series of services that are most of the time indirect in relation to the conflict. Today's PMSCs offer services ranging from logistics to transport to training, but it is rarer to find a company, even military, that intervenes directly in an armed conflict. This is explained in the fact that contractors continue to be considered as civilians, and non-combatants, therefore they can only operate on a range of activities that may be supportive or in any case necessary for the regular forces deployed on the field. In addition, the figure of today's private military and security companies is far too complex to be generalized and exemplified with the old mercenary label.

The contractors of the twenty-first century are placed in extremely complex and business-like structures, they are employees with highly professional and diverse profiles, and it is clear that this complexity also needs to be reflected on a legal level. What is certain is that the more the functions and services of these companies have expanded and evolved, the more the need for regulation has become urgent. It should be emphasized, however, that different attempts have been made, albeit always in a way that is not sufficient with respect to the entity of the subject who, year after year, has increased its capabilities more and more, coming to conclude contracts with superpowers like the United States. Before this, however, during the twentieth century, while this phenomenon still had to take the form as we know it today, in our analysis we retraced what were the first attempts to approach it, going from fundamental documents such as the Geneva Convention, to arrive at the first UN resolutions that advocated a whole other type of approach than today.

However, even if these documents have given their contribution, they remain rather backdated towards the phenomenon that we are discussing in this analysis, that is in constant evolution. All the criteria used in the past to identify contractors, today are almost completely obsolete or in any case insufficient. What is still missing internationally is uniformity in the management of PMSCs. The world of private security is certainly complex and the management of this sector, from a legal point of view, and not only, by the states and by IOs is really varied and heterogeneous.

In addition, a larger use of this type of companies also entails a greater risk about the violations of Human Rights and International Humanitarian Law perpetrated by the employees of PMSCs. In the peacekeeping contexts, conflict areas are not always managed transparently and, very often, contractors hired for roles not directly involved in the conflict have committed violations, especially as regards Human Rights and IHL. The lack of transparency and control in these contexts has certainly facilitated the violations of HR, for example the illegal activities carried out in Afghanistan, which has been the scene of many violations perpetrated by contractors.

With the number of such violations growing, the question that arises, and that many have placed before us, concerns the attribution of responsibility for such actions. Moreover, it has been proved that contractors operated in many occasions in what can be defined as a *legal vacuum* due to the fact that the jurisdiction over them can be difficult to assess because they are recognized as civilians and, most of the time, they operate in international contexts through different international contracts. Therefore, assessing the jurisdiction over them resulted to be in many occasions difficult. As a matter of fact, if many see this responsibility fall on the individuals directly involved with the violations in question, others have wondered if these acts should be attributed to other involved actors such as the same companies that employed the direct executors of the breach to Human Rights or even to the States or the International Organizations that, nowadays, play an important role in relation to the employment of PMSCs.

Precisely because the private security sector is constantly expanding, and the outsourcing of specific military activities by governments is increasingly common, and certainly it will not diminish over time, there is an increasing need to fill the legal vacuum in the field, trying to adapt the different levels of regulation, in order to have a regulatory management of the subject in a more or less uniform way at international level. We can trace back in time all the conventions and treaties that assessed something related to Private Security Industry starting from the early twentieth century with the Hague Convention of 1907 regarding Rights and Duties of Neutral Powers and Persons in Case of War on Land and the Universal Declaration of Human Rights (1948), although one of the key documents, central to the issue, is certainly the Geneva Conventions of 1949 with the subsequent Additional Protocols of 1977. The core of the Conventions is about the protection of wounded soldiers, prisoners of war and the civilian population in conflicts, while the Protocols regard the protection of all the victims involved in armed conflicts.

In this context, the debate on the identification of contractors as combatants or as civil (non-combatant) personnel is certainly current as there is no specification in the conventions. We can find at the Article 75 of the Additional Protocol I the "fundamental guarantees" that assess that, even if the combatant or the prisoner-of-war status are not recognized, mercenaries must be treated as non-combatants who have taken part in hostilities so they can have a certain level of protection within International Humanitarian Law.

Another important document is certainly the 1984 Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment. A convention linked especially to the conduct of security personnel and to the military one. However, all the documents mentioned above were approved in a period where security outsourcing was certainly in transformation but was still defined and thought of as mercenary and it is for this reason that most of these treaties and conventions cannot be seriously applied to the PMSCs, because the latter are a modern phenomenon, current and not associated with the contractors of the 70s, framed, in those years, as mercenaries indeed.

