FACULTY OF POLITICAL AND SOCIAL SCIENCES

HIDE AND SEEK WITH PRIVATE MILITARY COMPANIES (PMCs). The urgent need for an international regulatory framework.

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Supervisor: Christoph Vogel

Master's dissertation submitted in order to obtain the academic degree of
Master of Science in Conflict and Development Studies

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GHENT UNIVERSITY

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Policy Report

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FOREWORD

This paper was produced in the framework of a Master's Dissertation by a student of the M.Sc. in Conflict and Development Studies at Ghent University. Hence, completely independent of the volunteer work for the IGWG on PMSCs Secretariat at the UNOG, the author performed during the data collection stage for this academic thesis and, thus, not linked in any case with the Secretariat. Therefore, its contents are the sole responsibility of student herself, and can under no circumstances be regarded as reflecting the position of any of personalities with whom the author might have held conversation, and the participants of conferences, forums, and webinars the author of this policy report has attended. Especially regarding her fieldwork at the United Nations (UN), the content can under no circumstances be regarded as reflecting position of the Secretariat, the OEIGWG on PMSCs, and any delegation present neither in the intersessional consultations nor at the 5th session. Hence, any references to the data collected during any stage of her fieldwork aims to work as a reflection of current discussions around private military and security companies in an international and institutionalized frame. The views expressed in this paper are of the author and do not necessarily represent the policy or opinion of the UN, the Secretariat, the WGs, the HRC, the OHCHR or any UN's member organisations, as well as any personal opinion of the delegations rather than what was expressed in the room according to their diplomatic and political duties and responsibilities as representatives of States, NGOs, ECOSOC organisations, Academia and IOs. The author would like to thank the people and organisations who shared information on their activities for the case study and the overall research included in the present policy report, concretely the IGWG on PMSCs Secretariat to trust and believe in the author to perform support team duties and award her access to both the Intersessional Consultations (IC) and the 5th session. Eventually, this author would like to thank her thesis supervisor, who provided support and feedback throughout the editing process, and encourage her all along the research process.

EXECUTIVE SUMMARY

This report aims to be a reinforcement to the United Nations (UN) efforts to build up an international regulatory framework (IRF) on the activities of private military and security companies (PMSCs). Indeed, the UN established the OEIGWG on PMSCs in 2010, along several change and character modifications, seeking to establish an IRF on PMSCs, work to which the author of thus policy report has been able to contribute as a volunteer for the Secretariat and through the present research. Therefore, Blackwater is the case of study chosen to analyse the essential elements and principal aspects to produce an international regulatory framework on PMSCs.
In a nutshell, Blackwater was a North American Private Military Company (PMC) founded in 1996 by Erik Prince, a former Navy SEAL. As a result of the reduction of the military budget, a direct consequence was the increase of subcontractors by the United States Department of Defence. At first glance, this case does not seem controversial, nonetheless, once digging deeper it can be seen several events that led the international community to investigate both Blackwater and its CEO. Certainly, the constant change of names, from Blackwater to ACADEMI ending up as Constellis Holdings Inc., as well as the Nisour Square massacre in Baghdad where four Blackwater security guards killed fourteen civilians in 2007, Known as 'Baghdad Bloody Sunday' (Scahill, 2008), are some examples of what the United Nations is investigating, allocating the spotlight in human rights violations across the world.

Considering that a policy report focuses on a practical-applied problem, the research problem the author would deepen into scopes. Indeed, framing a current and rising problem whose starting point was the Cold War, essentially. This author has researched the privatization process of security, within a narrowed and concrete epicentre: private military contractors (PMCs).

This research targets to have a real impact on the problem of the privatization and centralization of security and defence by contributing to working groups and policy reports of the OHCHR and the UN itself. Nonetheless, among several issues the author has faced when researching the activity of private military contractors, the initial one regarded a geographical problem, which is worth noting. Considering that private military companies have had and still have business in several countries: Afghanistan, Baghdad, Cambodia, Egypt, Iraq, Libya, Nagorno Karabakh, Serbia, sub-Saharan Africa, Syria and Ukraine among others, the author could not approach in-person all missions, firstly based on the fact most of them occurred on the past, and secondly considering the limited resources a master student does have when researching, aside the fact of getting real and secured access to conduct fieldwork in hostile area, much unlikely. Therefore, this issue was solved by locating Blackwater as the case of study in the epicentre of the investigation, through its historical background and real outcomes to answer the previously presented research question.

Blackwater, and especially putting the accent on its historical and performed activities' background, has settled down the premises to urgently need the production of an international regulatory framework (IRF) – precisely, currently being driven by the OEIGWG on PMSCs at the United Nations. Regardless, the latter shift of paradigm the contemporary security and military companies do not share the same characteristics as 2000s enterprises, and, therefore, cannot be named PMSCs either. This debate has led to question whether to production of an IRF on PMSCs is an accurate step into the right direction. Nonetheless, as it has been pointed up in several discussions, businesses in the security and military fields are quickly evolving, scoping more field of services as well as diverging the range of services they provide, and being outsource an increasing number of functions by States themselves – being specially worrying the delegation of the use of force and inherently State functions[1] –. Such spend harden tracking and, accordingly, producing the corresponding legal frameworks on the regulation, oversight and monitor of PMSCs activities, by the international community. Therefore, building up an international regulatory framework for companies in security and military is much of an urgent matter. Current negotiations, especially at the United Nations[2], are taking a fruitful path vertebrated by IHL, IHRL, ICL, CIL and international Conventions and agreements such as the Children's Rights Conventions, Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict[3] and CoC, seeking to build up parameters determining PMSCs scope of action and legitim interactions with other actors, especially States and sub-contractors.

Consequently, the present policy report aims to be a valuable strengthening of the work conducted by the UN since 2010[4] whilst ensuring a solid contribution to Academia per se, precisely consider the author's recent fieldwork within the OEIGWG on PMSCs at the UN. Resulting in a precious enriching amount of primary data which has been coded and analysed throughout the production of this text under a neutral, objective, and impartial perspective within security and conflict, and development studies as well as under the international law's umbrella. Thanks to the transversality and intersectionality of both the author and the conducted fieldwork, the present paper can ensure compliance

[1] See the seventh preambular paragraph (PP7) of the revised third draft instrument.
[2] The United Nations has been chosen as the central intergovernmental organism, not only based on the authors fieldwork conducted in this transnational organisation, but also since it is worldwide considered the largest international organisations where to decide global matters.
[3] Hereby, Montreux Document.
[4] It must be noted that neither the WG nor the Secretariat have directly asked for the present report, however, in the aftermath of the author's fieldwork, she has offered to share her work with whoever needs further and external assistance in building an IRF on PMCs.

with ethical and moral codes of conduct at an Academic level[5], and in the global context. Hence, it is undoubtedly the rigour and essentiality of this policy report.

Throughout the case of study Blackwater, not prejudging the nature activities, background, and contemporary circumstances, as well as the licensing and legal, criminal, and 'civil' prosecutions, jurisdictions, regulations and legal actions take on against or within the mentioned enterprise, the author of this policy report presents allegations to consider an international regulatory framework on PMSCs and their activities the convenient way-forward towards a sustainable, equal and fair (co)existence of military and security companies in a context vertebrate by constant conflicts, disputes, combatant situations and hostile scenarios world-widely.

[5] In accordance with AAA Code of Ethics (2009), EASA's Statement on Data Governance in Ethnographic Projects (2022), and AoIR's Internet Research: Ethical Guidelines 3.0 (2019), as well as further reports produced by the Ethics Working Committee.

CONTENTS

ABBREVIATIONS

ART Analysis and Research Team

BHR Bussines and Human Rights

CBO Congressional Budget Office

DPH ‘direct participation in hostilities/combat’, or ‘direct participation in hostilities’

DPH&C ‘direct participation in hostilities and combat’

EU European Union

HR Human Rights

HRC Human Rights Council (UN)

HRC/WG on the elaboration of PMSCs alternative reference for OEIGWG on PMSCs

HNPW24 Humanitarian Networks and Partnership Week 2024

IC Interssessional Consultations

ICC International Criminal Court

ICJ International Court of Justice

ICoCA International Code of Conduct Association

ICRC International Committee of the Red Cross

IGWG on PMSCs Intergovernmental Working Group on regulatory framework of activities of private military and security companies *(same as OEIGWG on PMSCs)*

IHL International Humanitarian Law

IHRL International Human Rights Law

IL International Law

IRF International Regulatory Framework

ISF ‘Inherently State Functions’

MS Member States

NGO Non-Governmental Ogranisation

OEIGWG on PMSCs Open-ended Intergovernmental Working Group on regulatory framework of activities of private military and security companies *(same as IGWG on PMSCs)*

OHCHR Office of the High Commissioner for Human Rights

PMCs Private Military Companies

PSCs Private Security Companies

PMSCs Private Military and Security Companies

RTDI Revised Third Draft Instrument

SIPRI Stockholm International Peace Research Institute

SF 'State Functions'

'the Charter' the Charter of the United Nations

The Secretariat IGWG on PMSCs Secretariat

UDHR Universal Declaration of Human Rights

UN United Nations

UN Guiding Principles on Business and Human Rights (UNGP on BHR)

UNOG United Nations Office in Geneva

5th session *Fifth session of the open-ended intergovernmental working group to elaborate the content of an international regulatory framework, without prejudging the nature thereof, relating to the activities of private military and security companies*

12th session *12th United Nations Forum on Business and Human Rights*

INTRODUCTION

This policy report, which simultaneously is a master's thesis, aims to be a proposal for stronger regulation over private military contractors' actions and legal limitations for governments and international organisations and the private military companies themselves as well as their personnel and sub-contractors, to make use of PMCs under the pretext of humanitarian aid; military intervention in armed conflicts; direct participation in hostilities and combat[6]; assistance within natural disasters situations of prevention, recovery and investigations; and man-made emergencies, both nationally and internationally.

Taken the aforementioned, this research focuses less on the victims and direct consequences of the private military contractors' missions in hostile areas in terms of victims and victimhood. The author genuinely aimed to avoid over-researched communities based on the lack of real assistance and tangible aid directly provided by the author considering her status as student and, thus, the lack of considerable resources. "The contrast between the amount of research conducted in the camp and the lack of positive change in the camp's social and economic conditions" (Sukarieh & Tannock, 2012: 499). This policy report seeks to contribute to the complaints of both over-researched communities themselves and academic scholars by adopting an institutionalized scope within a juridic framework ruled by the Critical Security Theory. Thus, the author has not focused on the population itself, but on the states, institutions, and private companies since not only countries like the U.S., Germany, Russia, France, UAE, China, Canada, and Turkey have made use – and still do – of PMCs and PSCs but also the international community.

The main goal of this research is to cope with legal pitfalls encountered in regulating the activities, competencies, and legitimacy of private military companies (PMCs) under the international law framework. Therefore, Blackwater has been chosen as the case study whose historical background operates as the backbone argument answering the research question, which must be the essential elements and principal aspects of an international regulatory framework on PMCs and their activities? Resulting as a reinforcement of the work that has been conducted by the OEIGWG on PMSCs 'to elaborate the content of an international regulatory framework, without prejudging the nature thereof, to protect human rights and ensure accountability for violations and

[6] According to the discussions held during the 5th session, 'direct participation in hostilities/combat' (DPH) was presented as one of the two specific issues to be in-deep discussed, together with 'Inherently State Functions (ISF).

abuses relating to the activities of private military and security companies' (OHCHR, 2024), since 2017 with the renewed mandate but onboard since 2010[7].

In the same vein, the corresponding sub-questions aligned with both the research question and the concepts – presented in the above subsection –, read as follows.

How States use PMCs as a state's tool to reach military goals unachievable by governments per se? both themes on investigating private enterprises, and States and IOs' obligations and responsibilities are undoubtedly present and become not only keywords when answering the proposed inquiry, but also central points in the completion of a proper guideline in the construction of an international regulatory framework on PMSCs activities. Precisely, within this sub-question the concept of 'State Functions' proposed by the IGWG as one of the two specific issues emerges as a vertebrate of this policy report. Therefore, aiming to properly answer this first enquiry, this research focuses on the Blackwater case considering it was a PMC settled in the U.S. as the 'Home State'[8].

