
THE PRIVATIZATION OF THE USE OF FORCE MEETS THE LAW OF STATE RESPONSIBILITY

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I. THE CRITERION FOR ATTRIBUTION ESTABLISHED IN ARTICLE 5 OF THE INTERNATIONAL LAW COMMISSION'S DRAFT ARTICLES ON STATE RESPONSIBILITY

According to the criterion for attribution established in article 5 of the International Law Commission's ("ILC") Draft Articles on the Responsibility of States for Wrongful Acts ("2001 ILC Draft"), a State is internationally responsible for the conduct of entities empowered to exercise elements of the governmental authority.¹ The proliferation of autonomous entities within the State favored including the criterion for attribution in the ILC's work in 1974. Indeed, taking the non-absolute nature of article 5 of the draft adopted in first reading as a starting point,² Rapporteur Roberto Ago, who was devoted to the attributing to the State of conduct of its own organs, deemed it necessary to refer to other acts that could be attributed to the State as a potential source of international responsibility when behavior of individuals or groups could not be strictly classified as state organs under domestic law. This led the Commission to adopt the attribution criteria contained in article 7 of

1. See *Responsibility of States for International Wrongful Acts*, [2001] 2 Y.B. Int'l L. Comm'n, U.N. Doc. A/56/49(Vol. I)/Corr.4, available at http://legal.un.org/ilc/texts/instruments/english/commentaries/9_11_2011.pdf [hereinafter *Draft Articles*] (establishing state responsibility under international law for the acts of persons or entities that are not organs of the State, so long as the actor is empowered by the law of that State to exercise aspects of governmental authority and is acting in that capacity).

2. See generally U.N. Int'l Law Comm'n, Draft Articles on State Responsibility with Commentaries Thereto Adopted By the International Law Commission on First Reading (Jan. 1997) [hereinafter 1997 Draft Articles with Commentaries] (explaining that the abbreviation "ILC Draft 1996" is used to refer to the draft approved on first reading by the ILC on July 12, 1996, in spite of the fact that the first part of this draft, relating to the origin of the responsibility, was approved in 1980).

the ILC Draft 1996 at its twenty-sixth session. Specifically, this provision stated that:

1. The conduct of an organ of a territorial governmental entity within a State shall also be considered as an act of that State under international law, provided that organ was acting in that capacity in the case in question.
2. The conduct of an organ of an entity which is not part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question.³

Specifically, Rapporteur Ago was referring to the actions and omissions of organs of public institutions different from the State, which he classified into two major categories.⁴ On the one hand, there are *public establishments* and other public institutions with their own personality that have autonomous leadership and management and whose mission was to provide a certain service or exercise certain functions. On the other hand, there are *public territorial communities* that are characterized by a general public activity but developed at the local or regional level, which later were integrated under the expression “organ” for the purposes of the attribution of conduct to the State.⁵

The need to address these public institutions’ acts from the State Responsibility point of view resulted from the increasing formation and proliferation of these public establishment at that time.⁶ Despite

3. *Id.* at 26.

4. *Cf. id.* (noting that organs, which are separate from the State but are empowered by internal law to exercise governmental authority, can be separate due to the organs’ territorial jurisdictions or the special nature of the organs’ functions).

5. *Draft Articles, supra* note 1, art. 4 (“The conduct of any state organ shall be considered an act of that state under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the state, and whatever its character as an organ of the central Government or of a territorial unit of the state.”).

6. *See* Special Rapporteur on the Expulsion of Aliens, *Third Rep. on State Responsibility, The Internationally Wrongful Act of the State, Source of*

a clearly public mission, these institutions possessed a different personality from a domestic law perspective, had its own organization separate from the State, and were subject to a *sui generis* legal regime in their activities that is covert for some public law matters and for some private law matters.⁷ In short, although these institutions had their own organization, they provided services and performed *duties of a public nature*. According to the Commission and relevant State practice in these cases, the principle of state unity would justify the attribution criterion from an international perspective.⁸

Nevertheless, due to the novelty of the phenomenon in the 1970s, few precedents and opinions existed to confirm this phenomenon. Some scholars considered the nature of the function assumed was the decisive element in this criterion, not the exercise of the functions by State or non-state bodies.⁹ That is, the criterion for determining this type of entity should be the *common feature* that characterizes them: being empowered to exercise certain functions pertaining to those exercised by State organs.¹⁰ Moreover, as Rapporteur Ago pointed

International Responsibility, Int'l Law Comm'n, ¶ 164, U.N. Doc. A/CN.4/246 (1971) (by Roberto Ago) [hereinafter Special Rapporteur, *Third Report*] (indicating five main causes for this phenomenon: (1) the diversity of common interest tasks that the collectivity should perform in a modern society; (2) the increasing number of services that only the collectivity is able to provide; (3) the progressive extension of services to the most diverse sectors of economic, social, and cultural life; (4) the technical nature of the services, frequently requiring both autonomy and decisive action while possessing expertise; and (5) the need to give greater flexibility to procedures and to reduce controls to ensure the effectiveness of services).

7. *See id.* (describing these institutions as “para-state institutions,” meaning they are organized separate from the State but execute public tasks in conjunction with the State).

8. Rep. of the Int'l Law Comm'n, 26th Sess., May 6-July 26, 1974, at 162, U.N. Doc. A/9610/Rev.1; GAOR, 29th Sess., Supp. No. 10 (1974) [hereinafter Int'l Law. Comm'n 26th Sess. Report] (noting that the Commission's work has “exercised a definite influence” on the development of legal opinion across all sectors of the international legal order).

9. *See* 1997 Draft Articles with Commentaries, *supra* note 2, at 30-31 (conveying that the Preparatory Committee for the 1930 Codification Conference created precedence for determining state responsibility for the actions of non-state entities on the basis of the legislative or administrative nature of the entity's public functions).

10. *See* Int'l Law. Comm'n 26th Sess. Report, *supra* note 8, at 282 (dismissing other criteria for determining this type of entity, such as the definition of public or

out, a different solution would be illogical and even unrealistic because the distribution of public functions between the State itself and other entities previously reflected an organizational technique that varies from one system to another, whereas an act or omission carried out in performing the same, single public service could be considered a state act in some cases and not others from the international law perspective.¹¹ Therefore, from the international law perspective, this explains the need to categorically recognize that the conduct of the personnel of these establishments or institutions has to be qualified as an act of the State to be able to generate international responsibility.¹² Thus, when this attribution criterion was adopted, the ILC provided that an established standard existed on the matter and providing that it was imperative to make such a rule to promote “clarity in international relations” and “progressive development of international law.”¹³

In the late 1990s, in referring to this attribution criterion, Special Rapporteur James Crawford noted the increasing number of *parastate bodies* performing governmental functions and made necessary to address the issue.¹⁴ However, while recognizing the need to include this attribution rule and thereby proposing its maintenance, it is still necessary to examine its scope and provide

private, the more or less extensive public participation in its capital, and state control).

11. See Special Rapporteur, *Third Report*, *supra* note 6, at 256 (asserting that basing a state’s responsibility on its distribution of public functions could lead to discrepancies over responsibilities for an identical public function because various methods of organization are used by different states).

12. E.g., *Observations and Comments of Governments on Chapters I, II and III of Part I of the Draft Articles on State Responsibility for Internationally Wrongful Act*, [1980] 1 Y.B. Int’l L. Comm’n, at 94, U.N. Doc. A/CN.4/328 and Add.1-4 [hereinafter *Observations and Comments of Governments*] (expressing disagreement among the States with respect to the scope of this rule of attribution, such as Canada’s observation in 1980 that the circumstances in which a State should be considered responsible for those acts had to be “more restrictively drafted”).

13. Int’l Law. Comm’n 26th Sess. Report, *supra* note 8, at 282.

14. See Special Rapporteur, *First Rep. on State Responsibility*, Int’l Law Comm’n, at 39, U.N. Doc. A/CN.4/490 and Add.1-7 (1998) (by James Crawford) [hereinafter Special Rapporteur, *First Report*] (stressing the importance of addressing the proliferation of para-state entities in article 7 despite some States’ concerns).

recent examples of its field of application.¹⁵ In contrast, Crawford references a precedent that the Commission used in 1974 and commented some of the expressions used in the provision.¹⁶ Thus, this rule is meant to encompass individuals, such as private security guards acting as prison guards, to the extent that they exercise public functions, including the power to detain and enforce compliance with judicial sentences or prison regulations.¹⁷ With respect to the expressions used, he pointed out that the maintenance of the term “entity” was provided because it has a meaning sufficiently broad as to encompass many different realities, such as territorial public entities, public establishments, parastate entities, various public institutions, and companies under private law in special cases.¹⁸

With regard to the expression, “an entity which is empowered by the law of that State to exercise elements of the governmental authority,” Crawford stated it was the most appropriate because it reflects the true common feature of these entities.¹⁹ In the words of the Rapporteur, “being empowered, even if only in an exceptional and limited way, to perform certain functions that are related to those normally exercised by State bodies.”²⁰

This statement raises a number of questions, primarily in regard to the way that this power is granted, because the statement does not specify how these entities can be empowered. In other words, it does not indicate whether such authority must be granted through a concession of legislative power, or, for example, through an executive act, as it could be a contract between a government and a

15. *See id.* (noting that the commentary for article 7 elaborates on the application of the attribution rule to certain private actors, but could have provided more examples of the types of public functions that fall under the rule).

16. *See id.* at 38 (relaying the concerns of states, such as the United Kingdom and Germany, about the lack of guidance with states’ responsibility for traditional state activities conducted by entities outside the structure of the state).

17. *See id.* at 39 (observing that the commentary of article 7 provides that the attribution rule was intended to apply to private security guards employed as prison wardens).

18. *See id.* at 38 (pointing to the commentary of article 7 that explains the need for a broad term to encompass the various forms of parastatal actors).

19. *See id.* (stating that the commentary of article 7 discusses the difficulty of defining the concerned entities without referencing their delegation of public authority by law).

20. *Id.*

private entity to perform public functions.²¹ Likewise, doubts have arisen about how to differentiate these entities from persons or groups of persons that act on behalf of the State or persons that act on the instructions or under the direction or control of the State as provided under article 8 of 2001 ILC Draft.²²

Not surprisingly, given the lack of this attribution criterion's concrete scope, some States, such as the United Kingdom and Germany, after seeking clearer guidance regarding an increasingly common phenomenon, such as the parastatals represented, held that it did not sufficiently take into account "the increasingly common fact that States delegate to persons outside state organs activities that are usually attributable to this."²³ However, the Rapporteur expressly refused to specify the scope of the *elements of governmental authority*.²⁴ In his opinion, "what is considered 'public power' depends on the society in question, its history and traditions," adding that we are in presence of "questions of application of a general rule to particular and various circumstances."²⁵ It is for the applicant to show that the damage actually emanates from the exercise of those powers."²⁶

21. *See id.* (noting that such criteria is not determinative when ascertaining attribution or non-attribution of conduct involving state organs to the State itself).

22. *Draft Articles, supra* note 1, art. 5 (commenting that the criterion included in article 5 of the 2001 ILC Draft, to the extent that it encompasses cases in which the State delegates public functions—and not specific assignments, tasks, missions, or orders—to private organizations or authorizes them to exercise rights under their own sovereignty, refers to *de jure* agents because, in these cases, there is the aforementioned delegation or authorization in accordance with its domestic law; alternatively, it is more appropriate to call the individuals of whom the criterion in article 8 is referring to agents *de facto*, because even such cases where a commission may exist or in which individuals act under the direction or control, a public and formal delegation of the state functions is normally lacking and likewise the task or assignment does not refer to the exercise of a public prerogative or a state function).