What remains is the lack of uniformity between national and international regulations. Since the documents mentioned above are not globally recognized and, in any case very often not binding, there is therefore no comprehensive approach that makes the management of the phenomenon easier at an international level.

But what are the specific Human Rights violations that could be perpetrated by Private Military and Security Companies? The fact that during the last years the use of PMSCs increased in a massive way brought to the consequent enlargement of Human Rights violations risk. The augmented risk of affecting Human Rights regards not only the individual rights, but also the collective ones. The first right to be taken into consideration is certainly that of the right to life which can also be thought of as a basis for all other successive and consequent rights. Properly because PMSCs are capable to breach many important Human Rights in a lot of different situations, such as that of counterterrorism, when these violations occur, it is legit to question about the responsibility for these actions. At first sight, we would probably say that the ones to account are the contractors involved in the breaches of HR, but most of the time the reality is much more complex than what it seems. In many cases the responsibility may fall over the entire PMSC that employed the individuals involved. However, in many occasions, the burden of

responsibility should fall over the state which it can have different roles with respect to the PMSCs employment. Indeed, states can assume different position in respect to the employment of private military and security companies: they can employ them so as to be defined as the Hiring State, or they can be the country where the PMSC has its legal and physical base so as to be the so-called Home State. Finally, the state can be defined as the Host State, that is the weaker position it can assume with respect to a PMSC because it literally "host" a company or more when it does not have the power to maintain the order on its territories. The centrality of states in this area, indeed, is easily understood if one thinks that great part of the contracts, especially the most substantial and profitable ones, come from the states, very often from the major world powers. There are some specific cases that testify to the complexity of similar situations, very often ending without a real and defined conclusion. The Nicaragua case and, also, the Tadić are important in respect to the application of the "effective control" and "overall control" tests which are used to define the level of control that a state has over another "organ". These tools can be useful too in the context of International Organizations' responsibility.

In this framework, an attempt has been made in order to develop a parallel analysis on the responsibility that IOs have in case of wrongful acts perpetrated at international level. The International Law Commission decided to develop the matter appointing Mr. Giorgio Gaja as Special Rapporteur and establishing a Working Group. Then, after many amendments, in 2011 the Draft Articles on Responsibility of International Organizations were then adopted with the aim to define in a more detailed way all the aspects concerning the responsibility that the IOs have in case of internationally wrongful acts. In this context, to be held responsible, International organization must have the features of separate legal personality and that of being an operational organization. In recognizing these features, indeed, there is also the recognition of the IOs as a new non-state actor, an international subject as much as the State.

As the Draft reports, IOs can be held responsible either for wrongful acts made at international level by their "organs or agents" or by "organs of a State or organs or agents of an international organization placed at the disposal of another international organization". When it is the IO that directly hire contractors, so that they can be defined as "organs or agents" working for the Organization in an international operation, responsibility can be attributed to the IO in a more direct way. On the contrary, when PMSCs are hired by a state as an "organ or agent" and then seconded to another IO, things

are definitely more complicated, so much to define a precise tool that can delineate when the IO has the responsibility for wrongful acts made by PMSCs. The "effective control" test, the same that we have already seen in Nicaragua case, is applied through Art.7 of the Draft to assess if the IO had a strict control over the agent and, thus, if this can be held responsible. In this regard, there have been many critics because, looking in peacekeeping operations where control is most of the time delegated to multiple states that operate within the mission, it is difficult to demonstrate an effective control by the IO. In this view, White suggested to use the "overall control" test, as this is broader and easier to apply in these contexts. One of the most important articles in this document is Art.4 which defines the elements of an internationally wrongful act of an IO assessing that: "There is an internationally wrongful act of an international organization when conduct consisting of an action or omission: (a) is attributable to that organization under international law; and (b) constitutes a breach of an international obligation of that organization. The final part of this article is particularly relevant for our research because it means that if we want to demonstrate that an IO is responsible for a HR violation perpetrated by a PMSC, we also must prove that that Organization has international obligations with respect to HR. This is a complex issue and we want to assume that both the two IOs that we are studying have these internal obligations, even if in the UN case it is more complicated. Indeed, the EU has its fundamental principles and rights present in the Charter of Fundamental Rights, while the UN can be less bound to these principles at internal level. However, we want to report a concept by which HR can be considered implied, following statement of White: "The legal bases upon which human rights are applicable to all UN activities can be derived first of all from the inherent nature of human rights. Human rights are part of being a human being and therefore such rights are automatically part of the legal framework applicable to those with power to affect the enjoyment of those rights."