How are the control and track of PMCs' activities recorded and judged under international law (humanitarian, human rights, and criminal law)? Taking international law as the umbrella, and consequently navigating among each branches of humanitarian law, human rights law and criminal law; parallelly, there is a inherently need to keep referring to domestic law and customary law, based on States being the main stakeholder in the use of PMSCs whilst simultaneously are the principal agent to indeed ratify an international regulatory framework considering the UN is composted by States – as Member States (MS), alike any other intergovernmental organization –, which hold the monopoly on the legitimate use of force within the current understanding of the world ruled by modern states[9] and poststructuralism.

Which are the reasons of legal relevance in International Law regarding military-based companies splitting, subcontracting, and changing their names, shapes and core services? Taking the Montreux Document as the basis to reflect the danger of privatisation of military and security services by PMSCs, along with the twilight zone' inherent in its activities and legitimacy as transparent enterprises complying with international law and its derivatives (Human Rights Law, Humanitarian Law and Criminal Law).

[7] See section X on 'The UN role on PMCs criminal prosecution', compressed within 'Blackwater, the roots of PMCs', for further information on the OEIGWG on PMSCs.

[8] According to the revised third draft, outcome from the intersessional consultation prior the 5th session of the OEIGWG on PMSCs, a "Home State" is 'a State of nationality of a Private Military and Security Company' (OHCHR, 2024).

[9] In accordance with Weber, recalling capitalism and colonialism. Also, it must be included Thom Hobbes in the discussion on the use of force, as well as the jeopardized terminology and sematic demarcation between the increasement of PMSCs and Organized Crime, quoting Milan Vaishnav (2017). For this discussion, see subsection X on the 'Research Problem'.

This report is backboned by the case of study Blackwater as an exemplification of the private military and security companies' activities along with the obstacle that face and must overcome the international community, represented in this paper by the United Nations essentially, in order to elaborate an international regulatory framework on PMSCs' activities, without prejudging its nature. Hence, this policy report digs into the research problem in Chapter 5 and exposes the methodological framework in Chapter 5 seeking to compose a solid, proper, and accurate basis to navigate into the case of study Blackwater. This policy report emphasizes Chapter 7 'Blackwater, the roots of PMCs', and its corresponding sub-chapters which embraces the case of study per se, the history of Blackwater and PMCs since the Cold War, and the games played by PMSCs in the scenario of the world. Subsequently, the report exposes the results in Chapter 8, which have been obtained thanks to the fieldwork and the extractive academic revision throughout the resolution of the sub-questions and main research questions. Eventually, this thesis framed as a policy report reaches the conclusions, recommendations, and limitations.

RESEARCH PROBLEM

The research problem scopes a ramification of issues, starting by the elaboration of an international regulatory framework within the frame of the world, ergo heterogeneity, diversity of legislation, and lack of consensus, all the way through the definition of Private Military and Security Companies, within the opened debate on whether the IRF should be limited to PMSCs or also encompass other types of business enterprises performing under the umbrella of security and military companies and services. Therefore, in order to provide a well-structured analysis of the core elements, the two main concepts must be defined: international security and juxtaposition between accountability and privatisation in the context of international security. Alongside a brief presentation of international humanitarian law, as the more extensive and intersectional branch of international law, in comparison to human rights and criminal law which are more concreted and specialised.

International Humanitarian Law (IHL), also known as *jus in bello*, aims to mitigate warfare suffer and struggle as well as to regulate within armed conflicts the conduct and behaviour of the actors involved, thus indirectly promote the protection, respect, and compliance with human rights. Nonetheless, even rooted in the same field of international law, international humanitarian law and international human rights law have been developed 'independently' whilst being complementary. For instance, the Convention on Enforced Disappearance, and the Convention on the Rights of the Child and its Optional Protocol on the involvement of children in armed conflict are examples of IHL provisions included within human rights treaties (ICRC, 2015).

Besides, resulting from the above, another core issue composes the research problem, the growth of PMSCs promotes the privatization of security services. 'The trend towards increased outsourcing of military activities has led to a rapid expansion of the military services segment of the arms industry in recent decades' (Perlo-Freeman and Sköns, 2008: 1). Indeed, according to the authors, depending on the nature of services and/or type of costumers, the private company might vary its name.

Considering the aforementioned, the main concepts that vertebrate the research problem ought to be presented: international security, and the juxtaposition between accountability and privatisation in the context of international security. It must be clarified that the first concept is scoped within the scope, meaning that the correlation between both is more than tangible, as the reader must have noticed already. The concept 'international security' works as the dependent variable, while the juxtaposition between 'accountability and privatisation' is the independent variable – considering the research can control the cause which might change depending on the researcher's lens. In other words, resulting from the approach given to the juxtaposition between accountability and privatisation in the context of international security, the later per se would be presented one way or another depending on the outcomes of the juxtaposed variable. Indeed, the inherent aim of this policy report, concluding how PMCs affect international security by performing their activities without a proper, solid, and settled international regulatory framework, as well as how do they get sub-contracted by States and sub-contracted other enterprises without criminal prosecution nor investigation.

International Security

On one hand, the concept 'international security' must be defined not avoiding the fact that is part of the international law and, therefore, must be explained under its umbrella, alongside with international human rights law. Hence, in the context of building and drafting the International Criminal Court and the UN International Law Commission on international criminal law, while several countries stuck Nazi criminals in justice – for instance, the Eichmann Trial in Israel –, and the Balkans were facing massacres and ethnic cleansing, international criminal prosecution consequently came back into scene. Parallelly, and resulting from the mentioned circumstances, 'international criminal law has been seen as a political tool serving international peace and security while used sporadically to seek justice'. (Reginbogin and Safferling, 2006: 13). Nonetheless, digging into the concept of international security itself, several approaches can be given from a modern perspective of it, thus within the definition of international security the theoretical approach that this thesis adopts is exposed as well. According to Habibullo Y. Azimov, security is a concept tingly related to human and societal development coined by Romans and connected to the concept of Leviathan by Thomas Hobbs as a modern superpower in international relations. In addition, in the aftermath of the Cold War, the perspective on security changed under the influence of globalisation merging with the

traditional and realistic approach (Y. Azimov, 2022: 151152). Not only, the Cold War is relevant in both international law and security perspectives, according to the dichotomy between the rise of nationalist ideologies and antisemitism on religious freedom under the frame of the Congress of Vienna (18141815), when 'religious intolerance had the greatest potential of jeopardizing international security and peace' (Reginbogin and Safferling, 2006: 117). But, also in regard to the increase and proliferation of private military companies, recalling the previously mentioned Sharma (2023), as well as the pit-off on the Nuremberg intentions to prosecute crimes against humanity at an international level (Reginbogin and Safferling, 2006: 13).

Juxtaposition between accountability and privatisation in the context of international security

On the other hand, the juxtaposition between accountability and privatisation in the context of international security must be placed as a compounded definition of accountability and privatisation together with the juxtaposition of both, within international security as framework. According to Schreier and Caparini (2005), it must be pointed out that in exchange for free accountability for the private military companies and their employees, governments get paid off through the surge of their military capacity in internal conflicts, and stability revenue in case their power is being questioned; along with the earning of a smoother path for their political leaders who aim to take states to war. Nonetheless, on top of that, PMCs are considered the "'covert wing' of government polices" (O'Brien, 2000 quoted by Leander, 2005: 807). Likewise, security privatization materializes in 'epistemic power' to reshape the semantics border of the concept of 'security', resulting in PMCs interpreting homeland intelligence (almost) on behalf of public authorities, according to Leander (2005).

Considering the increase of privatisation both of security and military services, as well as the use of force, as a clear inherent State function, thus it could be also claimed and therefore included in the above list the delegation of certain key functions which inherently belong just to States but have been lately being performed by private military and security companies under the pretext of sub-contracted agencies based on their high-qualified and licensed performance of security and military activities. As a consequence, several private companies have raised 'many questions about (…) the capacity of the nation's militaries, in Europe and in the United States, to operate with commercial actors with the objective of developing new systems able to guarantee the required degree of availability and security' (De Neve, 2020). Indeed, the relevance of private military companies for governments is as big as its monopolisation of security. For instance, in 2020 former U.S. President Donald Trump pardoned four security guards who killed 14 civilians in 2007 during the Nisour Square massacre (Safi, 2020). Precisely, the lack of a hard hand with PMCs is rooted in the states' lack of military presence, as a

consequence of the Cold War, and the derived notable number of unemployed soldiers (Sharma, 2023). Therefore, taking into consideration this scenario both PMCs and privatization of security services act as central concepts in this research within the corresponding contextualization.

Ultimately, this report's structure is vertebrated by six core chapters encompassing from the introduction to the recommendations. At the outset, the policy report presents a brief detailed introduction of the research itself, followed by the research problem in order to embrace the initial considerations and state the research questions and sub-question in the introduction, while the research problem chapter contains the main concepts. Subsequently, the author incorporated the methodology explained in-depth, with emphasis on the participatory-observation method. At this point, the report already digs deeper into the case of study Blackwater, navigating through its history, influence, and consequences in the frame of private military companies, alongside a significant incorporation on the United Nations as the core fieldwork setting of this report, seeking to perform well-structured results, conclusions and recommendations.

METHODOLOGICAL FRAMEWORK

This policy report is primarily vertebrated by qualitative methods based on ethnographic research from the already concluded participant observant experience, alongside gathered secondary data through the analysis of policy reports and external resources.

Precisely, regarding the participatory-observatory method, a concrete location has been the niche of the fieldwork conducted so far: the United Nations in Geneve, Switzerland. Consequently, this thesis has concluded to focus on the United Nations (UN) as the main intergovernmental organization which have been used as a close representation of reality concerning the role of the international community in the use of PMCs; whilst the International Court of Justice (ICJ) in The Hague, The Netherlands, has been chosen to represent the legal lighthouse when analysing and interpreting international law. Mainly, based on the fact that the author did join the Winter Course on International Law at The Hague Academy in January 2024, aiming to gain not only experience and knowledge in the field, but also expand the author's network. Furthermore, since the author researches the dynamics and correlation between the lack of criminal prosecution and the international law spotlighting security as a key aspect, within Blackwater in the epicentre throughout its chronological timeline frame, fieldwork itself has had to be performed in spaces where the participant-observation method is possible.

As a subsequent consequence of the aforementioned, the author must remark that this policy report and, parallelly, a research thesis adopts an idealistic theoretical framework to define and shape the answers to both the main research question and the corresponding sub-question on the correlation between the lack of criminal perspective

of PMCs in international security under the prism of international law. Indeed, even though it has been widely claimed that not many (or even) any researchers allocate themselves to idealism, but rather realism based on the reshaped approach given by the U.S. President Woodrow Wilson – close to open diplomacy, democracy, and the League of Nations – to Kant's perspective on security based on international peace. This research fundaments its results on international order, indeed law and regulations, to avoid conflict choosing cooperation, common peace, and central governance as its main pillars. In a nutshell, 'international organizations based on legal norms will guarantee security' (Y. Azimov, 2022: 155).

Scope and Positionality

Certainly, the proposed research questions could at first glance awaken several reticence and criticism on its neutrality and fair distance with opinion bias, hence, the author must remark that the target of the mentioned questions is the legal frame, indeed. Neither PMCs themselves, nor any government or international organisation. Thus, there is no room for hesitation or doubt of the plausibility of this research. Moreover, the research question connects with the main research topic which in a nutshell could be entitled as 'PMCs in international law', whilst includes the respective key concepts of the investigation. Additionally, as it was noted in previous suggestions the research question has been composted not oriented as a yes/no question, but as a (bi)polar interrogative question. In the same vein, the corresponding sub-questions complement the main inquiry rather than bring added information or overlap the research with unnecessary extra questions. Hence, the sub-questions of this research complete the investigation, avoiding loopholes and gaps when answering the main query.