23. Int'l Law Comm'n, *Comments and Observations Received by Governments*, U.N. Doc. A/CN.4/488 and Add. 1-3 (July 20, 1998).

24. *See* Special Rapporteur, *First Report, supra* note 14, at 39 (expressing doubts as to whether article 7 should specifically identify the level the "government authority" that would make an entity's actions attributable to the State because a general standard would allow the rule to be applied to various sets of facts).

25. *Id.*

26. *Id.*

II. INITIATIVES FOR THE REGULATION OF THE EMERGING SECTOR OF PRIVATE MILITARY AND SECURITY COMPANIES

While supporting the abstract character that the attribution criteria should have, some scholars suggest that the abstract character of the attribution criteria should not prevent some allusion to the problem currently posed by the behavior of private contractors in the comments.²⁷ Without prejudice to the self-regulatory efforts that are taking place in this sector and the work of the U.N. Working Group on this matter, the conduct of these entities is subject to the attribution criterion contained in article 5 of the 2001 ILC Draft.²⁸ This solution diminishes the *evidentiary difficulties* and has another important consequence. It supposes that the State, when it acts through private entities, must respond not only for their conduct in the exercise of delegated functions, but also for the *ultra vires* acts.²⁹ This solution would result in the contracting state supervising this kind of companies' operation to a greater extent.³⁰ However, to

27. See Juste J. Ruiz, *Responsabilidad internacional de los Estados y daños al medio ambiente: problemas de atribución*, en JORNADAS DE LA ASOCIACIÓN ESPAÑOLA DE PROFESORES DE DERECHO INTERNACIONAL Y RELACIONES INTERNACIONALES 113, 118 (1989). Ruiz asserts that the attribution criteria:

[M]eets a formalistic legal logic, wisely dosed, that is based on a historical practice that has hitherto little flaws. This is not surprising in any way since the construction in question fully reflects the long-dominant schemes of legal positivism to the present day, and the common interest of states on restricting the scope of their possible responsibility The reason, interest and history thus 'shake hands' in a finished formulation, crimped with the precision of the artist. But the proposed picture sometime seems more responsive to the needs from the past than future ones, and their solutions are not well-adapted to certain current realities.

Id.

28. See *Draft Articles*, *supra* note 1, art. 5 (providing that "[t]he conduct of a person or entity which is not an organ of the state under article 4 but which is empowered by the law of that state to exercise elements of the governmental authority shall be considered an act of the state under international law, provided the person or entity is acting in that capacity in the particular instance").

29. See *Draft Articles on Responsibility of States for Internationally Wrongful Acts, with Commentaries*, [2001] 2 Y.B. Int'l L. Comm'n 31, at 45, U.N. Doc. A/56/10 [hereinafter *2001 Draft Articles*] (elaborating that the State is responsible for the acts of entities that are empowered to exercise aspects of state authority even when those acts are beyond the entity's delegated authorization or contrary to the State's instructions).

30. See *id.* at 43, 45 (noting that while article 5 expressly limits its authority to entities that are "empowered by internal law" to exercise state functions, article 7

confirm that impression, it is necessary to examine the complex questions raised by the privatization of certain state functions.

As the doctrine has provided, one of the most innovative features of today's armed conflicts is its submission to the privatization process that is characteristic of globalization. At present, as Angeles Cano Linares indicates, "the phenomenon of liberalization has reached to the use of armed force both internally and externally so that even the war is privatized."³¹ This reality comes from a gradual process of outsourcing state activities.³² Today, private companies provide a great variety of services and play a wide range of public and private functions.³³ The private sector's activity in this area began with the provision of secondary services, such as infrastructure maintenance, followed by the performance of safety and surveillance functions over installations and military infrastructures, as well as protection of persons or transnational corporations. However, its activity was subsequently extended to consultancy work, logistics, teaching, armed forces training, security or police activities, weapons

clearly makes *ultra vires* acts of state entities attributable to the State itself, even if the entities acted in "excess of authority or contrary to instructions").

31. See ANGELES CANO LINARES, *EL DERECHO INTERNACIONAL HUMANITARIO FRENTE AL USO DE LA FUERZA COMO ACTIVIDAD EMPRESARIAL ¿EL FIN DE UN MONOPOLIO?* 47 (2008); JOSÉ LUIS GÓMEZ DEL PRADO & HELENA TORROJA MATEU, *HACIA LA REGULACIÓN INTERNACIONAL DE LAS EMPRESAS MILITARES Y DE SEGURIDAD PRIVADAS* 18-19 (2011) (arguing that although the trend in the past two centuries was "strengthening the legitimate use of force as a public good," this trend has been reversed with the end of the Cold War and "the private security industry has become a transnational phenomenon as a result of the reduction of national armies and the globalization of the economy").

32. See, e.g., Mario A. Laborie Iglesias, *La controvertida contribución de las empresas militares y de seguridad (EMSP) a la resolución de conflictos*, in MINISTERIO DE DEFENSA, *LOS ACTORES NO ESTATALES Y LA SEGURIDAD INTERNACIONAL: SU PAPEL EN LA RESOLUCIÓN DE CONFLICTOS Y CRISIS*, INSTITUTO ESPAÑOL DE ESTUDIOS ESTRATÉGICOS CENTRO NACIONAL DE INTELIGENCIA 77, 78 (2010) (remarking that modern PMSCs originated in the 1950s and have since provided various services to improve the efficiency of Western armies; however, the private military and security industries have only experienced unprecedented growth since 1990, mainly due to the need for security in weak or failed states and the search for efficiency in developed countries).

33. E.g., U.N. Secretary-General, *Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self Determination*, at 4, U.N. Doc. A/65/325 (Aug. 25, 2010) [hereinafter *Use of Mercenaries*] (listing the functions commonly carried out by private military and security companies, such as policing, administering prisons, protecting personnel and convoys, intelligence collection and analysis, and interrogation of detainees).

systems maintenance, surveillance and interrogation of detainees, intelligence work, surveillance and reconnaissance, and even direct participation in hostilities.³⁴ Hence, as Jaume Saura Estapa notes, the novelty is not so much the outsourcing of some functions of the military field, but “the neglecting that some governments are doing of sovereign inherent functions, such as security and use of force, into the hands of private actors.”³⁵

However, despite the wide range of services that these entities, generally called Private Military and Security Companies (“PMSCs”),³⁶ have been providing, the doctrine classifies them into *two types* according to the developed activity: those that offer *security activities* and those that provide *military activities*. Despite this issue, as Cano Linares notes, this is a complex distinction “based on the defensive or offensive nature of the activities, argued and utilized by the majority of companies of this sector to defend the need and kindness of their services, outside of the direct use of armed force;” so that in practice, the border between the two types of activities is “fuzzy and difficult to pinpoint.”³⁷ Logically, they are the *strictly military activities* (or traditional military functions) that are the most problematic from the point of view of international law.³⁸ As Carlos Espaliú Berdud notes, security activities performed by contractors are “perfectly licit”; the only problem posed to

34. See CANO LINARES, *supra* note 31, at 60 (observing that private military and security companies have diversified their services and the types of organizations for which that they work). See generally Laborie Iglesias, *supra* note 32, at 87-89 (explaining the diverse functions of military and security companies).

35. Jaume Saura Estapà, *Las empresas militares y de seguridad privadas ante el derecho internacional de los derechos humanos: su actuación en el conflicto iraquí*, 19 REVISTA ELECTRÓNICA DE ESTUDIOS INTERNACIONALES, 2008, at 1 [hereinafter Saura Estapà, *Las Empresas*].

36. The Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination, Human Rights Council Res. 2005/2, U.N. Doc. E/CN.4/2005/L.10/Add.5, at 4 (Apr. 7, 2005) (defining these companies in a draft convention on PMSCs in 2010 as “business entity providing paid military and/or security services through physical and/or legal individuals”).

37. CANO LINARES, *supra* note 31, at 60; see also Laborie Iglesias, *supra* note 32, at 78 (agreeing that distinguishing between the various types of PMSCs is difficult because they are often interrelated).

38. CANO LINARES, *supra* note 31, at 61 (observing that the privatization of military functions becomes problematic when private actors participate in abusive practices and violations of human rights and humanitarian law).

international law is to determine its statute from the perspective of international humanitarian law “in the case in which, working in an area where war is developed, they would be involved in combat, despite of not participating in it.”³⁹ Similarly, Mario Laborie Iglesias points out that “the fundamental point of debate affects only in practice to activities related to military functions exclusively conducted so far by national armies.”⁴⁰ That is, the author agrees that the main drawback associated with these private entities is the *exercise of public power attributions or prerogatives*, mainly, the use of armed force.⁴¹ Specially, if we take into account that in the field of military activities; there exists a growing trend of States contracting “cowboy” companies, which receive this designation by adopting increasingly aggressive attitudes on the ground.⁴²

In effect, the main problem in recent years relates to the PMSCs that provide *strictly military services*. This is why, at first, efforts of the United Nations and doctrine were targeted to the approximation of this reality to the phenomenon of mercenarism—qualifying private contractors as *new mercenaries*.⁴³ In this sense, Jose Gómez del Prado, former president of the U.N. Working Group on Mercenaries, and Helena Torroja Mateu, argue that “military and private security companies are the modern reincarnation of a long

39. CARLOS ESPALIÚ BERDUD, *EL ESTATUTO JURÍDICO DE LOS MERCENARIOS Y DE LAS COMPAÑÍAS MILITARES PRIVADAS EN EL DERECHO INTERNACIONAL* 57-58 (Thomson Aranzadi ed., 2007).

40. Laborie Iglesias, *supra* note 32, at 78.

41. *See id.* at 83 (contending that even the word “military,” as opposed to “civil,” should only be used for regular armies and not private companies due to the ethical and legal implications of such a label).

42. *See* Benjamin Perrin, *Promover el cumplimiento del derecho internacional humanitario por las empresas de seguridad y militares privadas*, 88 INT’L REV. RED CROSS 307, 317 (2006) (asserting that every time the United States contracts with a outwardly aggressive PMSC, it weakens the norms that regulate the entire PMSC industry).