In the ILC Draft, there are other important elements such as the reparation and remedies for the victims and also the section regarding the preclusion of wrongfulness which can occur in occasion such as that of self-defence.

Other important criticisms over the Draft are about the lack of a sufficient *practice* concerning the issue and also in relation to the missing of a dispute settlement mechanism capable to control in an impartial way IOs' compliance with the Draft. However, despite these shortcomings, we want to assess that the Articles in question can truly affect IOs, both because they want to respect international law, but also human rights, although there

is no internal document that defines obligations with respect to HR in the UN context, and because they also fear the concept of reputation that can affect their legitimacy. Thus, in the case of HR breaches by PMSCs, within the context of international operations, responsibility may fall over the IOs that hired, directly or not, the companies in question.

The UN, over time, has changed a lot its way of approaching the world of PMSCs, passing from the first resolutions condemning the practice of mercenary, to that of today where to see the employment of PMSCs in many of the UN operations, especially in peacekeeping ones, is now completely usual. If, indeed, within the UN there has always been a current totally opposed to mercenary, on the other, especially with the progressive decrease of interest by the member states in wanting to participate directly in war contexts, we are witnessing the growing of a perception sustained by those who support the use of PMSCs in war theaters, causing a debate inside the United Nations that today is still ongoing. One of the first actions initiated by the United Nations regarding PMSCs, dates back to the 1989 approval by the General Assembly of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries. This Convention was drafted in order to determine the parameters to identify the mercenary and to decide the practices for the eradication of mercenarism. As a matter of fact, the initial approach of the United Nations towards this phenomenon was not at all positive, so much so that the resolution aimed precisely at eliminating the subject. It is important to understand that this first step, even if negative, is the consequence of a very precise historical period, at the end of the Cold War, which played a fundamental role, influencing the member states not a little.

Another important step that the United Nations made in order to further regulate and deal with the phenomenon of the PMSCs is the establishment of the UN Working Group in 2005. As a consequence of the latter, indeed, in 2010, the Draft of a possible Convention on PMSCs was presented to the Human Rights Council with the scope to increase the promotion of transparency and responsibility among all the Member States that use Private Military and Security Companies and also in order to set out more efficient services of rehabilitation for victims involved in these kind of dynamics. What remains ambiguous of this Draft is the double direction it tried to pursue. In this document, indeed, they looked, at the same time, for a dramatic prohibition on military and security contracting and also for a complex system of regulation.

We already said, that after the Cold War, PMSCs have been able to enlarge their activities within peacekeeping context, so much that in the last years these became the first private partner of the UN. In this regard, we want to dwell more on the concept of responsibility, recalling the ILC Draft Articles adopted in 2011. The parts of the draft already cited, regarding the attribution of the conduct, the obligations of reparation and also the definitions on the preclusion of wrongfulness are very important in this context. Moreover, following the assumption previously exposed in this work, we can say that these articles can actually affect the IOs, and the UN itself, even if the document in question has not been developed in an International Treaty. Therefore, even if without a dispute settlement mechanism, it could be said that the most important functions that the Articles on the responsibility of IOs can perform is that of preventing internationally wrongful acts, also due to the already expressed concept of reputation.

Subsequently, we want to shift the analysis toward something else that has been defined many times, more or less improperly, as an International Organization *sui generis*: the European Union. The development of the EU has accelerated more and more in recent years and its system of legislation has brought about various changes on the international, but above all national, level, impacting a lot on the European member states. The use of PMSCs in the European context is known to be very diversified due to the not uniform regulation among EU countries. It is not difficult, in fact, to find countries within the Union that approach the world of private security not only in a different way, but quite the opposite. We could divide the member states of the Union into two macro-categories: those with a clearer and more delineated regulation and those that adopt a more laissez-faire policy, even if, in recent years, even these countries have begun to become more aware of the need to further regulate the subject in question. Since the regulation at national level is almost always present as regards the services of the PSCs (the PMCs are much less present), there is therefore the need for further regulation at the level of the European Union, especially in relation to the export of activities carried out by the PSCs in third countries.

In addition, most of these companies operate nationally in unarmed contexts (private or public security) while abroad the implementation of services with armed contractors increases, these being often employed in third states with armed conflicts. Furthermore, the European arms exportation regulation does not deal with the export of security services, leaving them within the internal policies of the member states. Indeed, there are

Member States that use PMSCs in different measures and the constant growth of these companies has led to the search for a cohesion, among all the countries belonging to the EU, which is still unsatisfied today.