Terminology

At the outset, 'Private Military and Security Companies (PMSCs) must be defined as private business entities, including entities owned or partially owned by a State, and irrespective of how it describes itself, which provides [on a compensatory basis] military and/or security services. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel.' (OEIGWG on PMSCs, 2024: 6). In addition, a United Nations Working Group published a report exposing that private military and security companies play an important role in humanitarian action since they are promoting the "commercialization of humanitarian aid on the humanitarian principles of impartiality, neutrality and operational independence" (United Nations, 2021). Besides, the chairperson-rapporteur of the UN Working Group, Jelena Aparac, denounced that

these PMCs and PSCs lack transparency and respect for human rights and international humanitarian law (OHCHR, 2021). Therefore, this research scopes both UN and OHCHR data as the research subjects, along with the proposal for stronger regulation should be established over their actions and the actors themselves since they not only aim to bring humanitarian aid into armed conflicts but also take part in natural disasters and man-made emergencies both nationally and internationally.

According to data collected from the fieldwork at the UN and respective derivatives opportunities surrounded the authors participation in the OEIGWG, both PSCs and PMCs as well as the corresponding military and security companies perform merged actions and services, thus the fine line between them often it is presented blurry and unrecognisable, reason why many States proposed during the 5th session of the OEIGWG on PMSCs to split the definition included in Article 1(f) of the Revised Third Draft (RTD). Nonetheless, separating this core concept might not be the best way to proceed to compose an instrument, either legally binding or non-binding, to regulate, monitor and oversight the activities of both private military and security companies. Regardless, a fruitful proposal could be to include both a merged definition as it can be found in in Article 1(f) of RTD, and two different definitions of PMCs and PSCs respectively; parallelly to the inclusion of a solid definition of military companies and security companies, leaving the door open to further contribution in its regards[10]. Because of the prior discussion and recalling the forthcoming to be presented glanced proposal on the definition of PMSCs, the author of the present policy report has concluded to analyse Private Military Companies (PMCs) within the merged definition on PMSCs[11] proposed by the UN in Paragraph 1 Article 1(f) of the third draft produced by the IGWG on PMSCs. Throughout the case of study Blackwater, not prejudging the nature activities, background, and contemporary circumstances, as well as the licensing and legal, criminal, and 'civil' prosecutions, jurisdictions, regulations, and legal actions take on against or within the mentioned enterprise.

Decolonizing (this)I Research

Digging into this policy report itself, and considering the respective research topic as the investigation of the privatization of security throughout Blackwater as one of the fundamental private military companies (PMCs) that has ever existed and performed military, and also security, activities, in confluence with the correlation between PMCs and governments, with a special focus on the international community, the author opted

[10] Considering this is direct proposal from the author of this policy report, please see a further explanation in section X 'Results'.

[11] Hereafter, when referring to PMCs while being scoped within PMSCs definition, the author will use PM(S)Cs.

for research participants to be employees and researchers from worldwide organisms such as the OHCHR, RedCross and UN working groups. Certainly, there are complicit components in colonization since the location focus turned out to be Geneva, Switzerland, worldwide known for keeping neutrality in decision-making, as a not member of the European Union – as the author of this policy report indeed comes from an EU country – a positionality bias has been jumped thanks to it. Alongside, the author got to volunteer for the IGWG on PMSCs Secretariat at the UNOG, hence obtained data, drafted reports and interact during the 5th session as a complete impartial actor – aside from her Academia status which also bring within certain positionality bias but was covered by the mentioned work for the Secretariat. In other words, both the collected data and the production of this policy report scoped a neutral, impartial, and objective analysis of private military companies. Nonetheless, it cannot be forgotten the profile of the researcher which might bring bias considering social, cultural, and even academic pretexts and preconceptions based on a European (colonial) perspective, which this author has avoided as much as possible both while producing this thesis and within her students at Ghent University. Furthermore, it is worth noting that “the term 'research' is inextricably linked to European imperialism and colonialism” (Tuhiwai Smith, 2012: 1), thus the author is genuinely aware of her privileged position since she can do research and at the same time of how dichotomic is that any researcher somehow promotes colonialism, ergo it is involved into neocolonialism (Nkrumah, 1965). At first glance, it might seem to be a conflict between white soldiers against indigenous, however, PMCs have a presence all over the world, thus even though the origin might be located in Britain, nowadays both contractors and mercenaries are spread across the world. Notwithstanding, colonial nation states are still put in the epicentre of this investigation, however, the aim is to punish those nation states, rather than surpass indigenous and colonialized territories in importance. Unfortunately, “‘America’ as a nation as opposed to just an assortment of former colonies. The Tales are credited with the constructions of the vanishing Indian, the resourceful Frontiersman, and the degenerate Negro: the pivotal triad of archetypes that forms the basis for an American national literature.”, thus when researching people who promote those colonial archetypes a complicit component is present unwittingly. Regardless, this research is mainly focused on uncovering turbulent and illegal activities of private military companies performed in the eyes of the world without punishment. Precisely, this policy report aims to be a reinforcement for a strengthening of regulation in the field of international law and human rights. Therefore, it could be stated it is a genuine humble investigation the author has carried out as a sort of solidarity project for the international community and derivatively for hostile areas where PMCs perform their illicit actions. In contrast, even though the author intentions as a researcher are not careless, the simple act of doing research is promoting colonialism since it is “history that still offends the deepest sense of our humanity” (Tuhiwai Smith, 2012: 1). Nonetheless, the author ensures that her research helps society by building up collaborations with an international organism which can change the international law and the decolonize the approach the West has about human rights,

along with using the policy report format which can be use by those who can globally make a difference. Eventually, it must be remarked that the author has avoided the colonial concept of white men entering indigenous conflict as the only salvation, since more than bringing humanitarian aid, they promote the struggle and the expression of imperialism by 'saving' land in return for controlling the territory, the starting point is the military resource (Tuhiwai Smith, 2012: 19-40). Thus, the privatization of security is based and settled on imperialism and colonialism, and consequently this author has taken privatisation as a main concept to be analysed and scrutinized across this policy report.

Fieldwork Conducted

As aforementioned, the data collection has been navigating between participatory-observation opportunities, and an extensive extractive academic review. Nonetheless, the fieldwork per se has been primarily conducted at the United Nations Office at Geneva (UNOG) and supported by several online seminars, conferences, and events which have reinforced the data extracted in Geneva as well as solidified and polished the authors knowledge regarding international law. Therefore, the participatory-observation fieldwork which backbones and basis the data use for this policy report, deserves a notable explanation in its regards.

Participatory-Observation

Initially, the author started the fieldwork at the *12th United Nations Forum on Business and Human Rights*, where getting a first glance at Human Rights in businesses and how do enterprises consider or perform their activities without them was the main objective of this first fieldwork. Indeed, after several considerations on where and how this thesis could scope any kind of fieldwork further than the secondary data analysis, but based on collecting information first-hand, the United Nations was the organisation where the author could access the easiest and amplify the author's network the most. Therefore, the author got invited again to join the *Fifth session of the open-ended intergovernmental working group to elaborate the content of an international regulatory framework, without prejudging the nature thereof, relating to the activities of private military and security companies*[12], and its intersessional consultations. As a result, and outlining previous references, this author understood that the UN must be in both the centre and the basis of the policy report. Moreover, as aforementioned, this author got the opportunity the join the Online Winter Course at The Hague Academy seeking to reinforce the international law insights and boost the voice of this research. Eventually, the Humanitarian Networks

[12] Hereafter it is going to be referred to as the 5th session.

and Partnership Week 2024 (HNPW24) marks the closure to both the fieldwork and the questions answering by attending several conferences, sessions and workshops comparing the analysis and subsequent obtained results with the shared insights during the HNPW24.

In addition, recalling the sub-questions, certain fundamental aspects of the data collection to answer them must be dissected in extension.

Chiefly, the primary sub-question which leads the subsequent two proposes *How States use PMCs as a state's tool to reach military goals unachievable by governments per se?* At first glance, the data needed to construct the answer could ideally be to conduct direct interviews with personalities close to the U.S. government and legal section as well as former and current members of Blackwater, nonetheless, those options are not viable and indeed considering the target of this research useful in essence. Therefore, in this first case, the best option is to combine qualitative and quantitative methods since using secondary data to construct a solid bed of insights on the correlation between the U.S. and Blackwater. Hence, the data is sourced, on one hand, online in specialized sites and libraries both The Peace Palace Library and the United Nations archive, being collected using special permit access (already granted). On the other, based on the fieldwork at the UNOG both during the intersessional consultations and the 5th session. Finally, highlight that the chosen methodologies are primarily since the proposed sub-question can be easily biased when answering it as researcher. Therefore, seeking neutrality and objectivity during the whole process of data collection and sub-question answering an international assent information base ensures this policy report is potentially free of bias.

Next in order. *How are the control and track of PMCs' activities recorded and judged under international law (humanitarian, human rights, and criminal law)?* Coining the second and subsequent sub-question by adopting a more general scope. Indeed, both the order and confection of the sub-questions agree with inductive reasoning, coming from concrete keywords in the questions to overall general aspects. Following the shared guidelines, the data needed to construct a proper answer for this query is mainly part of international law. Therefore, thanks to the author's participation in the Winter Course at The Hague Academy a specification of terms and limitations was provided to indeed give a suitable answer. Parallel, to the insights obtained in the ICJ, it must be mentioned that the author has access to The Peace Palace Library from where much data is being extracted. Therefore, the data collection method applied where is both secondary data analysis and participant-observant method. Nonetheless, it must be noted that as agreed with the supervisor The Hague Academy course could not be considered fieldwork per se but a tool to indeed extract information, regardless of the main method used still was participant observation while taking notes from the lectures. In addition, the author's participation in both the 12th UN Forum and the intersessional consultations and the 5th session is a notable asset to answering this sub-question using the participant

observation method. Consequently, as requested in the guidelines using Participant Observation is meant to be applied to extract precise and detailed data not available to the public about the legislation on PMCs indeed collected from the United Nations, where the fieldwork is also conducted, by observing high institutions specialised in private military contractors agree with regulations and sanctions. Certainly, an enriching input is to be closer to the process of negotiating, building up partnerships and establishing new legal guidelines.

Lastly, the third sub-question closes the circle and aims to provide the most practical answer from the three sub-questions: *Which are the reasons of legal relevance in International Law regarding military-based companies splitting, subcontracting, and changing their names, shapes, and core services?* With this inquiry, this policy report seeks to specifically focus on one contemporary issue that not only merges the previous sub-questions but also reinforces and supports the main research question *How does the legal architecture in international law regulate the lack of prosecution in the way PMCs operate?* Concretely, taking the case of the study Blackwater as a real problem – encore the previous questions – this last sub-question needs data not only from former policy papers and newspaper articles about the topic but also the opinion of professionals and the analysis of criminal prosecution actions taken by the international community. As aforementioned, global, and intergovernmental organisations involved in the criminal prosecution and legal sanctioning of PMCs represented in this paper by the United Nations since it is the place where the main fieldwork is taking place. As a consequence, the data collection method is undoubtedly the participatory observation method by conducting fieldwork in the United Nations where the author got an exceptional and special permit to attend both the intersessional consultations (22nd and 23rd February 2024) and the 5th session scheduled from the 15th until the 19th of April 2024 where the author not only took notes of the discussions but also assisted in drafting the final report of the session as well as smoothly the session helping in the podium. At the end, it is undoubtedly that the best data collection method needed to construct the answer for this last sub-question is the participatory observation as it is allowing the researcher to dig deeper into the policy and law-making, as well as having a step into the international community comprehension and management of the PMCs from first-hand.

Ultimately, it must be added that the Humanitarian Networks and Partnership Week 2024 (HNPW'24) which concluded on top of the sub-questions answering process used as a sort of reinforcement of the results obtained and answers given by attending this event online. The finishing touch when shaping the final policy report version.