43. *See* COMITÉ INTERNACIONAL DE LA CRUZ ROJA, DOCUMENTO DE MONTREUX 43 (2008) [hereinafter DOCUMENTO DE MONTREUX] (discussing how PMSC personnel do not generally fit the definition of a mercenary because they have not been recruited to fight in military operations, they are often nationals of one of the parties to the conflict, and they are not motivated by personal gain, but some PMSC employees can fit the definition of a mercenary and therefore they have no right to be a combatant or a prisoner of war in international armed conflicts).

tradition of private contractors of war and suppliers of physical force: privateers, buccaneers, and mercenaries.”⁴⁴

However, as some scholars have highlighted, despite the remote origins of the mercenary figure and his parallelism with it, the emergence of PMSCs and their participation in armed conflict has now reached *worrying dimensions*.⁴⁵ In the past two decades, we have witnessed a spectacular development of PMSCs mainly in developed countries, such as the United States and United Kingdom, that provide their services especially in internal armed conflicts, low-intensity conflict zones, and post-conflict situations, such as those in Afghanistan, Iraq, the Balkans, the Great Lakes Region, and the Horn of Africa.⁴⁶ Moreover, as Gómez del Prado and Torroja Mateu point out, that parallel to the privatization of war at the international level creates an increasing demand for security services and protection of property.⁴⁷ For example, more and more transnationals are contracting their services to mining.⁴⁸

Thus, due to the wide variety of services provided by PMSCs, it is no longer an activity exclusively intended for the States—Western or

44. GÓMEZ DEL PRADO & TORROJA MATEU, *supra* note 31, at 18-19.

45. See Saura Estapà, *Las Empresas*, *supra* note 35, at 3-4 (maintaining that the PMSC industry is sufficiently entrenched and calls to abolish the practice are done in vain); Jorge J. Urbina, *El papel de las compañías militares y de seguridad privadas en los conflictos armados recientes: una aproximación al estatuto jurídico de su personal en el derecho internacional humanitario*, en SEGURIDAD Y DEFENSA HOY: CONSTRUYENDO EL FUTURO 141, 173 (Javier Jordán et al., eds., 2008) (asserting that PMSCs provide their users many advantages and benefits: (1) greater specialization, (2) prompt action, (3) overcome limitations and responsibilities, (4) advantages in operations area by recruiting staff from the local population, and (5) lower cost); Laborie Iglesias, *supra* note 32, at 97-102 (analyzing the benefits that PMSCs offer to their users, but concluding that the growth of this industry has led to ethical and legal questions).

46. See *Use of Mercenaries*, *supra* note 33, at 4 (finding that privatization of security is intensifying and mostly driven by the United States and the United Kingdom, which supplies and contracts the majority of private military and security companies).

47. H.R.C. Res. 2005/2, *supra* note 36, at 2 (recognizing the demand for private mercenaries on the global market due to increased instability and conflicts).

48. E.g., GÓMEZ DEL PRADO & TORROJA MATEU, *supra* note 31, at 17-19 (observing that the illegal extraction of natural resources in conflict zones creates a demand for PMSCs).

weak.⁴⁹ These private entities have strongly spread across the market providing their services to different clients from opposition groups, national resistance movements, criminal organizations, multinational corporations, individuals, non-governmental organizations that carry out humanitarian activities, and even international intergovernmental organizations such as the United Nations.⁵⁰ As Laborie Iglesias notes, “in an unstoppable growth trend, PMSCs have now become essential actors to when understanding the current context of international security.”⁵¹

As previously noted, given the existing proximity between mercenaries and PMSC employees, initial efforts were directed toward elaborating a *broader definition of a mercenary* or adapting the notion of a mercenary to deal with the new reality.⁵² The proximity between the two figures is easily apprehensible because it is possible to describe the mercenaries as “soldiers for hire” inasmuch as “instead of fighting for their own country they offer their services to governments and groups from other countries for a

49. See Laborie Iglesias, *supra* note 32, at 133-34. Remarking that PMSCs thrive because

On the one hand, in weak or failed states, governments are unable to exercise the monopoly of the use of armed force. Rebel movements, insurgents, terrorists, pirates, warlords, ethnic or tribal militias and organized crime movements fill the vacuum created by the inability of states. The governments of these countries and especially transnational corporations who operate there, contract PMSC services to continue their productive activity. On the other hand, Western states have suffered ‘neoliberal’ transformations due to globalization and trade liberalization. Western armed forces have also been affected by the privatization waves which, carried out in the name of efficiency, have affected all economic sectors.

50. See GÓMEZ DEL PRADO & TORROJA MATEU, *supra* note 31, at 20 (referring to a U.N. contract with a British PMSC to send security personnel to the U.N. mission in Afghanistan); see also *Grupo de Trabajo inicia estudio sobre compañías de seguridad privadas usadas por la ONU*, CENTRO DE NOTICIAS DE LA ONU (Mar. 18, 2013), <http://www.un.org/spanish/News/story.asp?NewsID=25962#.VSM1cUKY1zp> (reporting that the Working Group announced it would carry out of a study on the use of PMSCs by U.N. organizations and expects to submit the report to the General Assembly in 2014 to enable developing a coherent policy on the matter).

51. Laborie Iglesias, *supra* note 32, at 78.

52. See U.N. Comisión de Derechos Humanos, *Repercusiones de las actividades de los mercenarios sobre el derecho de los pueblos a la libre determinación* (1987), <http://www.ohchr.org/Documents/Publications/FactSheet28sp.pdf> (tracing the evolution of the definition of “mercenary” and concluding that some of today’s PMSCs are seen as a new form of the familiar label).

substantial monetary compensation,” as the U.N.’s Office of the High Commissioner for Human Rights study on the impact of mercenaries’ activities demonstrates.⁵³ However, the existing legal definition in international law requires the concurrence of a number of cumulative requirements for a person’s qualification as a mercenary.⁵⁴ The need of cumulative compliance of each and every one of the conditions required poses, the problem that:

[I]n practice it will be very difficult to find a person who can be qualified as a mercenary It is very complicated for one State to show that a person receives a salary for his military services when payment is carried out in the mercenary’s country of origin or in a bank account of a third State.⁵⁵

Moreover, as the doctrine has been noting, it is necessary to provide a specific and adequate answer to this phenomenon because of the dimension that the war-privatization phenomenon is reaching.⁵⁶ However, as Saura Estapa notes, whether or not to include new contractors in the definition of “technical notion” of mercenaries is a crucial question in many aspects, especially relating to the suitable application of the rights and obligations under

53. *Id.* at 4-5.

54. *See id.* at 17-18 (listing the concurring requirements that define a mercenary: (1) specifically recruited to fight in an armed conflict; (2) participates directly in combat; (3) motivated by private gain that is promised to be substantially higher than that paid to similar combatants in the armed forces of a party to the conflict; (4) not a national or resident of a party to the conflict; (5) not a member of the armed forces of a party to the conflict; (6) not sent on official duty as a member of the armed forces of a State that is not party to the conflict).

55. ESPALIÚ BERDUD, *supra* note 39, at 47-48 (noting that the frequent recourse to PMSCs with the nationality of the contracting state is that most of its members elude to the requirement of citizenship referred to in the international instruments on mercenaries).

56. *See* CANO LINARES, *supra* note 31, at 47 (maintaining that “the various features that differentiate the current reality in respect of the historic phenomenon make extremely difficult that the solution could be reduced to the current criminalization procedure with the modification/extension of the concept of mercenary nowadays in force”); Laborie Iglesias, *supra* note 32, at 136-37 (advocating a specific regulation of PMSCs on the premise that “the discussion concerning whether these companies are or are not a new form of mercenary, is completely useless. Open hiring of these private services by democratic governments gives a great deal of legitimacy to PMSCs Therefore, it seems crucial to regulate the activities of private security companies as an entirely different matter in respect of mercenarism.”).

international humanitarian law.⁵⁷ However, from the broader point of view of respecting human rights, this is a relatively minor issue.⁵⁸ Indeed, it is a good position because it is crucial to determine the obligations of the contractors, as well as the distinct types of responsibilities that may arise from acts contrary to international human rights law.⁵⁹

With regard to the efforts in establishing a regulatory framework for PMSCs in the early 1980s, the U.N. Commission on Human Rights focused on the role of mercenaries in relation to the principle of self-determination of peoples.⁶⁰ Subsequently, the initial mandate was extended to generally cover the repercussions of PMSC activities upon realizing human rights.⁶¹ As evidenced in the work of

57. Saura Estapà, *Las Empresas*, *supra* note 35, at 5.

58. *Id.* (noting that it is irrelevant whether employees of PMSCs respond to the technical label of “mercenaries,” unless certain conditions, such as whether their actions constitute a violation of generally recognized human rights standards, apply).

59. See Comité Internacional de la Cruz Roja, *El Derecho Internacional Humanitario y Los Desafíos en Los Conflictos Armados Contemporáneos*, at 32-34, 30IC/07/8.4 (Nov. 26-30, 2007). In its report, the ICRC Committee conveys that PMSC staff do not have a specific status in international humanitarian law because:

PMCs/PSCs are private companies. Although INTERNATIONAL HUMANITARIAN LAW is binding on non-state actors, this is only to the extent that they are parties in an armed conflict (i.e., organized armed groups). As legal entities, private companies are not bound by INTERNATIONAL HUMANITARIAN LAW, contrary to what happens with his staff who, as individuals, must be ruled by international humanitarian law in situations of armed conflict. People who work for private companies in armed conflict have rights and obligations under INTERNATIONAL HUMANITARIAN LAW, but there is no particular statute that covers all employees. The status of each individual depends on the specific situation where that person acts and the functions assumed” because in the field of international armed conflicts, PMSC staff can be located in any of the following categories: i) members of the armed forces; ii) militias or other volunteer bodies; iii) individuals who follow the armed forces.

Id.

60. International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, G.A. Res. 44/34, art. 5, U.N. Doc. A/Res/44/34 (Dec. 4, 1989) (“[S]tates parties shall not recruit, use, finance or train mercenaries for the purpose of opposing the legitimate exercise of the inalienable right of peoples to self-determination”).

61. *E.g.*, Int’l Comm. of the Red Cross, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, at 34 (Nov. 28, 2007) [hereinafter Red Cross Conference Report] (examining several international initiatives for developing standards for PMSCs to ensure their compliance with international humanitarian and human rights law).

the Working Group and as some scholars have been pointing out, as well as the need for a regulatory framework for the activities of these private companies, the basic underlying problem is whether state functions relating to the use of force can be performed by private entities.⁶² In other words, the debate centers on the role of the State as a monopoly holder of legitimate force.⁶³

However, parallel to the work within the United Nations and emerging studies on the subject within the framework of the Council of Europe and the European Union,⁶⁴ there have been increasing attempts to *self-regulate in recent years*.⁶⁵ Along with the ethical codes by which PMSCs try to regulate themselves, the most important instrument is known as the Montreux Document, adopted in response to an initiative launched in 2005 by the Swiss Government with International Committee of the Red Cross (“ICRC”) as a co-sponsor.⁶⁶ Indeed, besides the codes of ethics or conduct subscribed within PMSC associations or lobbies, seventeen States adopted the Montreux Document on Pertinent International Legal Obligations and Good Practices for States regarding the Operations of Military and Private Security Companies during Armed Conflicts⁶⁷ on September 17th, 2008.⁶⁸ It played an important

62. *E.g.*, CANO LINARES, *supra* note 31, at 76 (contending that PMSCs must be regulated at the industry, national, and international levels).

63. *See* Red Cross Conference Report, *supra* note 60, at 33 (asserting that as the presence of private military companies (“PMCs”) continues to grow, most challenges against PMSCs focus on the legitimacy of States outsourcing their military functions and whether States should be restricted from transferring their monopoly of force to the private sector); *see also* Laborie Iglesias, *supra* note 32, at 106-07 (questioning the role that the State should play with regard to its position as guarantor of the monopoly of force).

64. *E.g.*, GÓMEZ DEL PRADO & TORROJA MATEU, *supra* note 31, at 18-19 (describing the Council of Europe’s regional initiative to regulate PMSCs).

65. *Id.* at 37-60 (describing the efforts in the United States to regulate PMSCs); Laborie Iglesias, *supra* note 32, at 128-29 (referring to the code of conduct created by the PMSC lobby group, International Peace Operations Association); *e.g.*, Pilar Pozo Serrano & Lourdes Hernández Martín, *El marco jurídico de las CMSP: reflexiones a propósito de la experiencia en Irak*, 23 ANUARIO ESPAÑOL DE DERECHO INTERNACIONAL 315, 348-49 (2007) (relaying the self-regulatory initiatives carried in the United States by the PMSC industry).