However, some attempts have been made within the European framework to move towards a more harmonized regulation at European level. Following the analysis of Krahmann and Abzhaparova, we can report the policies and regulations already present by dividing them into three categories in order to be able to schematically exemplify the European production of PMSCs policies: in the first category we find the Council "Regulations" which are very important because these can be applied directly to the Member States of the Union. In the second category there are the Council "Common Positions" that are "binding legal acts which have to be implemented into national laws or practices". The third category concerns the Council 'Joint Actions', "i.e. legal acts defining common actions such as the Common Foreign and Security Policies (CFSP) on technical assistance related to weapons of mass destruction (WMDs) and to embargoed destinations, and the export of small arms and light weapons ". From now on, the EU has slowly updated this type of regulation with various amendments, but it remains important because through the control and limitation of various technological devices, a process, albeit still weak, of controlling PMSCs has been initiated.

In addition, attempts have also been made to use innovative tools, such as the Montreux Document and the International Code of Conduct for Private Security Services Providers or the provisions proposed as Recommendations within the context of the Priv.-War Project, aimed at finding binding and non-binding measures both as regards the member states and PMSCs, with, in some cases, some attempts to check on the IOs too.

The first one, the Montreux Document, was signed not only by as many as 54 countries but also by International Organizations of fundamental importance such as NATO, OSCE and EU. In the first page of the document we can read the specific aims of this text which are “on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict”. The main goal of the Montreux Document, however, is to arrive at providing a common guide that can help to manage the obligations of countries with respect to regulation in International Humanitarian Law and Human Rights Law. However, it should be emphasized that although this document is important in the development of a regulation of PMSCs, it

remains non-binding and therefore can only suggest guidelines but cannot force the signatories to follow these. Despite the non-binding nature of the Montreux Document, the European Union, being among the signatories of this document, confirms its position in wanting to move towards the harmonization of the legal regulation of the PMSCs phenomenon at international and European level.

The International Code of Conduct for Private Security Service Providers (ICoC) is the "natural" consequence of the Montreux Document, created for private companies in the first place and signed by them. Although the European Union is not among the signatories, and there are only two European member states that signed the Code which are Sweden and the UK(with the Brexit officialized on the 31 of January 2020, now it is just one member state), we wanted to include the ICoC mainly for two reasons: on the one hand, the Code stems from the further development of the Montreux Document and since this has been signed not only by the EU but also by other important International Organizations, the Code of Conduct remains important, so much so that, and here we come to the second reason, several proposals put forward at the European Parliament have pushed for involvement and the adhesion to the code by the EU or at least by a greater number of European member states. The main purpose of the ICoC is to make the obligations that PSCs have at an international level more harmonized, especially regarding the respect of Human Rights Law and International Humanitarian Law. With this code, in fact, the signatory corporations undertake to follow certain standards concerning the respect of rules that place limits on the contractors' activities. In addition to the Code, in 2013, an Association was established (ICoCA) with the aim of managing and controlling the correct implementation of the Code of Conduct, making certifications and resolutions. For these reasons and for others that we will see later, the European Union and its members should adhere to the Code of Conduct in order to get closer and closer to that much desired harmonization.

In the same years of the Montreux Document, an important study has been developed on this subject, financed by the EU Seventh Framework Program for Research. The three-years project Priv.-War has sought to outline the development and impact of the growing use of private contractors especially in contexts of armed conflict and, by analyzing the international and European regulatory framework, the project then drafted a series of recommendations for the EU with the aim of suggesting some provisions that could improve compliance with the IHL and the HRL. Among the main objectives of the study

there are the promotion of a clearer understanding of the Private Security Industry, with therefore a more precise formulation of what PMSCs are, and an in-depth analysis of the main activities carried out by these companies and the reasons that drive countries and IOs to use them. What is really important of the Priv. War Project is that it has examined an already existing regulation at several levels, thus affirming that, as regards the PMSCs, there is no real legal vacuum but that what is really missing is an effective mechanism of enforcement. One of the aims of the study, in fact, is precisely to demonstrate the central role of the European Union and how much this one could affect the regulation of PMSCs, applying more comprehensive and standardized monitoring. With this in mind, maintaining the centrality of the IHL and HRL, as a result of the project, we therefore find the outlines of possible approaches and legal instruments, such as "licensing" and "registration", in the form of recommendations aimed above all at the EU. It is important to underline the fact that, not only has the Priv. War Project contributed significantly with these thirteen binding and non-binding instruments proposed in these recommendations and with all the research work reported in several publications, it also takes into consideration the possibility that the European Union itself may contract PMSCs in Common Security and Defense Policy contexts.