BLACKWATER, THE ROOTS OF PMCS

In a nutshell, this section presents the case of study Blackwater alongside the theoretical approach at the outset, and an explanatory sub-section about the United Nations umbrella scoping private military and security companies. Therefore, by confluence between the past and the present of PMCs at a global scale, this report exposes the consequences of a weak criminal prosecution affecting international security and international law, and the remarkable branches of humanitarian, criminal and human rights law, simultaneously.

Theoretical Approach

At the outset, it is worth considering the Cold War as the birth of PMCs, when contractors emerged and the need for criminal prosecution blossomed. In this context, it might be glimpsable thought that intergovernmental, transnational and supranational international organizations such as the United Nations, which is rooted and dependent upon States as much as the EU or ICoCA for instance, should have taken the lead and ensure a proper compliance with human rights, while the International Criminal Court (ICC) or the International Court of Justice (ICJ) – noting the differences and respective duties[13] – collaboratively support national courts and States when prosecuting crimes.

Consequently, this policy report may be scoped within the paradigmatic approach of human rights (HR), proposed by Benjamin P. Davis, since it is the perfect understanding of human rights based on the premise that States are the primary duty-bearers. Precisely, seeking a higher level of clarification and understanding, P. Davis chose the case of the Standing Rock Sioux Tribe as a clear exemplification of State in the epicentre of power and legitimation within an interstate-institutional correlation to decipher normative outcomes in context of human rights violations.

Benjamin P. Davis published in 2021 *The Promises of Standing Rock: Three Approaches to Human Rights* exposing two tensions in the correlation between human rights and theorize the state. On one hand, Davis pointed out the actors' strain in human rights discourses stepping beyond the state applications of them; on the other, the author spotlighted the central position the modern state understanding has in human rights scholars. Aiming to provide further details aside academic statement, Benjamin P. Davis took the Standing Rock Sioux Tribe as his case of study, backboned by the research question 'how to theorize the "failure" of rights to change the institutions on which they are making claims' (Davis, 2021: 206), also raised by Jean Drèze (2005) and aligned with Samuel Moyn's statement 'Because they [human rights] promise everything to

[13] See subsection 7.3. 'The United Nations as the lighthouse in the regulation of PMCs'.

everyone, they can end up meaning anything to anyone' (Moyn, 2014: 87). Whilst opted for a multifaced analysis vertebrated by three approaches to human rights: organizational, paradigmatic, and critical. Indeed, each of which scoped the Standing Rock case from different angles, according to Gregg (2016), the paradigmatic approach would conclude that the State is the duty-bearer in terms of human rights claims and simultaneously can be the violator and perpetrator of those rights, by adopting this premise, Gregg suggested that the State itself is the ultimate power which can heal the damage caused, 'a classical Greek topos' (Greg, 2016: 26 quoted by Davis, 2021: 211). In opposition to the previous, the critical approach appeals to the modern reality – well-differentiated from the modern ideal – also named 'modern/colonial state as part of modernity/coloniality' (Davis, 2021: 214), defined by Nelson Maldonado-Torres as 'long-standing patterns of power that emerged as a result of colonialism, but that define culture, labor, intersubjective relations, and knowledge production well beyond the strict limits of colonial administrations.' (Maldonado-Torres, 2007: 243 quoted by Davis, 2021: 214). Therefore, P. Davis noted that the critical approach is in the vicinity of European tradition of critical theory, defending the lack of faith in rights, but rather promoting social and political change from a left-wing perspective, ergo community-oriented initiatives and movements, agreeing with Brown and Halley (2002). The third approach, the organizational, advocates for communication, talking and the word in the rights theoretical discourse, especially flagged by Valeria M. Pelet del Toro (2019). Certainly, a shift in the theoretical dynamics hopped in by the hand of the organizational approach, in fact, leave behind the recognition of the state and focuses on public spaces as the environment to defend rights and injustices.

In confluence with Benjamin P. Davis, and considering the legal investigations done so far concerning PMCs and their illicit activities resulting in regulations and sanctions – according to the UN Working Groups focused on PMCs and mercenaries, respectively the emphasis on the use of rights as a gateway to broader political action and public conversation does not have enough strength compared to the paradigmatic approach which focuses on leveraging rights and claims to reform the state. Indeed, the contemporary comprehension of the world is ruled by the 'Modern State' thinking line, which not only places States in the epicentre but also entitles them as the motor of conventions and treaties, along with the real power for compliance with human rights. In other words, all the decisions made at an international level are not only under the scope of the intergovernmental organisations such as the UN but also State participation, the ultimate decision actor regarding domestic and homeland law. Therefore, the struggle for justice and the search of criminal prosecution is either inexistent in some cases, or notably hard to unearth from all the connected intersections that human rights violations cases encompass. In consequence, the author advocates for an international legal framework to both PMCs and States' activities, stating the parameters, limitations, and lines of action, response, and subcontracting under the rule of law, in the present policy report. Furthermore, it is worth noting that exist certain similarities between both cases,

Blackwater, and Standing Rock Sioux Tribe, essentially regarding the key interstate-institutional actors: the United Nations and the United States government. Certainly, considering 'The numbers of people worldwide subject to the violence of their own states are staggering' (Nagengast, 1994 quoted by Davis, 2021: 205).
Through a thought-provoking comparative analysis, the author of this policy report concluded that the paradigmatic approach is ideal perspective to understand political and power dynamics as well as the human rights per se in the case of Blackwater. However, according to both the critical and organizational approaches, it could be contra-argued that a real change and swift of paradigm comes from direct actions and activist resistance based on the premise that human rights are for the people who consequently need to raise their voices and be listened beyond the states' parameters, considering that any decision-making is exclusionary, elitist, and conservative-institutionalized, far from the depoliticization and fulfilling democratic ambitions (Lacroix, 2012).

In contrast, Marie-Bénédicte Dembour (2010) *What Are Human Rights? Four Schools of Thought* would agree with the authors choice to place this policy report within the deliberative school, which states that human rights are agreed as good principles for governance – in opposition to the natural school which believes HR are given by God, nature, universe; the protest school which argues that human rights must be fight for as an outcomes of social struggle; and the discourse school, which advocates for communication and linguistics taking into consideration that often HR are falsely proclaimed (Dembour, 2010). This 'model squarely' interpretation of human rights vaguely aligns with the reality, where issues and people navigate through the four schools depending on time circumstances, settings and environment, and individual and social interest and benefits. Hence, the analysis of private military and security companies does not step aside from divergency and heterogeneity of approaches either. Notwithstanding, this report, must be placed within the deliberative school in order to not prejudge actors, being included in the nature school only might bias when human rights are violated in grey zones and concluded in a closed-path discourse in terms of combats, hostilities and conflicts. In the same vein, the protest school would not be a perfect match when analysing PM(S)Cs considering that the effective, binding, and legal measures are consensually discussed within institutions and deliberately decided by States, thus even though social movements are key elements, as the critical approach (Greg, 2016 & Davis, 2021) would argue, they cannot embrace the whole changing process. Eventually, with regards to discourse school, it is worth noting that indeed language and linguistics when producing an international regulatory framework are essential, nonetheless, they might mean the basis for further deliberations in political and legal spheres. Therefore, the analysis of global and local power relations ruled by privileges and resources' redistribution establishes the fundaments for action as well as exemplifies the reality that must be discussed by organizations with the capacity to deliberative take decisions and conclude regulations. Moreover, it must be highlighted the fieldwork conducted by the author of this policy report, which mainly has taken place at the United Nations Office at

Geneva (UNOG) within the OEIGWG on PMCs. In order words, collective data from direct discussions that ought to be mirrored with the deliberative school arguments throughout a process of participation and observation methodologies. Indeed, 'We need to stop thinking of human rights as trumps and begin thinking of them as a language that creates the basis for deliberation (…) the shared vocabulary from which our arguments can begin, and the bare human minimum from which differing ideas of human flourishing can take root.' (Ignatieff, 2001: 83 quoted by Dembour, 2010: 14).

Parallelly, further Academic contributions have been published regarding the possible approaches to human rights issues. According to Dr. Ingrida Milkaite there are three main spheres through which problems concerning human rights can be approached. In first place, the national sphere, embracing Constitutions, thus limiting the scope to local, regional (within the nation-State), and national issues and legislation. In the second place, the regional or supranational layer, scoping the European Convention on Human Rights typified by the Council of Europe, and the Charter on Fundamental Rights ratified by the European Union. Indeed, gathering several States in a demarcated regional geopolitical organization, the European Union. In the third place, the International legal framework – indeed where the regulations on PMCs must be placed in essence –, which encompasses the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the UN Convention on the Rights of the Child.

In the same vein, in the digital era there are two core responsible actors which must protect and respect human rights, States and Business enterprises. Alongside the international community, especially the UN Guiding Principles on Business and Human Rights (UNGP on BHR). On one hand, States are responsible for the protection of human rights, as stated in Article 2 of the *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental*[14]. Nonetheless, the nature of the State duty to protect human rights understood as an obligation can be either positive or negative, the later must take into account the duty to not interfere even though at instances of exceptional circumstances. On the other, business enterprises, have the responsibility to respect human rights, ensure by States which must proceed with investigations in case there is a violation, omission, or lack of compliance in respect of human rights. Accordingly, OHCHR states that 'International human rights law lays down obligations which States are bound to respect. By becoming parties to international treaties, States assume obligations and duties under international law to respect [States must refrain from interfering with or curtailing the enjoyment of human rights], to protect [States to protect individuals and groups against human rights abuses], and to fulfil human rights

[14] This Declaration was adopted on the 9th of December 1998 by the General Assembly resolution 53/144, in compliance with International Human Rights Law.

[States must take positive action to facilitate the enjoyment of basic human rights]' (OHCHR, 2024).

Eventually, it is necessary to highlight the importance of the 'modern state' as it does shape not only this report and its respective theoretical approach, but also prior and contemporary treaties, conventions, agreements, and legal frameworks within international law.
Recalling Benjamin P. Davis and its approaches to human rights, his main arguments navigate around the modern state, and precisely the paradigmatic approach is rooted on the state as the primary duty-bearer, indeed this report is included in the paradigmatic approach. Aligned with Jack Donnelly's claims 'the modern state has emerged as both the principal threat to the enjoyment of human rights and the essential institution for their effective implementation and enforcement' (Donnelly, 2013: 33), the United Nations claimed that 'Recognizing the relationship between international peace and security and the enjoyment of human rights and fundamental freedoms, and mindful that the absence of international peace and security does not excuse non-compliance' as part of a human rights instrument[15]. In line with James Griffin, Donnelly should be placed as a firm contributor to the 'critical-reformist tension' which 'criticizes state-caused rights violations before returning to a call for state reform' (Davis, 2021: 205); parallelism with Benjamin Gregg's claim (2016). Indeed, in a context of conflict and hostility, states might suppose a threat, rather than protecting and security citizens could turn into an oligarchy[16] and have dictatorial tendencies. However, the author of this report cannot include Kathryn Sikkink *Evidence for Hope* (2017) as a reinforcement argument noting that she focuses on activisms as a challenging method for change against government violating human rights. But rather recall Sikkink semantics on 'state-sanctioned human rights violations' and 'state repression' (Sikkink, 2017) to be a core focus on this report.

Parallelly, a throwback to Weber and Hobbes is the key to understand current private military and security companies, as well as proceed with a proper differentiation of those from mercenaries and organized crime. Precisely, the ICRC (2013) noted that the definite on mercenaries is considerably restricted. As stated in Article 47 of the Additional Protocol I, 'no one who is a national of any of the parties to the conflict can be a mercenary (…) a person must be employed with the aim of being directly involved in combat and motivated by the desire for private gain, and then the person must actually be doing that to be considered a mercenary.' (ICRC, 2013). Hence, generally PMSCs employees do not aligned with the previous statement, and thus cannot be considered

[15] See *Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms,* adopted on the 9th of December 1998 by the General Assembly resolution 53/144, in compliance with International Human Rights Law.
[16] According to Robert Michels' *Political Parties* (1911) a democratic regime ruled by the elite is equal to 'the iron law of oligarchy'.

mercenaries per se. Furthermore, the only international humanitarian law effect on mercenaries is to 'not entitled to combatant or prisoner of war status when participating in an international armed conflict. However, a mercenary is still entitled to adequate conditions of detention and has the right to a fair trial.' (ICRC, 2013). Additionally, it is relevant to remark that according to *European Parliament resolution of 25 November 2021 on the human rights violations by private military and security companies, particularly the Wagner Group (2021/2982(RSP)),* 'the International Convention Against the Recruitment, Use, Financing and Training of Mercenaries prohibits mercenaries' (European Parliament, 2021).