66. *See* Red Cross Conference Report, *supra* note 60, at 34 (recounting that the creation of the Montreux Document involved the participation of governments, industry representatives, academics, and nongovernmental organizations).

67. DOCUMENTO DE MONTREUX, *supra* note 43.

68. *See Participating States of the Montreux Document*, SWISS FED. DEP’T OF

role in the drafting process of the Document that both non-governmental organizations and companies within the sector participating in the process.⁶⁹

The main objective of this instrument, which has no binding legal value as its text specified,⁷⁰ is promoting respect for international human rights law in the context of the operations of PMSCs in situations of armed conflict.⁷¹ Now, this text is limited to reiterating the international obligations of the States, PSMCs, and their personnel in accordance with international human rights⁷² and to establish the “best practices” that companies should follow while offering a series of instructions that signatory states must follow to help those companies adapt their practices to the existing legal obligations.⁷³ In this sense, Gomez Del Prado and Torroja Mateu are right to assert the need to integrate “best practices” in a binding instrument because regrettably, “the experience shows that, left to

FOREIGN AFFAIRS, <https://www.eda.admin.ch/eda/en/dfa/foreign-policy/international-law...ian-law/private-military-security-companies/participating-states.html> (last visited Apr. 18, 2015) (noting the fifty-one state signatories to the agreement, including the seventeen states that participated in the drafting process: Afghanistan, Germany, Angola, Australia, Austria, Canada, Qatar, China, United States, France, Iraq, Poland, United Kingdom, Sierra Leone, South Africa, Sweden, Switzerland, and Ukraine were the original signatories, and Albania, Belgium, Bosnia-Herzegovina, Bulgaria, Chile, Cyprus, Costa Rica, Denmark, Ecuador, Slovenia, Spain, Finland, Georgia, Greece, Hungary, Iceland, Italy, Jordan, Liechtenstein, Lithuania, Macedonia, Norway, Netherlands, Portugal, Uganda, and Uruguay have joined afterwards).

69. See GÓMEZ DEL PRADO & TORROJA MATEU, *supra* note 31, at 53 (relaying the Working Group’s sentiment that PMSC industry groups played a significant role in drafting the Montreux Document).

70. See DOCUMENTO DE MONTREUX, *supra* note 43, at 9 (stating that the instrument does not possess a binding character and therefore does not affect the international rules and obligations applicable to the States).

71. See Permanent Representative of Switz., *Status of the Protocols Additional to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Armed Conflicts*, at 3, transmitted by Letter to the Secretary-General, U.N. Doc. A/63/467-S/2008/636 (Oct. 6, 2008) [hereinafter *Status of the Protocols*] (proclaiming that the Montreux Document contains a list of over seventy good practices designed to guide States that employ PMSCs in complying with international humanitarian law and human rights).

72. See Red Cross Conference Report, *supra* note 60, at 34 (maintaining that the Montreux Document reaffirms existing legal obligations in relation to PMSCs operating or registered in a State’s jurisdiction).

73. See *id.* at 34.

self-regulation, do not usually apply the best practices when they are only models to follow.”⁷⁴

This instrument has been completed by an International Code of Conduct for Private Security Services Providers and signed on November 9th, 2010⁷⁵ at the initiative of the private industry itself, once again counting on the support of the Swiss Government⁷⁶ As indicated in the 2011 ICRC report, the objective was developing a code of conduct that “systematizes the principles, so that private security services providers can operate in accordance with the norms of international humanitarian law and international law of human rights.”⁷⁷ The initial idea is that the Code has two distinct parts: first, concerning the rules of conduct, management, and governance; and second, establishing an international governance and oversight mechanism to ensure Code compliance by signed private entities.⁷⁸ Despite its realism, the doctrine is incorrect in its assessment of the Swiss Initiative, when it predicts that everything seems to indicate that the Swiss Initiative is condemned to a deadlock; however, it should not be so.⁷⁹

74. GÓMEZ DEL PRADO & TORROJA MATEU, *supra* note 31, at 51.

75. See *International Code of Conduct for Private Security Service Providers*, CONFÉDÉRATION SUISSE 3 (Nov. 9, 2010), http://www.icoc-ppsp.org/uploads/INTERNATIONAL_CODE_OF_CONDUCT_SPA.pdf (committing the sixty signatory companies—joined later by several more—to respect the human rights and humanitarian responsibilities of their personnel, clients, suppliers, shareholders, and the population of the territories in which they operate).

76. See *id.* (endorsing the principles of the Montreux Document and the rule of law).

77. Red Cross Conference Report, *supra* note 60, at 35.

78. See *id.* (claiming that the drafters’ proposed second part to International Code of Conduct for Private Security Service Providers, providing for an international oversight mechanism, has yet to be integrated into the Code); see also Chairperson of the U.N. Human Rights Council, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, at 3, U.N. Doc. A/HRC/21/43 (Jul. 2, 2012) [hereinafter Human Rights Council Report] (relaying the Working Group’s observations of the Draft Statute of the Mechanism of Supervision Code, submitted by the Provisional Steering Committee of the International Code of Conduct for Suppliers of Private Security Service on January 16, 2012).

79. GÓMEZ DEL PRADO & TORROJA MATEU, *supra* note 31, at 60; see also Human Rights Council Report, *supra* note 77, at 17 (concluding that the Working Group welcomes self-regulating efforts, such as the Montreux Document and the Code of Conduct for Suppliers of Private Security Service, but requests that States

Relating to the work of the Working Group, since its inception and in the exercise of its functions, the United Nations has recommended a set of general rules and principles and a draft of a possible convention on private military and security companies.⁸⁰ Some of the issues covered in this draft convention deserve to be noted although Western states, where this new industry has emerged, are not supporting efforts to regulate this sector.⁸¹ Eighty percent of existing PMSCs are established in the United Kingdom and the United States.⁸²

The existence of this binding instrument must be considered necessary to regulate and control PMSC activities.⁸³ The main reason for supporting the drafting of a binding legal instrument to regulate and control PMSCs is to address the existing difficulties to require and make effective the different responsibilities that may arise from

understand these initiatives as complementary, rather than substitutes for international and national regulatory frameworks).

80. See Chairperson of the U.N. Human Rights Council, *Report of the Working Group on the Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-Determination*, at 20, U.N. Doc. A/HRC/15/25 (Jul. 2, 2010) (aiming to create a binding instrument establishing minimum international standards for state regulation of PMSCs and their personnel); *Use of Mercenaries*, *supra* note 33, at 16-17 (recommending the adoption of an international legal instrument regulating PMSCs and encouraging States to participate in the Human Rights Council Working Group tasked with creating a new convention on this issue).

81. See GÓMEZ DEL PRADO & TORROJA MATEU, *supra* note 31, at 139 (discussing the various reasons that States rejected a conventional mechanism of regulation and control of PMSC activities: (1) the incompetence of the Human Rights Council, arguing that it is a matter for the Sixth Committee of the General Assembly because it is where the relationships between different branches of international law, such as international criminal law, international humanitarian law, and state responsibility law are studied; and (2) the existence of private initiatives for the regulation of the sector outside the United Nations, like the Swiss Initiative with the Montreux Document and other initiatives of the European Union and Council of Europe).

82. José L. Gómez del Prado, *Private Military and Security Companies and the U.N. Working Group on the Use of Mercenaries*, 13 J. CONFLICT & SEC. L. 429, 438 (2008) (remarking that regulation of PMSCs in the United States and United Kingdom seems to have been left up to the “invisible hand of the market”).

83. See G.A. Res. 67/159, at 2, U.N. Doc. A/Res/67/159 (Feb. 26, 2013) (expressing the General Assembly’s conviction that a legally binding, comprehensive, and international instrument must be adopted to ensure PMSCs are held accountable for human rights violations).

the actions of these private entities.⁸⁴ From the perspective of the international responsibility of the contracting state, it would be possible for the attribution of conduct PMSCs. However, the contracting state is not the only one that may incur international responsibility. At the same time, the other existing gaps, mainly regarding the responsibility of companies themselves, must be filled.⁸⁵ As evidenced by the reports of the Working Group, there exist many allegations of grave human rights violations committed by PMSC employees, ranging from summary executions to acts against the people's right of self-determination, through a series of complaints about acts of torture, arbitrary detention, human-trafficking, among others.⁸⁶

The draft convention regulating PMSCs specifies the general principles guiding the work of the U.N. Working Group. The text aspires to establish basic and minimum international norms for the regulation of the sector.⁸⁷ In other words, in the event that it becomes an international treaty, the States and international organizations would be faced with a series of primary rules that are applicable to all situations, independently of being or not defined as an armed conflict.⁸⁸ Their object and purpose is, on one hand, to prohibit the

84. See Urbina, *supra* note 45, at 173 (asserting that a legal framework for PMSCs must regulate the actions of PMSC personnel and should establish mechanisms to control the functions of such companies, assure transparency, and provide for individual and collective liability for abuses of human rights and international humanitarian law).

85. See Comité Internacional de la Cruz Roja, *supra* note 59, at 31 (remarking that PMSCs are not acting in a legal vacuum, as some critics argue, because their employees are bound by the rules of international human rights and humanitarian law, but in practice it becomes almost impossible to implement the rules due to the unwillingness or inability of the States and other stakeholders).

86. See H.R.C. Res. 2005/2, *supra* note 36, at 4 (citing concern that terrorism, arms trafficking, and covert operations may encourage mercenaries to participate in activities designed to impede the right to self-determination and the territorial integrity or political unity of sovereign and independent states).

87. See Red Cross Conference Report, *supra* note 61, at 35 (recounting that the Working Group reported back to the U.N. Human Rights Council in 2010 on the basic elements of a proposed international convention to regulate PMSCs).

88. See Office of the U.N. High Comm'r for Human Rights, Draft International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies 8 (Jul. 13, 2009), <http://www2.ohchr.org/english/issues/mercenaries/docs/A.HRC.15.25.pdf> [hereinafter Draft International Convention on Private Military and Security Companies] (establishing that the proposed convention would apply to States, intergovernmental organizations, and

delegation and/or contract of inherent duties to the State, such as the use of armed force by the PMSC, to ensure the respect and effectiveness of human rights.⁸⁹ In fact, the highlight of the draft convention is the recommendation about the prohibition of outsourcing of inherent state functions to PMSCs, in coherence with the principle that the State is the sole holder of the monopoly of the use to force.⁹⁰ On the other hand, the object and purpose is to establish a system to limit, control, and supervise the performance of PMSCs and also to punish the violations committed by contracts.⁹¹

In accordance with the above, the general principles guiding the proposed convention seems clear: (1) to reiterate the fundamental precept of the monopoly of force of the States; (2) to reaffirm the States' obligations to secure the respect for international humanitarian law and international human rights law by PMSCs; (3) to define those functions that should be inherent to the States and can neither be left in private hands nor externalized;⁹²(4) to propose normative systems, both internationally and nationally, creating a registration and licensing mechanism for PMSCs; (5) to establish an independent international committee composed of fourteen members that oversee the implementation of the convention while monitoring PMSCs' activities; and (6) provide a compensation system for potential victims of abusive actions committed by these security companies by creating an international compensation fund for victims with a subsidiary character.⁹³

non-state actors, including PMSCs and their personnel).

89. *See id.* at 5-6 (reciting that the purpose of the proposed convention is to reassert and promote States' responsibility for the use of force and address the challenges that PMSCs pose to the fully implementing human rights obligations).