We already discussed about the Responsibility of IOs for internationally wrongful acts, introducing the tool of the Draft Articles adopted in 2011 by the ILC and, also, trying to delineate what are the most suitable parts of this document in the UN context. Now we want to recall the responsibility issue, but with the intent to frame it within the EU context, also paying attention to CSDP and CFSP areas. The first part of the Draft is important to define and understand what and when IOs are responsible for wrongful acts at international level and, for this research, it is also remarkable because it can make us question about the specific features of the EU and, in this view, if this can be fully considered as the subject reported in the Draft Articles adopted in 2011. Indeed, if we compare the legal status of personality between the UN and the EU we can easily see some differences: The United Nations obtained the recognition of this status in 1949 while the nature of the EU was not so clear until the Treaty of Lisbon in 2009. As a matter of fact, International Organizations can be very different one from another and some of them are more different than the others. It is the case of the European Union that, despite its clarification about its position at international level in 2009, can occur in some problems with respect to the Draft. It is the case of when a European member state commits a

violation for which the EU can be held responsible. In this regard, when there is too much differentiation among IOs, as in the case of the EU, the Commission decided to adopt the Art.64. With this provision, the Commission wanted to include, with the tool of the *lex specialis,* also the IOs that result to be more different, as in the case of the EU. In doing so, the ILC opened up to the intent of a more developed and detailed differentiation of IOSs.

With this research, there is the intent to exemplify the development of PMSCs from the point of view of their regulation at different levels in order to understand and identify the most suitable way capable of leading us towards a more solid legal basis that could control, and eventually sanction the responsible of HR and IHL violations perpetrated by PMSCs.

After illustrating many important instruments, we want to hypothesize a possible implementation of a revised UN Draft on PMSCs as a binding tool within the context of the United Nations, while alongside this, as non-binding alternatives, we propose the possibility of applying the Montreux Document and the ICoC, despite having mentioned these previously in the European context. Then, as regards the context of the European Union, we add to the already mentioned options of the Montreux Document, the ICoC and the Priv. War Project, some alternative provisions proposed by Krahmann and Abzhaparova which in our opinion would be to be taken into consideration in order to make the regulatory development of PMSCs at a European level more delineated and detailed. The policy option n.3, which is about the export of military and security services, could be a very concrete provision because it is defined as a "Council Common Position on the export control of military and security service included in the EU Common Military List". The other important one is the option n.9 called "Inclusion of military and security services into an International Arms Treaty". This option is suggested in *Council Decision 2009/42/CFSP* and it would allow to enlarge the controls over the PMSCs services even outside the EU borders. The main goals of this option would be a stricter control over those companies that try to avoid sanctions by moving their legal base from a European country to a non-European one. However, even with this instrument there could be disadvantages, especially with regards to the range of services that should be controlled in the treaty. If there are many difficulties in finding a coherent path to follow among the EU Member States, at international level it is clear that the situation is even worse.

We wanted to develop the path of regulation that the UN and the EU had during these years, also in order to better address the concept of responsibility.

Indeed, the final key element we want to remark is that of responsibility of IOs. We developed this topic through the analysis of some of the main Draft Articles adopted by the ILC in 2011, trying to frame them within the United Nations and the EU contexts. These articles are very important in defining the obligations that the IOs have in case of damage caused by PMSCs, but, still, these are not binding, therefore we hypothesized the possible development of the Draft in something more stringent like an International Agreement with an oversight mechanism.

Having acknowledged the fact that IOs will rely in an ever-increasing way on PMSCs, there is the concrete need of a regulation and of a control over responsibility for the violations caused by these non-state actors. Therefore, there should be a further development either for what concerns the regulation at multiple levels of the phenomenon and also in the sense of a greater control on responsibility obligations. Starting from the Draft Articles on responsibility of International Organizations, the ILC and the Working Group should develop the topic, trying to converge into something more binding for the IOs in order to check on the compliance of these ones. The idea of a possible introduction of an oversight mechanism is exactly based on this concept: if it is applied a structure capable to assure the compliance of the obligations that IOs have in case of internationally wrongful acts, there would also be a larger access to remedies and reparation for the victims of these breaches. Thus, the creation of a mechanism that could impartially allow victims to access to justice in a proper way, with the power to control and sanction IOs for the internationally wrongful acts for which these are held responsible, could bring a substantial development in the matter. However, we must highlight the fact this is a process that requires a lot of compromises between many actors involved and, thus, it will take a long time to arrive at a satisfactory result.