Capitalism, colonialism, and the use of force. Three terms that have been described independently but are interlinked, often repercuss one another based on action-reaction theory and cause-consequence theory, and compose the 'modern state', even it could be claimed that vertebrate the modern world dynamics. Taking the prior premises into account, the 'State monopoly on violence' is the essential characteristic of modern states. Precisely, the State monopoly on violence is used to explain that only States hold the right to use or authorize the use of physical force, accordingly in the third draft of the instrument on PMSCs, concretely in Article 1(f) it is defined 'State Functions' explicitly referring to the use of force and the principle of the State monopoly on the legitimate use of force which cannot be outsource to PMSCs. Certainly, the modern norm of state monopoly on the legitimate use of physical force is rooted in the theory of the social contract – attributed to Thomas Hobbes, John Locke, and Jean-Jacques Rousseau respectively, until acquiring of the contemporary comprehension of it. 'The aim of this contract is the elimination of the purposive and regular use of armed force by citizens, and the creation of national zones of peace and stability' (Krahmann, 2009: 2). In accordance, Max Weber explained that State should be understood as such a 'human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory' (Weber, 1918: 4), statement part of his lecture Politics as a Vocation at Munich University after the end of the World War I (Mitropolitski, 2011:5). Consequently, Weber claimed that the modern state is anchored on 'expropriating the means of political organization and domination, including violence, and by establishing the legitimacy of its rule' (Munro, 2013). Nonetheless, by discussing the use of force, Thomas Hobbes must hop into the scenario. Hobbes argued notably against Weber in terms of the monopoly of violence, claiming that the State is the only legitimate actor that can control and use force. Thus, the discussion leads to 'self-defence' which is approached in this report as 'a legal right defined and legitimated by international law' (Schachter, 1989: 259) for which 'agency is required for violation of rights draw the conclusion that self-defence is not permissible, and is merely excusable' (Thomson, 1991:302).

In this context, it has been expressed in several debates that increase of both private military and security companies, which challenge the principle of the State monopoly on

the legitimate use of force claiming autonomy from the State, as well as organized crime, that 'may undermine order without being able to challenge the state monopoly and establish themselves as a parallel source of legitimate rule' (Munro, 2013), endanger the moder state. Regardless, it is worth noting that the legitimate monopoly of violence does not contemplate illegitimate violence, but rather focuses on the State as the only legitimate actor which can outsource the use of violence without losing its monopoly since it remains the capacity and its character of only source of the right to use violence (Munro, 2013). Therefore, the jeopardized terminology and sematic demarcation between the increasement of PMSCs and Organized Crime must be the final closure to the theoretical approach section. Quoting Milan Vaishnav (2017), and stepping out of the geopolitical context of India, thus applying the author insights across the globe, 'In places where the rule of law is weak and social divisions are rife, politicians can use their criminality as a signal of their ability to do whatever it takes to protect the interests of their community' (Vaishnav, 2017: xi). In fact, this is the scenario of many other examples such as the 'guerrillas' and militias in Colombia, the Garrison community in Jamaica, and organized groups in Guerrero and Michoacán in Mexico (Fuentes Díaz & Fini, 2021). Where social grievances ended up in violent rivalries among group identities linked to political interests and criminality from armed (defence) groups which activities are at the verge between legality and illegality and which the State is uneasy to tolerate and regulate. Notwithstanding, organized crimes must not be confused with communal violence which is defined as socioeconomic changes that derivate in patronage networks linked to religious divisions and separatist political speeches, which outcome benefit political actors electorally (Jasper, 2013 and Berenschot, 2011). Hence, the possible trigger of organized crime is linked to visibility and performance of political figures, 'if there is someone you do not wish to recognise as a political being you being by not seeing them as the bearers of politicalness, by not understanding what they say' (Rancière, 2001: 38 quoted by Feola, 2014: 506). Often resulting in 'Chremacracy', a system in which big money rules supreme (Chowdhury & Keane, 2021: 184-187). Notwithstanding, the author of this policy report does not aim to compare organized crime with private military and security companies, but rather thank to the aforementioned bring some clarification on terminology and the proper differentiation of both groups.

Ultimately, it is worth concluding that this report is scoped within human rights, as its lineal theoretical approach, the branches of which delved to place the analysis into the deliberative schools by Dembour (2010) and the paradigmatic approach by Davis (2021). Besides, considering the actors investigated and the topic chosen the preference among the three main spheres of analysis by Milkaitė is the wider one, the international legal framework: alongside a solid comprehension and advocacy for a co-shared responsibility and accountability by States and businesses enterprises, under the premise of the UNGP on BHR and the corresponding legally binding text in its regards. Indeed, the aim of this report, to clarify the prohibited outsourced activities for States while determining the regulations on PMCs' activities, and subcontracting. Essentially, 'modern state' is placed

in the epicentre and atemporal political philosophical theories are considered such as Hobbes' *Leviathan*, together with academic insights on organized crime by Milan Vaishnav (2017).

Case of Study: Blackwater

Blackwater, the PMC

Blackwater must be presented as a North American private military company founded in 1996 whose CEO is Erik Prince, a former Navy SEAL. Nonetheless, since 2009, Blackwater has changed its name twice and merged with other PM(S)Cs, resulting in ACADEMI as part of Constellis Holdings Group. Thus, it could be stated that the legal status and accountability of contractors are directly correlated to its employees and customers considering the existing legal framework and enterprise reality as prosecution, liability, and sanctions and regulations related to each other. In other words, criminal prosecution by international law struggles when keeping track of the military companies themselves, and even more on their impact on the promotion of private security services, and thus which regulations and sanctions must be applied to comply with the law – according to what it was continually stated at the ICJ –. As aforementioned, Blackwater has been named ACADEMI since 2012 when it was acquired by private investors, and refocused onto global traineeship, logistics and program management services (Constellis, 2015). Notwithstanding, before the adoption of the name ACADEMI, Blackwater was known as Xe Services by 2009, which website is still active and referring to Blackwater, as well as many experts in the field refer to Xe as 'the current Blackwater' rather than focus on ACADEMI considering the latter as a training service company. Getting closer to current time, a few years later of the last recorded solo change of name, ACADEMI merged with Triple Canopy in 2014 giving birth to Constellis Holdings Inc., along with Edinburgh International, OMNIPLEX, Strategic Social, AMK9, Gregg Protection Services, Centerra, Olive Group and the corresponding affiliates (Constellis, 2023). Regardless, it must be pointed out that Constellis itself was founded in 2010 as a 'non-financial risk management company in the U.S.' (Constellis, 2023). Therefore, from now on even though Blackwater does not exist anymore, and its new frame is ACADEMI as part of Constellis Holdings, and arguable Xe Services, this policy report exclusively focuses on the role that Blackwater had – and indirectly still has nowadays – in both international law and security.

Subsequently, recalling the foundation of Blackwater, it must be pointed out that its formation resulted as a consequence of a cut-off in the military budget which led to the promotion of subcontracts among PMCs by the United States Department of Defence as a preventive measure aftermath of the reduction of army-based resources.

Subsequently, during the early 2000s Blackwater got its first contracts and was involved in plenty of relevant national and international missions, which ended up in their methods being questioned. One of the most renounced cases was the Nisour Square massacre in Baghdad, Known as 'Baghdad Bloody Sunday' (Scahill, 2008), which meant the death of 14 civilians in 2007 by four Blackwater security guards' hands, which in 2020 were pardoned by former U.S. President Donald Trump (Safi, 2020). Has essentially been discussed to be a clear exemplification of how hired military contractors can openly deny responsibility for their crimes (Sharma, 2023). At this point, it is worth noting that private military and security companies (PMSCs)[17] play an important role in humanitarian action since they promote the "commercialization of humanitarian aid on the humanitarian principles of impartiality, neutrality and operational independence" (United Nations, 2021). Besides, both PMCs and PSCs lack transparency and respect for human rights and international humanitarian law (OHCHR, 2021). For instance, even though military contractors can be hired, they can openly deny responsibility for their crimes (Sharma, 2023). In addition, several private companies have raised 'many questions about (…) the capacity of the nation's militaries, in Europe and in the United States, to operate with commercial actors with the objective of developing new systems able to guarantee the required degree of availability and security' (De Neve, 2020). Considering that PMCs are not soldiers per se and, thus, are neither ruled by international law nor can be sent to trial by their government, their attractiveness is based on their ambiguity. Besides, PMCs' cost-benefit is extremely lucrative since they do not have to care about pensions and health care.

Aiming to comprehend the attractiveness and growth of Blackwater, among the 90s and early 2000-2010s, it should be understood that money is in the epicentre of the equation. According to Francesca Fattori, Xemartin Laborde and Nicolas Bourcier (2018), the trigger is allocated on the USSR fall and the military discrepancies between the Soviets and the American army. Consequently, 'A massive movement to privatize logistical and rear tasks was launched by Dick Cheney when he was Bush Sr.'s Secretary of Defense (1989-1993)' (Fattori, Laborde and Bourcier, 2018). However, which is the financial cost of subcontracting PMCs? According to the Congressional Budget Office (CBO) of the United States of America, in its report *Contractors' Support of U.S. Operations in Iraq* published in August 2008, it is stated that 'The costs of a private security contract are comparable with those of a U.S. military unit performing similar functions. During peacetime, however, the private security contract would not have to be renewed, whereas the military unit would remain in the force structure' (CBO, 2008: 2). Indeed, a clear difference between mercenaries and PMCs is the status of 'contractors', subcontracted as military affairs auxiliaries to intervene in conflicts and crises. Certainly, the principle of the State monopoly on the legitimate use of force seems to be violated,

[17] It can also be abbreviated as PMCs/PSCs, but the author would hereafter use PMSCs when referring to both private military and security companies, and PMCs regarding private military companies.

however, recalling Munro (2013) States may outsource the use of violence only when its monopoly, capacity, and status of only source of the right to use violence are ensured. Notwithstanding, 'the state monopoly on armed force seeks to outlaw violence among groups of peoples across national borders and aims to contain organized conflict in the international arena' (Krahmann, 2009: 2). Hence, is this feasible, especially under international law framed within the comprehension of the modern state? As has been noted over time unlawful measures have been adopted both by States and PMCs, for instance the Nisour Square massacre in Baghdad, where 14 civilians were killed by four Blackwater security guards' hands in 2007. Nonetheless, the warning for States and thus, the international community, and certainly this policy report[18], is the increase of 'by the number of subcontractors operating alongside American troops' (Fattori, Laborde and Bourcier, 2018). Concretely, in 2018 the United States counted with 26.000 contractors for 11.400 American soldiers spread across Afghanistan (Fattori, Laborde and Bourcier, 2018). Overall, security contractors in Afghanistan and Iraq were 10 out 20 percent of DOD contractors (Swed and Crosbie, 2019). While the United Nations and its Member States place the spotlight on the use of force which under any circumstances can be outsourced to PMCs[19]. A clear controversial dichotomy, thus who should be the central actor to decide, States independently or an intergovernmental organisation with transnational character conformed by States? The author of this report has a firm answer, the United Nations, considering prior agreements and documents complying with international law.