90. *See id.* (declaring that some military and security functions are inherently governmental under international law and cannot be outsourced).

91. *See id.* (averring the need for a monitoring mechanism to regulate the licensing and activities of PMSCs).

92. *See* GÓMEZ DEL PRADO & TORROJA MATEU, *supra* note 31, at 101 (advocating for the establishment of a strong core of non-delegable functions, delimiting the content of the use of armed force in its technical sense, rather than regulating the principle of the prohibition of the threat or use of armed force in international relations that concerns the illicit use of force between the states).

93. *See* Draft International Convention on Private Military and Security Companies, *supra* note 87, arts. 15, 29, 32. *See generally* GÓMEZ DEL PRADO & TORROJA MATEU, *supra* note 31, at 93-134 (reviewing the content of the Draft Convention).

III. INTERNATIONAL RESPONSIBILITY ISSUES FOR VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW COMMITTED BY PRIVATE CONTRACTORS

This section addresses issues relating to the international responsibility of the State in accordance with the regulations examined, including the Montreux Document and the draft convention relating to the States concerned, including the contracting state, the state of operations, and the state of origin.⁹⁴ Regarding the Contracting State, the first paragraph of the Montreux Document states that: "Contracting States are bound by obligations imposed on them under international law, although they contract PMSCs to perform certain activities."⁹⁵ It is therefore a reminder of the State's international obligations, particularly those derived from international humanitarian law. However, with respect to the attributive issues, the seventh paragraph provides that:

Notwithstanding the fact that to establish contractual relations with PMSCs does not involve by itself the responsibility of the Contracting States, they are responsible for violations of international humanitarian law, human rights standards, or other rules of international law committed by PMSCs or their personnel when those violations are attributable to the Contracting State in accordance with customary international law.⁹⁶

94. See *Use of Mercenaries*, *supra* note 33, at 20 (observing that the terms used in the draft convention referring to the involved states are very similar to those employed in the Montreux Document with some variation; for instance, contracting states are those that "directly contract PMSC services, including, where appropriate, when that company subcontracts their services with another PMSC or when a PMSC operates through its affiliated companies (draft convention, art. 2(j)); the states of operations (referred to as "Territorial State" in the Montreux Document) are "the states in whose territory a PMSC operates" (draft convention, art. 2(k)); the State of Origin refers to "states whose nationality bears the PMSC" or put differently the States in which they are registered or have established companies; if the state in which a PMSC is registered is not the same as their principal office directives are located, the State of Origin will be the state in which such offices are found (draft convention, art. 2(l)); and, finally, third-party states are "states other than the Contracting States, or origin, or of operation, whose nationals are employed as employees of a PMSC" (draft convention, art. 2(m)).

95. *Status of the Protocols*, *supra* note 71, at 7.

96. *Id.* at 8 (emphasis added). According to customary international law, the Swiss Permanent Representative concluded that "the *imputation* to the Contracting State" will take place:

The most notable—although predictable feature—of this regulatory initiative is the intent to minimize the contracting state’s responsibility, explicitly excluding the consideration of the contract as a way of delegating or assigning public functions to PMSCs.⁹⁷ Unlike these provisions, the draft agreement is a reminder of the implicated States’ international obligations whose violation leads to their international accountability and at the same time the delegation is equated with the hiring.⁹⁸

Indeed, the most important precepts from the perspective of the State’s responsibility are articles 4 and 9 of the draft.⁹⁹ Article 4’s first paragraph establishes the “responsibility for military and security activities of PMSCs” for the state of origin and the state of operations, whether or not they hired them, thus pointing to the States’ obligations to watch and supervise the PMSCs’ activities.¹⁰⁰ As Gómez del Prado and Torroja Mateu point out in their comments on this provision, the wording of this provision relies on the premise that the draft agreement does not aim to address the problem relating

[P]articularly if PMSCs personnel: a) have been incorporated to the state as regular armed forces, in accordance with their national legislation; b) are members of forces, units or armed groups under a command responsible to the state; c) are empowered to exercise public authority prerogatives if they act in such quality (i.e., if they are officially authorized by law or by some other rule to perform functions that are normally carried out by state organs); or d) they act following state instructions (i.e., if the state has given specific instructions regarding the conduct of the private agent), or following their directives or under their control (i.e., if the state actually exercises effective control over the private agent’s conduct).

Id.

97. *See id.* (attributing responsibility to the contracting state for violating international law committed by a state-sanctioned PMSC exercising elements of governmental authority).

98. *See* GÓMEZ DEL PRADO & TORROJA MATEU, *supra* note 31, at 114 (discussing *three specific prohibitions*: direct participation in hostilities, terrorist acts, and a ban on military actions that are only prohibited when pursuing one of the objectives listed in article 9 (the closed list), such as the overthrow of the government or undermining the constitutional order or the legal, economic, and financial basis of the state; the modification, by coercion, of internationally recognized borders; the violation of sovereignty or the support of the foreign occupation of part or all the territory of the State; and the deliberate attacks against civilians or disproportionate damages, such as those that are contained in an open list of examples).

99. *See Draft Articles, supra* note 1, arts. 4, 9.

100. *See id.* art. 4 (establishing the States’ strict liability for actions of any state organ, regardless of its function, position within the state structure, or jurisdiction).

to the attribution of the State's conduct, considering the 2001 ILC draft governs this issue.¹⁰¹ Thus, the purpose of including this provision is to highlight the obligation imposed on the country of origin and operation—whether they coincide or not with the Contracting State—to regulate, supervise, and control the activities of PMSCs.¹⁰² As these scholars note, “it could be a concretion of the general duty of prevention that the States have: preventing acts committed under their jurisdiction that may cause harm to other States or to the international community at large.”¹⁰³ Likewise, in the second paragraph of the same precept, an obligation expressly directed to the contracting state is collected, oriented to guarantee the instruction of PMSCs staff on international standards and their respect, thus extending to private contractors the international obligation placed on States respective to their organs and persons acting under its effective control.¹⁰⁴

However, the main difference with the Montreux Document is the equalization that is made in article 9 of the draft agreement between delegation and engagement.¹⁰⁵ Notwithstanding the fact that the draft agreement does not aim to examine questions relating to the attribution of conduct to the State, the equalization that is carried out favors the interpretation that the suitability of the application of article 5 of the 2001 ILC Draft in these cases.¹⁰⁶ It is possible to attribute the PMSC conduct to the contracting state to determine its international responsibility when public functions are delegated to

101. GÓMEZ DEL PRADO & TORROJA MATEU, *supra* note 31, at 111 (arguing that the text of the ILC Draft uses the terminology “state responsibility for the use of force,” in reference to the principle implicit in article 1.1 of the Convention, which addresses strengthening state accountability with regard to the use of force and emphasizing the significance of the monopoly on the legitimate use of force).

102. *Id.* (noting that the generic prohibition on the delegation or contracting of the use of force under article 9 eventually became linked to the principle of state monopoly on the legitimate use of force).

103. *Id.* at 110-11.

104. *See id.* (commenting that the second paragraph also establishes the States' obligation to adopt legislative measures concerning procedures for contracting and subcontracting PMSCs, forwarding export and import licenses for personnel and services, and effective customs controls for firearms used by PMSCs).

105. *See, e.g., Use of Mercenaries, supra* note 33, at 4 (prohibiting delegation of state functions).

106. *Draft Articles, supra* note 1, art. 5 (holding that an act by a non-state party authorized to act by a State shall be considered a state act under international law).

those companies, even though an act of the executive (contract) delegates the public function, as often happens in practice.¹⁰⁷ Indeed, article 9 of the draft convention intends to “[p]rohibit[] . . . the delegation or outsourcing of the inherent duties to the State.” Although its purpose is to prohibit States from delegating or contracting the development of inherently state functions to PMSCs, the article uses the disjunctive “or” when it refers to the way in which the attribution can take place, equating delegation and engagement.¹⁰⁸

In this way, the Montreux Document seems to deliberately stress the international obligations incumbent on the territorial state and the state of origin, and consequently the international responsibility derived from the PMSCs’ actions, to the detriment of the international responsibility of the contracting state.¹⁰⁹ In contrast, the main novelty of the draft convention in the context of primary rules is to extend to contractors the general obligation of instruction on international standards incumbent on States over their own organs.¹¹⁰ Nevertheless, because the proposed convention also attempts to establish international obligations for concerned states different from the contracting state, an extension for the state of origin of the international obligations incumbent on the territorial State and the establishment of primary obligations in relation to that State is necessary. Such international obligations can be an incentive to minimize the risk of infringement by PMSC employees and ultimately the most undesirable consequences of this phenomenon.¹¹¹

107. See *Use of Mercenaries*, *supra* note 33, at 22 (mandating each party define and limit the scope and activities of PMSCs).

108. *Id.* at 22 (providing that attribution may occur as the result of “hostilities, terrorist acts and military actions aimed at, or which states have grounds for suspecting would result in the overthrow of a government; the coercive change of internationally acknowledged borders of the state; the violation of sovereignty; explicitly targeting civilians or causing disproportionate harm”).

109. DOCUMENTO DE MONTREUX, *supra* note 43, at 13 (mandating that States retain obligations under international law even if they contract PMSCs).

110. *Use of Mercenaries*, *supra* note 33, at 21 (providing instructions for mandatory instructions of PMSCs in international human rights and international humanitarian law).

111. See Perrin, *supra* note 42, at 312 (noting that States obey international law when it suits their short or long-term interests; the States where PMSCs are constituted “will guarantee respect for [international humanitarian law] when convenient for its reputation” and “[t]here is clear evidence that national regulatory

Even though acts committed by PMSC personnel theoretically should be attributed to the contracting state under article 5 of the 2001 ILC Draft, the territorial state is still bound by its international obligations. Moreover, the territorial state has the duty to establish basic standards, such that the state of origin may regulate the activity of PMSC personnel in the event of a breach. Likewise, a breach would trigger both the international obligations of the territorial state or the state of origin and the contracting state.¹¹² That is, the attribution of the conduct of PMSCs to the contracting state would require qualifying the act of the contractors as an act of the State, regardless of eventual international responsibility that might arise in relation to the other implicated States in the case that at the same time it was proved that they have violated their international obligations.¹¹³ In particular, the Territorial State could engage responsibility for infringement of their obligations of preventing and/or repressing the acts of contractors and the State of Origin for violating their obligations to control and supervise the PMSCs.¹¹⁴

After examining these attempts of positive regulation and regarding attributive issues, according to the jurisprudence and state practice, the question arises who is responsible for responding to the infractions committed by PMSC employees? However, the contracting of a PMSC service is not prohibited by international law,

authority is launched when there are allegations of improper conduct by PMSCs abroad. South Africa was subjected to international pressure in order to control notorious companies based in that country (especially *Executive Outcomes*) which lead to the adoption of the Law on Regulation of Foreign Military Assistance in 1998"; accordingly, States of Origin will have an economic interest in promoting the perception that private entities registered in their territory are lawful; however, this author considers that it should not overestimate the strength of this incentive since the same is based on "the presumption that 'bad' PMSCs are not profitable" which is refuted in his study).

112. *Draft Articles, supra* note 1, art. 5 (describing non-state acts as acts under international law when supported by state).

113. Perrin, *supra* note 42, at 317 (offering holding states responsible for PMSC acts in situations as a counterbalance to the risk of "othering").