The Game of PMCs

Certainly, when researching private military companies, the accent must be allocated to two specific branches of international law, according to the OEIGWG on PMSCs third draft, with Chair-Rapporteur Mxolisi Sizo Nkosi (South Africa), from 24 January 2024: International Humanitarian Law and International Human Rights Law. Considering that international law has found over time several pitfalls trying to completely punish PMCs for their actions with indeed are between illegality and legality, commonly referred to as 'grey zones', or 'twilight zone'. For instance, on September the 1st 2015, ACADEMI achieved the 'certification for Quality of Private Security Company Operations – Requirements for Guidance (ANSI/ASIS PSC.1-2012)', along with other Constellis companies such as Triple Canopy, Olive Group and Edinburgh International (Constellis,

[18] It should be noted that due to the scope and resources of the present research, frame as an academic thesis whilst adopting a policy report format and objective, the author had to narrow down placing the accent into technical and legal matters – mainly discussed during the IC and the 5th session – rather than embracing all aspects regarding PMCs. Thus, concrete regional cases have not been analysed as in-depth as abstracted considering on PMCs in IL.

[19] See Revised Third Draft, Article 1(f) 'State Functions'. igwg-pmscs-revised-third-instrument-march-2024.pdf (ohchr.org)

2015). A clear exemplification of the notable legal loophole existing in the criminal prosecution regarding PMCs since they do 'act' under legality and thus cannot be completely punished under international law, even when the outcome is the privatization of security, ergo the military vulnerability of states and empowerment of enterprises.

The spotlight must be relocated to the origins of private military companies, seeking to both define them and share an understanding of their actions and role in international security. 'One of the most common fallacies in discussing the existence of PMCs is that they are a "new phenomenon"; in fact, nothing could be further from the truth' (O'Brien, 2000: 60). The historical root of PMCs must be located back in the British 1960s, concretely when Colonel Sir David Stirling gathered former British Special Air Services (SAS) and founded WatchGuard International. Thereupon, from the mid-1970s, indeed during the aftermath of the post-Cold War, PMCs' promotion boosted enormously, and its presence lasts until nowadays, potentially, resulting from their bolster by international agencies and states. For instance, according to O'Brien (2000) during the 80s and 90s several NGOs, and even, the World Bank and the UN hired private military companies as extra – or essential – support for their securitization missions. Nevertheless, even though, PMCs have been getting more and more influential since the 90s, contracted soldiers have existed since ancient Egyptians, Romans, and Greeks through the employment of mercenaries (Sharma, 2023). Hence, the comparison between private military companies and mercenaries is accurate depending on the resources and perspective adopted to analyse. Certainly, this policy report keeping neutrality on top seeks to undermine real cases and outcomes to reshape and rebuild the current legal framework on the security privatization issue, within PMCs in the epicentre. Therefore, the author has avoided a clear comparison between PMCs, and Blackwater as a case of study, as the concept of mercenaries, unless empirical results popped up in accordance and, thus, realities implied to consider PMCs as mercenaries.

In this context, proper legitimation and international recognition of PMCs was the further step for their expansion, thus Defence System Ltd (DSL) hopped into the scenario, casting off any mercenary trace to increase its reputation and legally contract former military personnel to meddle in territories of conflict. Recalling the case of the study, it can be claimed that 'Blackwater paved the way for Wagner' (Al-Marashi, 2023), even though the Wagner Group got the spotlight last June due to its mercenaries' rebellion, and because of the conflict between Russia and Ukraine, Blackwater has been performing its actions since the 90s and therefore it can be neither forgotten nor forgiven. As a consequence, governments started to yield towards the privatization of homeland security by sub-contract PMCs. Thus, 'The rise of the PMC industry reflects the new business face of war.' (Schreier & Caparini, 2005: 2), promoted by states since in exchange for free accountability for the PMCs and their employees, governments get paid off through the surge of their military capacity in internal conflicts, and stability revenue in case their power is being questioned; along with the earning of a smoother

path for their political leaders who aim to take states to war. Indeed, their attractiveness to governments is based on the legal ambiguity in which PMCs perform. Certainly, PMCs are not soldiers per se and, thus, are neither ruled by international law nor can be sent to trial by their government. Besides, PMCs' cost-benefit is extremely lucrative since they do not have to care about pensions and health care. Moreover, even though military contractors can be hired, they can openly deny responsibility for their crimes (Sharma, 2023). For instance, in 2020 former U.S. President Donald Trump pardoned four security guards who killed 14 civilians in 2007 during the Nisour Square massacre (Safi, 2020).

Eventually, it must be remarked that the lack of a hard hand with PMCs is rooted in the states' lack of military presence, because of the Cold War, and the derived notable number of unemployed soldiers (Sharma, 2023). Several private companies have raised 'many questions about (…) the capacity of the nation's militaries, in Europe and in the United States, to operate with commercial actors with the objective of developing new systems able to guarantee the required degree of availability and security' (De Neve, 2020). Indeed, the relevance of private military companies for governments is as big as its monopolisation of security. Accordingly, security privatization materializes in 'epistemic power' to reshape the semantics border of the concept of 'security', resulting in PMCs interpreting homeland intelligence (almost) on behalf of public authorities, according to Leander (2005). In a nutshell, PMCs are the 'covert wing of government policies' (O'Brien, 2000 quoted by Leander, 2005: 807). Focusing back on Blackwater, the U.S. 'heavy reliance on PMCs paved the way for the growing privatisation and outsourcing of war across the globe' (Al-Marashi, 2023). Therefore, it is not surprising the lack of criminal prosecution over private military and security companies across the globe.

In the same vein, the spotlight must be allocated to criminal law, which defines criminal prosecution as punitive measures against the insured for offences and convictions enforcing criminal laws; in other words, the act of prosecution refers to proceeding against a person, group, enterprise, or state through a court of law under the pretext of criminal responsibility. According to the CDPP-Australia's Federal Prosecution Service, there are eight essential steps in any prosecution process. Initially, investigations by the police who collect shreds of evidence and take statements are the starting point, followed by a brief assessment or changes laid, in which the prosecution starts itself when there is a public interest and reasonable prospects of the accused being found guilty. Subsequently, the third and fourth steps are the charging or starting proceedings, and the committal proceeding by the magistrate, who's also present in the fifth step or hearing making all decisions and judgments when there's no jury. Eventually, the last steps are the trial, before the jury and judge; the sentencing, when either the judge or the magistrate concludes which is the proper penalty in case of guiltiness; and the appeals, when de defendant can appeal against the sentence or the verdict that found the person guilty (CDPP, 2019). In the same vein, the United States Courts, precisely the U.S. Attorney as the prosecutor, along with its principal actors and jury follow a judicial process

to determine if evidence is sufficient to stand trial against a defendant. The mentioned process is composed of a burden of proof by the government, a pretrial to determine the existence of probable cause and whether the defendant should be in jail until the trial or not. Thereupon, the trial takes place and subsequently the sentencing (United States Courts, 2013). Besides, there are different types of prosecution, nonetheless, this policy report focuses on public prosecution, as a criminal proceeding initiated by a public prosecutor that represents the state, rather than in private prosecution promoted by a private organisation or individual private citizen. To this end, the type of criminal prosecution referred to in this thesis is appertained to international law regulated by sovereign states themselves through international agreements. Agreeing with the European Union, 'prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, including the safeguarding against and the prevention of threats to public security, should be equivalent in all Member States.' (European Parliament, Council of the European Union, 2016).

Considering the aforementioned, the United Nations Office on Drugs and Crime (UNODC) proposed that public prosecutors have an essential paper as 'gatekeepers' of criminal justice in society, based on prosecutorial independence and impartiality and in certain cases also define criminal policies and civil proceeding seeking the protection of freedoms and rights. Nonetheless, the main role of public prosecutors is 'to apply the law to criminal cases, protect the rights of the persons involved in criminal proceedings, respect human dignity and fundamental rights, and ensure public security.' (UNODC, 2020). Parallelly, it has been claimed that prosecutions also must protect the rule of law, even when applying to States' actions, according to Dandurand (2005). Furthermore, according to the *Guidelines on the Role of Prosecutors* (1990) adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders. Concretely with regards to their role in criminal proceedings, it must be highlighted point 11: 'Prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest.'. In addition, The Crown Prosecution Service (CPS) Asset Recovery Strategy proposes, in first instance, 'Confiscation is an essential tool in the prosecutor's toolkit to deprive offenders of the proceeds of their criminal conduct; to deter the commission of further offences; and to reduce the profits available to fund further criminal enterprises. (See *R v Rezvi* [2002] UKHL 1 and *R v Waya* [2012] UKSC 51).' (CPS, 2022).

The United Nations regulating PMCs in the contemporary context

Starting by flagging the importance role of the UN and the OEIGWG on PMSCs, since it is the only worldwide effective place of discussion on private military and security companies within substantive text-based negotiations. Even though, there are other organisations and even written documents that also scope PMSCs, and thus deserve further analysis, as well as a proper homogenisation within the IGWG on PMSCs instrument.

The United Nations has long act as a central transnational and intergovernmental organism which seeks for the protection and enforcement of human rights, as well as demands accountabilities for violations of such rights. Within the context of private military companies, that is not an exception. Indeed, since 2010 an open-ended intergovernmental working group was established to regulate, monitor and oversight PMSCs' activities, entitled as *Open-ended intergovernmental working group to consider the possibility of elaborating an international regulatory framework on the regulation, monitoring and oversight of the activities of private military and security companies relating to the activities*. At the end of the mandate, in 2017, a renewal of the working group and its objectives was established for three years under Mxolisi Sizo Nkosi as Chair-Rapporteur, thus the delegation of South Africa taking the lead. By 2020, an extension of three years of work was established replacing the previous mandate ran from 2010 until 2017 and seeking to elaborate an international regulatory framework to protect human rights and ensure accountability for violations and abuses relating to the activities of private military and security companies.

The Open-ended Intergovernmental Working Group on regulatory framework of activities of private military and security companies, also known as OEIGWG on PMSCs, and referred within the UN system as HRC/WG on the elaboration of PMSCs, backbones its current mandate, and thus obligations and responsibilities within the production of an efficient instrument in several prior resolutions such as the resolution 36/11 on the 28th September 2017 by the Human Rights Council, the resolutions 45/16 and 54/11 by the Human Rights Council – acknowledging the renewed of the mandate of the OEIGWG for three years each. Additionally, several sessions have been held aiming to bring negotiations onto the table and fruitfully discuss along with delegations the composition of the instrument. Concretely, four sessions of the OEIGWG have taken place since 2019, and the author has assisted at the fifth one this April 2024 where it was discussed the third draft instrument released last January 2024 under Human Rights Council resolution 54/11. It is noted, therefore, that the Office of the United Nations High Commissioner for Human Rights is at the epicentre of the net. Considering that it is the one in charge of organising the sessions, reporting the discussions, and ensuring proper and efficient compliance of the Working Group of its functions, as well as the Chair-Rapporteur.

Recalling the author's fieldwork conducted, it must be noted that both Working Groups, WG Business and Human Rights and WG Private Military and Security Companies, are extremely related to each other. According to the constant reference during the 5th session to the UNGP on BHR as well as the Legally Binding Treaty, it should be remarked that the OEIGWG might succussed in the production of a legal instrument, by noting the steps taken by the WGBHR. Certainly, by establishing Guidelines and Principles, while it is decided the legally binding approach of the instrument, the nature of which might not be excessively relevant for the time being, according to ICoCA, DCAF and the ICRC. However, it will in the coming years. As it has been seen since 2010, the need for an international regulatory framework on PMSCs is an essential step forward to achieve a fair, equal, and sustainable world, according to the SDGs and the UNBGP, as well as complying with conventions and treaties such as the Geneva Conventions, the Montreux Document and the BHR Treaty Process. In order to act in alignment with international law, and especially each most relevant branches within the context of PMSCs, military and security companies, States functions and prohibition of outsourcing the respecting, the use of force within the modern States understanding, Prohibited Activities, direct participation in hostilities and combat, and violent, non-violent, and mitigation of conflicts and combats – alongside spotlighting victims, vulnerable groups (children, women, elderly, people with disabilities, generational struggle affected persons, refugees, socioeconomic fragile circumstances individuals, lower income wagers' workers, migrants, domestic violence testimonials, Global South, among others) –.

Therefore, multilateral regulations are an essential within the UN policymaking, thus the Revised Third Draft refers and recalls the Montreux Document, the Geneva Conventions of 1949 and its Additional Protocols, the UN Guiding Principles on Business and Human Rights, among others such as Conventions and Treaties. At this point, it ought to be referenced that international law is composed by several branches, among which international criminal law, international human rights law and international humanitarian law – which determines the status of PMSCs employees in armed conflict and the responsibilities they have within IHL – are the core relevant for this research.

RESULTS AND INTERMEDIATE OBSERVATIONS

In the aftermath of the authors fieldworks conducted, many data have been collected and extracted from it, more than enough to answer the sub-questions proposed at the outset of this policy report and generously to resolve the main research question. Parallelly, several inquiries popped up while producing the present report in the line of why a law for PMCs is needed and how efficiently are evolving reports of the OEIGWG based on prior discussions with delegations, and how useful would be to merge and/or interfere

the central IRF[20] with other existing legal measures and instruments on PMCs, ergo multilateral regulations. Besides, the results section must point out that the author has aim for decolonized research as one of the main commitments as researcher, as well as propose for the OEIGWG, the UN itself, and the forthcoming drafts to do too[21].

Aiming to present the results outlined after the fieldwork data collection and the corresponding codification of it, alongside the extensive extractive academic revision, the author has considered convenient to present the results throughout the sub-questions and research questions to properly place the results along with the initial inquires.

SUB-QUESTION 1

How States use PMCs as a state's tool to reach military goals unachievable by governments per se?

As a core element of the OEIGWG on PMSCs elaboration of an international regulatory framework, highlighting the contained definitions of 'State Functions' and 'Home State', this report took the Blackwater case as a clear exemplification of the prohibited by international law outsource of the use of force, which is explicitly domain of States aligned with the monopoly of the use of force and the modern state comprehension, both explained in above sections[22].

Consequently, Blackwater's 'Home State' is the United States of America and, thus it is convenient to recall the *Contractors' Support of U.S. Operations in Iraq* by Congressional Budget Office (2008) where it is acknowledged that in peacetime the costs of the U.S. Army[23] operations in comparison to Blackwater's is extensively different. Precisely, the Blackwater contract did not have to be renewed after the Iraq conflict, 'except possibly for a small retainer to allow Blackwater to maintain a capability to meet the demands for security in a future conflict' (CBO, 2008: 17), whilst the Army remain in force even in peacetime and in wartime special pays or elevate rate of operations and maintenance (O&M) spending have to be summed up. 'CBO estimates the Army's annual peacetime cost at $60 million to maintain 2.2 units (where "unit" again represents about one-third of an Army light infantry battalion) and $82 million to maintain 3.0 units. During peacetime, however, the Army units need not devote themselves to security missions that parallel Blackwater's contract. Army infantry units can serve many other functions in peacetime or in other conflicts.' (CBO, 2008: 17). Indeed, as stated above, subcontracting PMCs by States is reasoned by economic and financial needs.

[20] Note that it is still being build up.
[21] See sub-section 6.3. 'Decolonizing (this) Research'.
[22] See section 7.1. 'Theoretical Approach'
[23] Includes the Joint Contracting Command—Iraq/Afghanistan (JCC-I/A), according to the CBO (2008).

Furthermore, it is worth noting that 'The difficulty in bringing a prosecution in this case shows the need for an international treaty to address the increasingly significant role that private military companies play in transnational conflicts.' (OHCHR, 2014), according to Patricia Arias. Therefore, an analytical categorization is needed since not only it does have to check out the international regulation regarding private military companies' activities and limitations, but also analyses and filters beyond a simple description of the law. Subsequently, concerning the insights exposed by the Analysis and Research Team (ART) of the European Council, concretely, its report about *The Business of War – Growing risks from Private Military Companies*, 'since the end of the Cold War to privatize US forces. This subsequently became a key tool in the US strategy in the war against terrorism' (ART, 2023), agreeing with Jan Aart Scholte (2000) who suggested that supra-territoriality is far from the extinction of armed conflict, but the scenario for racism, ultranationalism manifestations, terrorism and religious fundamentalism materialized in the 9/11 or Rwanda's civil war as example of how globalisation weakens nation-states (Siddhartha & Joshi, 2009: 107). Therefore, the role of PMCs in the process of privatization of security is sharply undoubtable.

In line with Scholte, and Siddhartha & Joshi's statements, it could be claimed that states such as the case of the U.S. use private military companies to continue their activities without being punished by law but avoiding regulations for the protection of the human rights. Regarding the character of this sub-question, it cannot be understood otherwise but as an analytical question which it must avoid opinion bias of the researcher and keep a both neutral and objective perspective while investigating and analysing the results. Eventually, on the edge of this research, it must be asked if both the U.S. and Blackwater settled the path for the contemporary PMCs such as the Wagner Group to perform their activities through legal loopholes in promoting the privatization of security. In other words, could Blackwater be considered one of the core roots of security privatization and, therefore, one of the origins and basis of private military companies (PMCs) per se. Indeed, considering Blackwater a category of PMCs itself, as has been proposed by SIPRI (2008) and ART (2023). Consequently, by avoiding opinion bias and basing the answers to all proposed sub-questions and the research question in essence on empirical results and compared data, the mentioned inquiries should certainly be categorized as descriptive questions. Therefore, considering the research a policy report per se, both the results and the legal regulations proposals are legitim and fair, accomplishing the production of key elements and principal aspects when composing the international legal framework over activities, personnel, and interactions with third parties of private military (and security) companies.

Along with the reasons why States might subcontract PMSCs to perform military duties which they are enable for, a major risk has been spotted by Perlo-Freeman and Sköns, 2008 (14), 'The US Congressional Research Service found in 2007 that some contractors operating for the US departments of Defense or State in Iraq—which had been granted

immunity from prosecution in Iraqi courts—might not come under the jurisdiction of US civil or military courts'.

SUB-QUESTION 2

How are the control and track of PMCs' activities recorded and judged under international law (humanitarian, human rights, and criminal law)?

According to the premise that the United Nations is composted by States – as Member States (MS), alike any other intergovernmental organization –, which hold the monopoly on the legitimate use of force within the current understanding of the world ruled by modern states and poststructuralism. Alongside the comprehension that international law encompasses international criminal law, international human rights law and international humanitarian law. It must be recalled the urgent need to finalize the elaboration of the international regulatory framework as noted by several State delegations and the Chair-Rapporteur Mxolisi Sizo Nkosi on the last day of discursive meeting during the 5th session[24].

In fact, it must be mentioned that currently PM(S)Cs do not have a proper regulatory framework, even though several documents within international law do refer to these enterprises, the task of controlling and tracking their activities is still in an ongoing process to be accepted – especially regarding the nature of the instrument, either legally binding or non-binding, extensively discussed during the 5th session without reaching out a consensual decision. Therefore, this inquiry cannot be firmly solved, nonetheless, the author would refer to the current regulatory texts that might be applied and remark the main items within the Revised Third Draft Instrument, the later based on the author's fieldwork and data collected.

Initially, the author advances the provision of including international criminal law within the international regulatory framework of the OEIGWG on PMSCs instrument, supporting an NGOs suggestion done during the 5th session. A recall of The Nuremberg Trials, fundamentals in International Criminal Law, must be done by the hand of Herbert R. Reginbogin and Christoph Safferling (2006). Precisely, on how 'criminal prosecution of those responsible for atrocities and compensation for the victims. (…) hold perpetrators criminally responsible.' (Reginbogin and Safferling, 2006: 189). Alongside with The Nuremberg Tribunal which implied a turning point in international justice. Additionally, Antonio Cassese claimed according to the Report of the International Law Commission resulted from the 46th Session in 1994. 'The supremacy of state sovereignty in the form of excessive restrictions on the jurisdiction of International criminal courts can only result in the creation of Ineffective institutions' (Cassese, 1998: 16). Parallelly, Cassese stated

[24] See 5th session recording, 18th April afternoon meeting at 15pm, https://conf.unog.ch/digitalrecordings/

that several trends aimed to criminalize and include international law into an institutionalization process, whilst denouncing that international criminal tribunal must be more than just normative tool and have real impacts, stepping over the limitations that international politics put on international law, agreeing with Stimson (1947).

Subsequently, it must be noted that PMCs in international law are referred to in the Montreux Document, and Geneva Conventions of 1949 and their Additional Protocols, as well as UN initiatives and ICRC reports.

According to the ICRC, PMSCs are obliged to respect the provisions of the international humanitarian law (IHL), considering that 'unless they are incorporated in the armed forces of a State or have combat functions for an organized armed group belonging to a party to the conflict, the staff of PMSCs are civilians' (ICRC, 2013). Therefore, the do have to comply with legislation as much as the rest of the population, not holding a special status or permit as part of military, either being hired by private companies, States, or international organizations. Regardless, the circumstances vary when PMSCs are involved as active actors directly participating in hostilities, where they are less protected from attacks and can be tried if captured. Hence, the ICRC produced in 2020 the *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, seeking to mitigate doubts on direct participation in hostilities under IHL. Parallelly, the ICRC in a joint initiative with the Swiss Federal Department of Foreign Affairs conformed 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* in 2008, which comply with IHL and human rights law in order to reaffirm, clarify or develop international legal standards to regulate PMSCs' activities, indeed the basis for the international regulatory framework for the OEIGWG on PMSCs. This document 'reaffirms the existing legal obligations of States with regard to PMSCs and recommends a catalogue of good practices for the practical implementation of existing legal obligations' (ICRC, 2013) 'whenever private military and security companies are present in armed conflicts. It is not legally binding as such but, rather, contains a compilation of relevant international legal obligations and good practices' (ICRC, 2020). At this point, the reader might wonder why the author has suggested that there are no real, legal, and existing documents on the regulation of PMSCs, even though it has just been mentioned the Montreux Document. In order to provide a proper explanation, it must be stated that an adequate document on PMSCs should be universal, thus the United Nations is the perfect setting for it even though there are territories and States not part of it, however, in the current scenario is the biggest and widest intergovernmental transnational organization. Besides, considering the broad and global scope of PMSCs, the 54 States endorsed in the Montreux Document do not represent the whole world, hence several State delegations during the 5th session noted that the Montreux Document is neither unaimed, consensual nor universal, thus could not be used as legal regulatory framework on PMSCs.

Notwithstanding, the Montreux Document established a solid basis for the configuration of an international regulatory framework, composed under the United Nations scope. In contrast, the Geneva Conventions of 1949 are ratified by all UN Member States and recognised as customary international law, and together with their respective Additional Protocols, provide 'a definition of mercenaries; whereas, on this basis, mercenaries are defined as civilians and are as such not allowed to take part in conflict' (European Parliament, 2021), precisely Article 47 of Additional Protocol I, as mentioned previously. Furthermore, the UN Guidelines on the Use of Armed Security Services from Private Security Companies from 2012, reviewed in 2017, established that 'The fundamental principle guiding when to use armed security services from a private security company is that this may be considered only 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 such as the Security and Safety Services or security officers recruited directly by a mission or through another UNSMS organization.' (UNSMS, 2017: 1).

Regardless, the lack of homogeneous national legislation, the inconsistent rules diversifying between countries, the insufficient self-regulation adopted by some PMSCs, the lack of penalties, and the impact of PMSCs operations in multilateral interventions and conflict regions (European Parliament, 2021) entitle some of the pitfalls the international regulatory framework faces and simultaneously the international community trying to control and track PMCs' activities under international law.

SUB-QUESTION 3

Which are the reasons of legal relevance in International Law regarding military-based companies splitting, subcontracting, and changing their names, shapes and core services?

In the same vein as the previous inquiry, the lack of an international regulatory framework notably obstacles the control and track of PMSCs' activities, thus it can not be completely ensured that they do comply with international humanitarian law and respect human rights. Hence, the experts face themselves in a grey zone or twilight zone that must be regulated but lack of basis, walls and roof. Accordingly, during the 5th session, both the ICoCA and DCAF outlined that private military and security companies are not alone anymore, indeed several typologies of security and military companies have been raised since the Cold War, far from the 2000s trends in services and business profile. 'The terms of security contracts vary in the work to be performed and the qualifications of contractor personnel, the Blackwater contract is not necessarily representative of other security contracts' (CBO, 2008: 16).