114. *Id.* (asserting that when State where the PMSC operates—the *Territorial State*—is different from the *Contracting State*, the conduct of PMSC personnel should be viewed as behavior of private individuals, without prejudice to any international responsibility for violating their obligations of preventing and/or suppressing on part of the state organs with respect to the acts committed by contractors).

even though this may not lead to a transfer of responsibility,¹¹⁵ as is currently the case. Moreover, this is a complex matter and the international responsibility of the state for the conduct of private contractors remains a controversial issue.¹¹⁶

Despite this, concluding that in cases in which States enter into contracts with PMSCs and their employees carry out the functions of the State, such as engaging in hostilities, the State is completely irresponsible for the conduct of the persons that, according to its own decision, perform its functions.¹¹⁷ This is why the criterion recognized in article 5 of the 2001 ILC Draft acquires a clear relevance in these cases.¹¹⁸ Its application would involve the attribution to the State of the conduct carried out by the persons and entities that perform public functions.¹¹⁹ Moreover, if as Benjamin Perrin notes, taking into account one of the causes of contracting PMSC services is to gain distance from contracted tasks, “political or even legally”, because such tasks are occasionally “inappropriate or unpopular.”¹²⁰

Perrin, following criminologists like Ruth Jamieson and Kieran McEvoy, maintains that “States try to mask their responsibility for state crimes outsourcing both perpetrators and victims.”¹²¹ In the same line, as Perrin rightly maintains, following the political scientist P.W. Singer, “a key risk of PMSCs is that they allow governments to

115. See Carsten Hoppe, *Passing the Buck: State Responsibility for Private Military Companies*, 19 EUR. J. INT'L L. 989, 1014 (2008) (providing that States are free under international law to outsource functions in armed conflict, such as guarding and protection, interrogation, or even combat, which formerly were in the exclusive domain of soldiers, although they are not free to “pass the buck” with respect to responsibility).

116. See Laborie Iglesias, *supra* note 32, at 78 (identifying the lack of an obligation for PMSCs to justify their actions and be subjected to legal consequences by authorities as the principal problem associated with private security and military forces).

117. Antonio Pastor Palomar, *Blackwater ante el Derecho internacional: el negocio de la inmunidad*, 60 REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL 426, 430 (2008) (stating that contracting state functions to private military groups cannot be used to circumvent international law).

118. *Draft Articles, supra* note 1, art. 5 (attributing international law to PMSCs supported by States).

119. *Id.* (noting that this provision is limited to circumstances where the person or entity is exercising elements of the governmental authority).

120. Perrin, *supra* note 42, at 316.

121. *Id.* at 312, 316 (internal quotations omitted).

perform actions that would otherwise not be possible, as they would not receive legislative or public approval.”¹²² Therefore, no doubt exists that the “combination of the dependence of PMSCs to do the ‘dirty work’ and the elimination of democratic oversight is a worrying prospect, which increases the risks of [international humanitarian law] violations.”¹²³

The main reason why the drafters included the current article 5 in the 2001 ILC Draft focuses on the nature of the role played, as opposed to what happens in article 8, where the nature of the function is not decisive and the decisive factor is the relationship or existing link.¹²⁴ The feature that characterizes the individuals or entities referred in that article is empowering individuals and entities to perform certain functions that the state organs assume as a general rule.¹²⁵ In other words, the basis of attribution criterion contained in article 5 of the ILC Draft 2001 is the State delegating its own functions and individuals consequently exercising those functions.¹²⁶

When at the end of the last century, James Crawford studied this criterion, he acknowledged that an increasing number of parastate entities exercise government functions. At the same time, he justified maintaining the term entity by its amplitude in order to include both public institutions and private law firms.¹²⁷ All this, without prejudice to the observations of some governments, such as Yugoslavia,¹²⁸ proposing a clause in the draft that defined what should be understood by an “entity which exercise[s] elements of public governance,” a proposal that was rejected by the Rapporteur.

122. P.W. Singer, *Outsourcing War*, 84 FOREIGN AFF. 119 (2005) (citing Perrin, *supra* note 42, at 312, 316) (internal quotations omitted).

123. Perrin, *supra* note 42, at 312, 317; *see also* CANO LINARES, *supra* note 31.

124. *Draft Articles*, *supra* note 1, art. 8 (describing laws where a person is acting on instructions of or under direction or control of the state).

125. *Id.* (considering an act to be a state act when a person’s action is under control of the State).

126. *Draft Articles*, *supra* note 1, arts. 5, 8 (regulating actors who are not state organs but exercise elements of government authority).

127. *See* Special Rapporteur, *First Report*, *supra* note 14, at 38 (arguing that the term “entity” is wide enough to cover a range of bodies).

128. *Observations and Comments of Governments*, *supra* note 12 (noting government commentaries and observations advocating for placing article 8 after articles 9 and 10).

Despite problems with delegating or authorizing the exercise of public function in favor of these entities, it is possible to conclude from Crawford's comments that the distinction between individuals whose conduct fall under the article 5 criterion and individuals whose conduct should be classified under article 8 is that the delegation of authority or authorization shall be in accordance to the law of the State.¹²⁹ Thus, this formula covers contracts between the State and PMSC, with or without the intervention of legislative power, through which a concrete public function or prerogative is entrusted, such as the use of force. If this authorization exists even by contract, then article 5 should be the basis of attribution without resorting to the criterion contained in article 8 of the 2001 ILC Draft.¹³⁰

Accordingly, under the attribution criterion and the formula endorsed in article 5 of the ILC Draft, there are three requirements: (1) entity empowered by the internal law of the State (de jure link); (2) authorized to exercise prerogatives of public authority (functional criterion); and (3) the conduct has been committed when the person or group of persons acted in that capacity, which is similar to the established requirement relating to the state organs in article 4 of the 2001 ILC Draft Convention.¹³¹ Thus, unlike the consequences in relation to the armed forces in the field of international humanitarian law,¹³² under general international law, the attribution of the conduct

129. *Draft Articles, supra* note 1, art. 5 (clarifying that actors are empowered by the law of that State).

130. *See, e.g.,* James Crawford, Human Rights and State Responsibility, Address at the 12th Raymond & Beverly Sackler Distinguished Lecture Series at the University of Connecticut's Thomas J. Dodd Research Centre (Oct. 25, 2006) (using the verb *contract* to refer to the form of delegation or attribution of public functions under the criterion contained in article 5 of the 2001 ILC Draft and maintaining that "[a] non-state actor might be engaged by the state to 'exercise elements of the governmental authority'; where this is the case, conduct of the non-state actor may be attributed to the state. According to ARSIWA Article 5" and indicating that: "[t]here are various situations in which non-state actors are agents of a state; for example, in recent years, in some countries, public bodies have contracted with private security firms to take over the management of prisons; this is an example of a private party acting as an agent of the state, a situation in which its acts will be attributed to the state for international law purposes").

131. *Draft Articles, supra* note 1, arts. 4-5 (providing that the conduct of any state organ should be considered an act of the state under international law pursuant to article 4).

132. Marco Sassòli, *La responsabilidad del Estado por las violaciones del*

is excluded when contractors acts in a private capacity. It could be argued that these requisites may be considered satisfied in cases where a State delegates its typical functions to a PMSC and its contractors, acting in the exercise of this functions, commit acts that can be qualified as international wrongful acts.

However, as Perrin rightly notes, “the responsibility of the State largely remains a theoretical question, and has been rarely invoked in practice.”¹³³ Indeed, the logical reasoning that is possible on a theoretical level is not, however, applicable in practice. Unfortunately, despite its consecration in the coding work of the ILC and its invocation by the International Court of Justice (“ICJ”) when it examines questions relating to the attribution of the conduct to the State,¹³⁴ the attribution criteria under article 5 of the 2001 ILC Draft seems only apply to very specific cases and face serious problems of application when applied to the actions of PMSCs.¹³⁵ Multiple reasons explain this reality.

A. THE PMSC: THE EXISTENCE OF AN INVOLVED THIRD PARTY

First, the existence of an involved third party (the PMSC). In the ordinary cases when the state organs act, there are two responsibilities that may coexist: the state responsibility and the individual one.¹³⁶ However, when the State delegates their functions

derecho internacional humanitario, COMITÉ INTERNACIONAL DE LA CRUZ ROJA (June 30, 2002), <https://www.icrc.org/spa/resources/documents/misc/5tecbx.htm> (stating that, in accordance with article 3 of the Regulations concerning the Laws and Customs of War on Land, annexed to the Fourth Hague Convention of 1907, the State is responsible for the acts performed by persons that form part of their armed forces in violation of this rules, regardless of whether they had acted in such quality or privately; this special provision relating to attribution was subsequently included in article 91 of the Additional Protocol to the Geneva Conventions of August 12, 1949 (Protocol I), adopted in 1977, which establishes that a party to the conflict “shall be responsible for all the acts committed by persons that form part of their armed forces;” this provides a clear example of *lex specialis* in the field of the attribution rules).

133. Perrin, *supra* note 42, at 317.

134. See *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. 168, 226, 242 (Dec. 19) (examining whether actions were under instructions or control of the State).

135. *Draft Articles*, *supra* note 1, art. 5 (providing the criteria for attribution regarding the conduct of persons or entities exercising elements of governmental authority).

136. *Id.* arts. 56, 58 (describing state and individual responsibilities otherwise

to a PMSC, a third party appears on stage. The current trend implies that the attention on the State's international responsibility is diverted toward the debate about the responsibility that should be claimed to PMSCs.¹³⁷ In the same way that both types of accountability exist in cases of concurrency of individual and state responsibility, the resource to PMSCs cannot lead to a decline in the State's international responsibility.¹³⁸

In this practice by the contracting state and PMSC, declining and transferring their responsibility for infractions committed by private contractors, no doubt exists that both parties are benefiting from avoiding their responsibility in most of cases in detriment to victims.¹³⁹ Given the current reality where convictions do not exist against the States for the performance of PMSCs, the only affordable option for victims is to seek redress by suing the private entity;¹⁴⁰ however, the problem that victims face when they demand before national courts is the strategy that PMSCs are actually using. In fact, in recent years under the Alien Tort Claims Act ("ATCA") with respect to PMSCs,¹⁴¹ there have been several lawsuits presented

not regulated).

137. See MARGALIDA CAPELLÀ I ROIG, *LA TIPIFICACIÓN INTERNACIONAL DE LOS CRÍMENES CONTRA LA HUMANIDAD* (2005).

138. *Id.*

139. *Id.*

140. *Id.*

141. See *id.* at 337-39 (arguing that ATCA foresees a mechanism of civil responsibility before U.S. courts through which the victims of violations try to obtain reparation for harm suffered, regardless of the place of events and the nationality of the victim, and with the only requirement to enable the Tribunal's jurisdiction that the defendant was found on American territory at the moment of the filing of the suit); Daniele Amoroso, *Moving Towards Complicity as a Criterion of Attribution of Private Conducts: Imputation to States of Corporate Abuses in the US Case Law*, 24 LEIDEN J. INT'L L. 989, 999 (2011) (applying ACTA to corporate human rights violations); Marta Requejo Isidro, *Responsabilidad civil y derechos humanos en EEUU: ¿el fin del ATS?*, 2011 REVISTA PARA EL ANÁLISIS DEL DERECHO 1, 31 (remarking that most claims brought under ATCA have not made it through the early stages of proceedings); Andrew Clapham, *Obligaciones dimanantes de los derechos humanos para los actores no estatales en situaciones de conflicto*, 88 INT'L REV. RED CROSS 1, 27-29 (2006) (arguing that based on the holding in *Sosa v. Alvarez-Machain* and other cases, it can clearly be seen how the reasoning in such cases under ATCA may be applied to PMSCs accused of human rights violations in other situations); Norman Farrell, *Attributing Criminal Liability to Corporate Actors: Some Lessons from the International Tribunals*, 8 J. INT'L CRIM. JUST. 873, 884-86 (2010) (requiring that

against private companies.¹⁴² By way of example, the Center for Constitutional Rights filed a lawsuit on behalf of the Abu Ghraib prisoners in 2004 against CACI International, Incorporated and Titan Corporation, companies that had been contracted by the United States to provide interrogation and interpretation services to coalition forces in Iraq.¹⁴³

However, the strategy used by PMSC defendants to avoid their responsibility is to adduce that their personnel were integrated in the military structure of the contracting state or that the contractors received instructions or were under the effective control of state organs.¹⁴⁴ Under this argument, claims brought against them by victims should be rejected because the State would be the only subject internationally responsible for the acts of private

the defendant must have provided substantial assistance with purpose of aiding and abetting for liability under ACR to attach); Éric Mongelard, *Responsabilidad civil de las empresas por violaciones del derecho internacional humanitario*, 88 INT'L REV. RED CROSS 1, 16-20 (2006) (noting that ATCA case law has established that corporations are obligated to respect international humanitarian law in some capacity); Pozo Serrano & Hernández Martín, *supra* note 64, at 345-47 (discussing how ATCA has most recently come into the limelight after the lawsuit against Blackwater employees for their actions in Iraq was filed); Francisco Javier Zamora Cabot, *La Responsabilidad de las empresas multinacionales por violaciones de los derechos humanos: práctica reciente*, 1 HURI-AGE CONSOLIDER-INGENIO 1, 8-9 (2012) (arguing that ATCA's extraterritorial reach is limited, aside from its significance in giving victims of human rights abuses a forum to bring their claims); Francisco Javier Zamora Cabot, *Los derechos fundamentales en clave del Alien Tort Claims Act of 1789 de los EE.UU. y su aplicación a las corporaciones multinacionales: "The ATCA Revisited"*, CATEDRÁTICO DE D^o INTERNACIONAL PRIVADO 333, 351-52 (2006) (discussing the *Doe v. Unocal* holding, where the federal circuit court ruled against a major corporation and applied an aiding and abetting test to evaluate the corporation's complicity in the Burmese government's actions).

142. See Pozo Serrano & Hernández Martín, *supra* note 64, at 348 (stating more exactly, the victims or their families may file their claims for violations of international law, which in practice are usually directed against legal persons; since the 1980s, its application resurged and big companies, such as Unocal, Bridgestone, and Nestle, among others, have been sued.)

143. See *id.* at 346 (stating that the case against CACI International Inc. was the first case involving PMSCs in Iraq to go to trial after the judge overseeing the case rejected a motion to dismiss).

144. See *id.* at 331 (remarking that if the employees of CACI International Inc. and Titan Corp. are deemed to be integrated into the structure of the military, their actions would fall under the ambit of state responsibility).

contractors.¹⁴⁵ As Pilar Pozo Serrano and Lourdes Hernandez Martin note, *Ibrahim v. Titan Corp.*¹⁴⁶ addressed this argument. Indeed, in this case, the judicial body concluded that the interpretive tasks were performed under direct orders and exclusive control of military personnel and consequently dismissed the suit.¹⁴⁷ However, in the case of *Al Shimari v. CACI*, the court reached a more satisfactory conclusion, to the extent that it found that interrogators acted under a dual chain of command (armed force and PMSC), saving its competence to hear the case, and admitting that the company could therefore have incurred civil responsibility.¹⁴⁸

Therefore, with the objective that both parties do not succeed in transferring responsibility at the expense of the victims, the infractions committed by the contractors in exercising the functions delegated to the PMSC deserve the consideration of acts of the State and consequently the contracting state has to be declared internationally responsible.¹⁴⁹ A different question is when and how the State could claim the compensation to the PMSC that it has to pay as a result of its international responsibility. Nevertheless, these are questions that exceed the scope of international law and have to be resolved by the national law of each State.

B. THE LACK OF PRECEDENTS AND STATE PRACTICE

Second, the lack of precedents and state practice has led the doctrine to sustain the precedence of different attribution criteria in these cases. When academic world analyses the possible attribution to the State of the wrongful acts committed by the private contractors, it normally has recourse to the criteria contained in

145. *Id.*

146. 391 F. Supp. 2d 10 (D.D.C. 2005); see Pozo Serrano & Hernández Martín, *supra* note 64, at 332 (describing that lawyers on behalf of the PMSCs, in its defense, argued that the employees were fully integrated into the military's hierarchy and therefore their actions should be considered "combat activities").

147. Pozo Serrano & Hernández Martín, *supra* note 64 (noting that CACI International Inc. employee were deemed as acting under a dual chain of command on behalf of both the military and their company and thus they were capable of responding "civilly").

148. Pozo Serrano & Hernández Martín, *supra* note 64, at 332 (stating that "this interpretation refers only to the effects of the eventual civil responsibility of the companies, but does not impact the individual responsibility of employees that participated in such cases").

149. *Id.*

articles 5 and 8 of the 2001 ILC Draft.¹⁵⁰ Predominantly, scholars conclude by discarding the application of the criterion under article 5 of the 2001 ILC Draft and determining that article 8 of the 2001 ILC Draft is applicable to these cases.¹⁵¹ Indeed, in the first instance, scholars often refer to the attribution criterion enshrined in article 5 of the ILC Draft at least to cover the acts performed by private contractors that may be considered the State's the public prerogatives, such as participating in hostilities. However, scholar usually consider article 5 inapplicable because delegating public authority should be in accordance with the law and that a contract between the executive power and the private entity is an insufficient basis for the attribution.¹⁵² Based on this interpretation of the form of the delegation of public functions,¹⁵³ part of the doctrine excludes applying article 5 and the corresponding qualification of contractors as de jure agents, demanding the concurrence of the requirements—instructions, direction, or control—to affirm the state responsibility contained in article 8 of the 2001 ILC Draft and consequently the qualification of the individuals as de facto agents.¹⁵⁴

Meanwhile, another doctrinal sector considers the concurrence of both attribution criteria requirements is necessary, namely delegating functions and providing the State with effective control at the

150. See Emanuela-Chiara Gillard, *Business Goes to War: Private Military/Security Companies and International Humanitarian Law*, 88 INT'L REV. RED CROSS 525, 554-55 (2006) (discussing attribution of power through articles 5 and 8).

151. See *id.* at 555 (describing the narrow application of both articles).

152. *Id.* at 554-55 (maintaining that the requirement that the entity must be empowered by the law of that State significantly limits the scope of the provision and the existence of a contract between the State and the company is insufficient per se to bring the latter within the scope of the provision).

153. *2001 Draft Articles*, *supra* note 29 (remaining silent about the way that delegation of public functions must be performed by law and failing to mention that it takes place by executive action and that the determining factor concerns persons or groups of persons empowered to exercise prerogatives of public power.)

154. See Francesco Francioni, *Private Military Contractors and International Law: An Introduction*, 19 EUR. L.J. 961, 962 (2008) (requiring state control and discarding the criterion contained in Article 5 of the 2001 ILC Draft for considering that the contract is not enough and maintaining that that "private military 'contractors' are by definition only in a contractual relation with the hiring state. Thus their acts are not in principle acts of state but acts of private people, even though their services often entail carrying weapons and exposing other people to the risk of injury").

moment of the infraction.¹⁵⁵ This cumulative requirement of both requisites may be due to the fact that, in the only occasion where a party raised it before the ICJ in a case relating to the application of attribution criterion encompassed in article 5 of the 2001 ILC Draft, the global court preferred to use the criterion contained in the current article 8 of the coded work.¹⁵⁶ The relevant case refers to the judgment that ended the military and paramilitary activities in and against Nicaragua, in which there were concerns about the behavior of the Unilaterally Controlled Latino Assets.¹⁵⁷

However, although the attribution criterion used by the Court—if not the most appropriate as Ago maintained in his individual opinion,¹⁵⁸ could be justified,¹⁵⁹ it is unclear why the doctrine insists

155. ESPALIÚ BERDUD, *supra* note 39, at 157-58 (“[T]he rules that we have evidenced above on the responsibility of the state for the activities of mercenaries apply *mutatis mutandis* to the employees of private military companies . . . [t]hat is, the state would not assume any responsibility unless it had control of the operation carried out and that if the denounced conduct could be considered as an integral part of the operation in question”); Pastor Palomar, *supra* note 117, 442-43 (distinguishing the responsibility of contracting states from that of host states); Jaume Saura Estapà, *Algunas reflexiones en torno a a privatización de la guerra y la seguridad y sus consecuencias en el disfrute de los derechos humanos*, in LA PRIVATIZACIÓN DEL USO DE LA FUERZA ARMADA 241, 254-55 (2009) [hereinafter Saura Estapà, *Algunas reflexiones*] (arguing that determining the degree of delegation of functions and effective control may be a herculean task—one which requires the traditional framework of state responsibility to be reframed); Saura Estapà, *Las Empresas*, *supra* note 35, at 16 (boiling down the definition of “control” to mean when a State enjoys the fruits of a PMSC’s labor and provides it legal impunity for its acts); Urbina, *supra* note 45 (maintaining that “the condition of belonging to a party to the conflict means the existence of a factual link between the armed group in question and the state whose name it acts, . . . [which] in the case of PMSCs, this requisite would be met with the existence of a contract with the state in which the functions that the company will have to play in its name are defined”).

156. See *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, 45-46 (June 27) (using article 8 in place of article 5 criterion in considering actions of persons acting on the instruction of the United States).

157. *Id.* (when referring to acts committed by this group that were attributed to the United States, the Court considered that it was indeed in presence of persons acting *on behalf of the state* and falls under the criterion provided in Article 8(a) of 1996 ILC Draft and providing that the ICJ considered: (1) the existence of *specific instructions* in relation to acts contrary to international law; (2) action *under the supervision* of American authorities; and (3) Participation of American agents in the *planning, direction, support, and execution* of operations).

158. *Id.* (separate opinion of Judge Ago) (opining that the conclusion reached

that the requirements of both criteria overlap. Even more, when the commentaries of the ILC expressly stated that, in those cases, unlike the application of article 8, "it is not necessary to show that the behavior was effectively verified under the control of the State,"¹⁶⁰ and the ICJ now recognizes the customary nature of the attribution criterion set out in article 5 of the 2001 ILC Draft.

C. STATES INCUR INTERNATIONAL RESPONSIBILITY FOR VIOLATING POSITIVE OBLIGATIONS IN INTERNATIONAL HUMANITARIAN LAW

Third, the possibility is that the State incurs international responsibility for violating positive obligations in international humanitarian law instead of for the individual's acts. Rather than the behavior of private contractors being attributable to the contracting state, the doctrine sometimes provides recourse with an alternative solution that also implies the State's international responsibility, but for the conduct of their own organs regarding the behavior that the contractors observed.¹⁶¹ The conduct of individuals or entities may

by the Court was correct, but it would have been more appropriate to attribute the acts to the United States by way of article 7 of the 1996 ILC Draft (now article 5 of the 2001 ILC Draft) because these were individuals who exercised elements of governmental authority *previously authorized* by the state and further being *paid* for the performance of those functions in the framework of the Nicaraguan conflict).