Recalling the case of Blackwater, the change of name, scope and services is the common line of action of private military and security companies seeking to comply with IHL, avoid sanctions on unlawful actions, or avoid excessive attention on them by public authorities, nationally and internationally. Therefore, States must ensure that PMSCs employees respect IHL and mechanism to hold accountable the suspects. Moreover, when the scenario is inverted, PMSCs operating in a State, the later must respect human rights and IHL as well as private military and security companies. According to the respective national law, States should proceed to control and oversight PMSCs activities, require licensing and disciplinary measures in compliance with their regulatory system and sanctions. Nonetheless, the risk is placed on 'whether a particular service could cause the PMSCs personnel to become involved in direct participation in hostilities' (ICRC, 2013). Additionally, in order to ensure that State comply with their responsibility to respect human rights and align subcontracting PMSCs with the IHL, in a context where private military and security companies violate HR, 'the State that has hired them may be responsible if the violations can be attributed to it as a matter of international law, especially if the PMSC acts under instructions or control of the State authorities' (ICRC, 2013).

When companies split, subcontract each other, change their names, shapes, and core services the international community and the existing international law must reframe and broaden the scope of regulations and sanctions. Hence, hinders and slows down an effective criminal prosecution of unlawful activities performed by PMSCs, such as the Nisour Square massacre. Precisely, SIPRI published a report presenting different types of military services, ergo divergences between private enterprises providing military services which enlarges the issues of controlling and tracking PMSCs. For instance, Constellis Holding is a clear example of the merge of several PMSCs within one company without a clear epicentre and with a wider scope that single private military and security companies. Considering that 'The bulk of the revenues of the military services industry is generated by the R&D, technical services and operational support sections of the market' (Perlo-Freeman and Sköns, 2008: 13).

RESEARCH QUESTION

Which must be the essential elements and principal aspects of an international regulatory framework on PMCs and their activities?

This policy report acts as a reinforcement of the work that has been conducted by the OEIGWG on PMSCs 'to elaborate the content of an international regulatory framework, without prejudging the nature thereof, to protect human rights and ensure accountability for violations and abuses relating to the activities of private military and security companies' (OHCHR, 2024), since 2017 with the renewed mandate but onboard since

2010. Hence, the essential elements and principal aspects that a proper international regulatory framework on PM(S)Cs and their activities

Wider importance should be done on international criminal law (ICL) as well as an increase of the references across the text, together with the inclusion of constant quotes to international human rights law (IHRL) and international humanitarian law (IHL), even though the latter has more presence and it is reinforced by the references to the Montreux Document, the Geneva Conventions of 1949 and their Additional Protocols, as well as to several Conventions and indirectly to international treaties. In addition, another essential element is a broader definition of private military and security companies, which should not be divided but embrace further types of security and military companies in order to encompass all typologies of business enterprises oriented to security and military services. According to Herbet Wulf (2005) exist six categories of private actors within the security sector that aim to identify them properly: PSCs providing security services to private companies, governments, and citizens; defence producers present in all the steps of military equipment for military consumers, from research and development to production and financing; service provides entitled of services' management and financing to the military sector; PMCs which clients are UN agencies, military customers, and humanitarian organizations seeking for military services. Wulf also embraces two more types, which considering the scope, objective and aim of the international regulatory framework might not be placed among the previous one, but rather included in separate provisions on what private actors providing services could be even though are entitled or adopted the label of PMSCs. Those are non-statutory armed force, in order words organized crimes which can be integrated by warlords, groups and rebels; and mercenaries understood as non-state actors' tools uncovered as combat troops (Wulf, 2005: 43-47 quoted by Perlo-Freeman and Sköns, 2008: 4-5). Hence, one essential elements and principal aspect is to include a definition of military services and security services, following the line of PMSCs definition in Article 1(c) of the Revised Third Draft Instrument of the OEIGWG on PMSCs. One potential option could be 'Military services include, on the one hand, those outsourced by the armed forces or defence ministries and, on the other hand, services of a military nature that are purchased by other parts of government and by private sector clients' (Perlo-Freeman and Sköns, 2008: 5). As well as concrete definition of 'Armed forces' and 'Armed security' which scope the competences of Blackwater, and indeed indirectly refer to the use of force, the direct participation in hostilities/combat, presence in conflicts and State functions.

In the same vein, a strong and solid reinforcement of the principle of the State monopoly on the legitimate use of force must be incorporated, alongside a deeper recall of the prohibition to outsource the mentioned principle to private military and security companies, their personnel, and subcontractors. Parallelly, further principal aspects that the international regulatory framework should include are consensual definitions especially of 'State functions', 'direct participation in hostilities', and 'prohibited activities'

– as a new provision proposed by a state delegation during the 5th session in April 2024 –, aligned with the OEIGWG on PMSCs discussions held this year. Furthermore, this author during her fieldwork noted a lack of explanatory definitions on conflict and combat as well as the missing presence of mention to international organizations subcontracting PMSCs, according to the HNPW'24 data collected.

Eventually, it must be outlined that the Revised Third Draft Instrument present an enriching basis to further contributions and polishing process, scopes a range diversity of definitions that are indeed present in the spectrum of PMSCs, and properly recalls existing international legislations. Nonetheless, the nature of the instrument is still a matter for open discussion, which should be solved in order to accept and ratified the instrument as such.

CONCLUSIONS

As a closure, it should be claimed that the International Regulatory Framework (IRF) and the OEIGWG are key elements to slow down the increase of private military and security companies (PMSCs)and the privatisation of security and military services, as well as the outsource of State functions. Certainly, as it has been presented throughout the report, private military and security companies arise after the Cold War, however, their structure and scope of services has change, diversified, and amplified since the 2000s. Hence, the traditional definition of PMSCs need a broader frame and the inclusion of new typologies of business enterprises within the security and military services as core providers of those, in comparison to national military services – especially the U.S. Army. Notwithstanding, it is well known that not only State, but also international organizations such as the United Nations have used and still consume security services from external private companies, according to the HNPW'24 data collected.

This policy report concludes that there is an imminent urgent need to finalize the elaboration of the international regulatory framework on private military and security companies, which claims to be accepted and ratified in the contemporary timeframe. Certainly, in the aftermath of the decisive choice on the nature of the instrument, which not only determines the whole document, but also is interlinked with the two key specific issues 'Inherent State functions' and 'direct participation in hostilities/combat' for which this report proposed to dissect and define explanations in order to recompose the concept again scoping a range variety of aspects from within and including as many perspective in its regards as possible. Indeed, this paper aligns with the aim of including NGOs, civil society, and Academy more into the discussions, brining fresh external and

non-institutionalized points of view to diversify the solutions, avoiding getting stuck in State framed provisions. Parallelly to the importance of linguistics, which indeed are well-studied in Academia and, thus, further contribution from scholars and legal experts might bring some light into the discussions – as it could be observed during the 5th session by the author. Indeed, the meetings held require from a high expertise which occasionally the delegations lack of, and the Secretariat must provide from external support, which is notably scarce. Therefore, as it has been done by the OEIGWG on PMSCs until achieve the current Revised Third Draft Instrument, a multilateral regulation framework vertebrated by constant references to international law, international humanitarian law, international human rights law, and international criminal law, is the right way-forward. Theses dynamics of report production enable the text to contain intersectional approaches, ensure the compliance with all branches of IL, and include every agent, actor and organism involved in private military and security companies' activities.

Eventually, the author considers convenient to recall the nature of the instrument, and conclude Chapter 9, aiming to state that a legally binding instrument would be much more effective in the regulation of PMSCs activities as well as considering further contributions and future scenarios. Certainly, the Montreux Document already works as the non-binding document on private military and security companies, alongside the reinforcement of the Geneva Convention of 1940 and their corresponding Additional Protocols together with the UN Guidelines on the Use of Armed Security Services from Private Security Companies reviewed version of 2017. Thus, the production of a legally binding regulatory instrument might be the turning point on the analysis, control, oversight, and track of PMSCs' activities, as well as a notable reduction of unlawful activities. Indeed, even though many private military and security companies do try to comply with international humanitarian law – considering the responsibility of States to ensure the prior, according to the ICRC and IL –, and accurately hold licensing and certification, the broad range of private business within military and security services pitfalls the control, oversight and track of human rights violations and activities without compliance with IHL. Consequently, a narrow, solid, and strict legal regulatory framework under an international umbrella, elaborated under the wing of the United Nations as the wider intergovernmental transnational organization, ergo the 'universal organisation' in terms of human rights, would provide effective results and unprecedented outcomes. Precisely, this author concludes that the international regulatory framework on private military and security companies could follow the lines of action of the WG on BHR, which built up the UN Guiding Principles on Business and Human Rights and currently are constructing the vertebrate of the respective binding document. In contrast, the IGWG on PMSCs ought to only focus their efforts in a legally binding instrument since some non-binding on private military and security companies already exist.

RECOMMENDATIONS

According to the data collected during the fieldwork at the UNOG and the extractive academic review, the author suggests the following recommendations for the improvement of the international regulatory framework as well as the analysis of private military and security companies.

In first instance, the international regulatory framework should also scope or leave the door open for the regulation of new forms of security and military companies, considering the variants and heterogeneity of types of private business within security and military services.

In second instance, an eye on colonialism and Global South should be emphasized both while producing the international regulatory framework and when analysing real cases. Certainly, to ensure the solid compromise of key actors through the commitment of delegations, including everyone and scoping all human rights violations perpetrated by private military and security companies, far from a Western-colonial perspective. Indeed, criticism that international organisations often receive.

In third instance, the international regulatory framework must place more attention to international criminal law and international human rights law, alongside international humanitarian law as noted in the conclusions, in Chapter 9. Whilst the international regulatory framework should not be established as mere guidelines and principles, but as a legally binding document to ensure effective results, in confluence with the Montreux Document, essentially.

LIMITATIONS AND FURTHER CONTRIBUTIONS

As has been mentioned previously, the frame in which this policy report has been produced is placed within a master thesis at Ghent University, therefore neither the resources nor the time of the author, student of the M.Sc. in Conflict and Development Studies, enable her to scope all aspects of PMCs as well as bring her the ability to compare different military and security enterprises. Consequently, this report has focused on Blackwater as an exemplification of the pitfalls committed in the past by international law in order to learn and avoid mistaken again in the same terms. Furthermore, it is worth noting that this policy report has had to be placed within post-structuralism based on the definition of the modern state, considering is the organization the international community and global actors follow in their interactions. Thus, it could be claimed that even the efforts to decolonise the research, it still has slights glimpses to the post-colonialist understanding of the world. Nonetheless, since the author sought to avoid bias and misinterpretation, this report does not comprehend PMSCs within a geopolitical scope but rather under a pure legal approach with emphasis on regulations.

Therefore, leaving the door open to further contributions, the author proposes to focus future guidelines of research on peace within a nexus centred on peacebuilding, human security, and conflict prevention, rather than just onto militarised interventions as one of the key essentialities for produce an international regulatory framework. Thus, including conflict sensitive and an open discussion of conflict, combat, and hostilities alongside prohibited activities – the latter was proposed by a delegation during the 5th session – ought to be the second principal aspect when building the IRF on PMSCs. By combining the two initial proposals, the outcome would reach violent conflict prevention, peace building across the world and the within societies, achievement of sustainable development and humanitarian needs reductions, according to the Issue Brief published by Nonviolent Peaceforce (2023) and Angelini and Brown' paper (2023). Precisely, based on the fact that interlinked systems composed by peace, development and humanitarian work confluence with violent conflicts tightly connected to Unarmed Civilian Protection (UCP) which 'integrates direct action to prevent and respond to violence with longer-term peacebuilding strategies, working to address both immediate needs and longer-term development and peace outcomes.' (Nonviolent Peaceforce, 2023).

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