159. *But see* SIMON OLLESON, BRITISH INST. OF INT'L & COMPARATIVE LAW, THE IMPACT OF THE ILC'S ARTICLES ON RESPONSIBILITY OF STATES FOR INTERNATIONALLY WRONGFUL ACTS 64 (2007) (referencing the decision in article 8 of ILC Draft criterion, since at the time this criterion was already considered as a part of customary international law, unlike the dubious customary nature contained in article 5, although the conclusion reached in this particular situation would have been exactly the same independently of whatever criterion was chosen; this implies that the state should respond to all of the acts committed by individuals qualified as persons who exercise prerogatives of power public, including *ultra vires* acts; in contrast, considering private contractors as individuals that act under instructions from or under the direction or control of the State, means that the State is not responsible for *ultra vires* acts committed; in other words, the same result will be achieved regardless of whether the criterion contained in article 5 or article 8 of the 2001 ILC Draft is attributed).

160. *See* Rep. of the Int'l Law Comm'n, 53rd Sess., Apr. 23-June 1, July 2-Aug. 10, 2001, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001).

161. *See* Gillard, *supra* note 152, at 556 (arguing situations where acts of contractors cannot be attributed to a State may still lead to direct responsibility of the State for its own violations of the law because the State failed either to meet its

not be attributable a State as a general rule. For example, the impossibility of applying the criteria contained in articles 5 and 8 of the 2001 ILC Draft in a specified case does not prevent the State from possibly incurring international responsibility for the breach of their international obligations as a result of an individual's harmful acts.¹⁶² Here, the origin of the responsibility lies in the behavior of their own bodies contrary to its international obligations in preventing and/or suppressing the individuals' acts, without prejudice that this international responsibility sometimes entails the obligation of the State to repair the entire damage caused by individuals.¹⁶³

In certain areas like international human rights law and international humanitarian law, the State currently has negative obligations (obligations not to act) and positive obligations (obligations to act). In the field of the *jus in bello*, positive obligation entails the duty to respect and ensure respect for international humanitarian law, as established in article 1 of the Geneva Conventions.¹⁶⁴ Thus, States are obliged to take all necessary measures to ensure and guarantee that their armed forces comply with the provisions of this regulatory sector, which States satisfy not only with divulgation, instruction, formation, and training of their armed forces on these rules, but also supervising individuals.¹⁶⁵

The immediate question is whether contracting states have this same obligation in relation to PMSC personnel. Contracting states have the same obligation to PMSC personnel when the private contractors are integrated into the armed forces or when they are "acting on its behalf or under its direction and control."¹⁶⁶ If the State

obligations under international humanitarian law or to take the necessary steps to ensure respect for the law).

162. *Id.*

163. OLLESON, *supra* note 161, at 204 (stating this obligation to repair the full damage usually takes place in cases of international responsibility of the State for violation of its *positive obligations* in the field of international human rights law, in accordance with the jurisprudence of the regional human rights bodies).

164. Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 1, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva Convention] (establishing this duty for contracting parties in all circumstances).

165. Gillard, *supra* note 152, at 551 (outlining states obligation to ensure armed forces, including PMSCs, comply with international humanitarian law).

166. *Id.*

delegates or contracts inherently state functions, does it get out of their international obligations according to international humanitarian law? An affirmative answer is unacceptable. With the argument that PMSCs do not form part of the regular chain of command and their acts are independent and not coordinated with the military operations of the contracting state or defined by its organs, these States argue that they are not internationally responsible for harmful acts performed by contractors. Currently, the specific regulatory framework is seeking to change this rule and require States to be responsible for the harmful acts of contractors by implementing new primary rules.¹⁶⁷ In this sense, it should be emphasized that one of the international obligations contained in article 4 of the 2010 draft convention of PMSCs is the obligation of the contracting state to ensure that private contractors respect and comply with international humanitarian law.¹⁶⁸

However, before taking into account this regulatory framework, it is necessary to distinguish two cases to assert the responsibility of the State for violating its positive obligations in relation to the conduct of the PMSC. It is currently impossible to attribute the actions of private contractors to the contracting state by applying the attribution criteria to determine if the State incurs international responsibility in spite of violating its international obligations. Therefore, it is necessary to distinguish between the State contracting PMSC services for developing their functions in its territory during an armed conflict or in the territory of another State. In the first case, the State is internationally bound by the rules of international humanitarian law and international human rights law (negative and positive obligations).¹⁶⁹ In other words, the State organs are bound by

167. *Id.* at 553 (discussing the recent restatement of state responsibility in international law by the ILC in the 2001 Articles on Responsibility of States for International Wrongful Acts).

168. *Use of Mercenaries*, *supra* note 33, at 21 (placing responsibility for PMSC activities on the State).

169. See Chia Lehnardt, *Private Military Companies and State Responsibility* 1, 16 (Inst. for Int'l Law & Justice, N.Y. Univ. Sch. of Law, Working Paper No. 2007/2, 2007) (holding that states are obliged to respect, protect, and guarantee human rights and thus when it is not possible to attribute the acts of PMSC employees to a State, States must *prevent and suppress* human rights violations that may be committed by them; the *degree of diligence required by the State* will depend on specific circumstances, such as the actors of the game (a protected group), or the type of contracted activity the presence of a potentially dangerous

the positive obligations of preventing human rights abuses in relation to the conduct of the employees of PMSCs,¹⁷⁰ in addition to due diligence obligations that are enforceable when events take place in the State Territory or under its jurisdiction. From the perspective of redressing victims' rights, this solution becomes comparable to attributing PMSC conduct to the State. If a party proves that a state origin infringed positive obligations, the State will respond for the full damages caused by private contractors.¹⁷¹ This solution is also applicable to territories under the effective control of the State, which includes the occupying power by direct or indirect administration of the territory.¹⁷²

In the second kind of cases, when the State contracts the services of PMSCs to develop their activity in the territory of the other State, the former is not bound by their obligations concerning its territory or zones under its jurisdiction or control. The only enforceable obligations are the ones established by international humanitarian law, requiring respect and ensuring respect.¹⁷³ Regarding private contractors, the State violates these obligations if it does not introduce specific contractual clauses concerning respect for human rights rules in general.¹⁷⁴ As a consequence, when it is possible to prove that the State failed to comply with its obligations according to

activity).

170. GÓMEZ DEL PRADO & TORROJA MATEU, *supra* note 31, at 81 (commenting that even if States outsource some of their functions, they are still responsible for applying their positive human rights obligations at the national level in several dimensions, including by passing legislation and taking appropriate measures to “prevent, investigate, sanction, and provide effective remedies for the abuses that have been committed by PMSCs and their personnel”).

171. *See id.* (noting that the binding legal instrument proposed by the Working Group emphasizes the need for both measures to “promote transparency, responsibility and accountability when contracting or subcontracting out to PMSCs and their personnel” and the “creation of mechanisms for the rehabilitation of victims”).

172. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Judgment, 2005 I.C.J. 168, 226, 242 (Dec. 19) (holding the latter State responsible for the acts committed by the rebels in zones where, previously, it had considered this State as an occupying power).

173. Geneva Convention, *supra* note 166, art. 1.

174. *See* CANO LINARES, *supra* note 31; GÓMEZ DEL PRADO & TORROJA MATEU, *supra* note 31, at 77 (pointing out that the Security Council has so far remained silent on the use of PMSCs, whose sole obligations are based on the provisions of the contract they sign).

international humanitarian law by not including specific clauses in the contract, for example, it will incur international responsibility under the basic principle that the State is responsible for the actions of their organs.¹⁷⁵ However, this solution implies limiting the international responsibility of the contracting state solely to the violation of its international obligation to ensure respect of international humanitarian law, in cases where it has delegated its public functions.¹⁷⁶ This is an unsatisfactory solution, even more so because it seems deliberately designed by the States to incur an international responsibility of a lesser degree.¹⁷⁷

This solution favors the contracting state because it displaces the criterion applicable in these cases and enables it to avoid the attribution of private contractors' conduct.¹⁷⁸ Indeed, if a State delegates the exercise of public functions to a PMSC and does not supervise or exercise some control over the PMSC performing these functions, it becomes the perfect alibi to avoid that the harmful acts of private contractors from being considered acts of the State.¹⁷⁹ In this way, the State avoids attribution of conduct of private contractors and incurs the international responsibility not for those acts, but for the action of their own organs in violation of their obligation to ensure respect for international humanitarian law.¹⁸⁰

175. See CANO LINARES, *supra* note 31, at 70 (discussing the problems that arise when determining attribution due to different levels of state and individual responsibility for violations of international humanitarian law).

176. *Id.* at 76 (remarking on the use of PMSCs as "agents" or "delegates" of the State).

177. LINDSEY CAMERON & VINCENT CHETAU, *PRIVATIZING WAR: PRIVATE MILITARY AND SECURITY COMPANIES UNDER PUBLIC INTERNATIONAL LAW* 126 (2013) (arguing that the international legal order has been reluctant to proscribe privatization of state functions, particularly in regards to law enforcement and administration, which may explain why it has focused on crafting a legal framework for the attribution of state responsibility and enforcement of human rights instead).

178. *Id.* at 112-13 (commenting that the use of the term "agent" in the Geneva Conventions carries a caveat in that it limits the scope of those acting in the service of a contracting state to those who owe allegiance to the state itself and indicating that States wanted to limit their responsibility and avoid responsibility for the actions of *all* private persons acting within their territory).

179. *Id.* (remarking that international humanitarian law does not explicitly prohibit the actions of PMSCs during armed conflict, but limits the ways in which they may be employed on behalf of the State).

180. *Id.* at 143 (stating that most PMSCs do not meet the criteria to be considered state organs, but it is a worthwhile endeavor to examine attribution to

In other words, acts in violation of international humanitarian law that should be considered state acts because they are committed when performing state functions by virtue of article 5 in conjunction with article 7 (*ultra vires* acts) would end up carrying out at most an international responsibility of the contracting state that would not imply the reparation of the damage caused by the private contractors.¹⁸¹ It is therefore extremely simplistic for the State in these cases to elude its responsibility. It effectively allows States to delegate the use of force to a PMSC and disengage from the execution of the entrusted mission. This solution completely discourages States from supervising and controlling the exercise of functions delegated to PMSCs.¹⁸² This second group of cases are instances where the contracting state is not the Territorial State, a very common situation concerning countries that often have recourse to the services of PMSCs to operate abroad.¹⁸³

IV. CONCLUSION

To conclude, the court must refer to the attribution criteria under article 5 of the 2001 ILC Draft in the cases where a State generally empowers a private company to exercise public power prerogatives, regardless of how the attribution took place or if the State intervenes or not in the performing of the delegated functions by means of instructions or orders.¹⁸⁴ Consequently, the entire behavior of persons who develop the authorized state function, whether intra or *ultra vires*, has to be attributed to the State to determine its international responsibility.¹⁸⁵

PMSCs and state organs under the same lens).

181. *Draft Articles, supra* note 1, arts. 5, 7 (mandating that the person must be acting in capacity of the State for international norms to apply).

182. CAMERON & CHETAIL, *supra* note 179, at 220 (“[W]hen the private company is acting under the direct supervision of an organ of the state or arguably in a military run facility under the control of the state [. . .] responsibility of the state will remain even if particular instructions have been exceeded or have not been followed”).

183. *Id.* at 281-82 (distinguishing between the interests and responsibilities of territorial states and contracting states).

184. *Draft Articles, supra* note 1, art. 5 (outlining guidelines where a person is empowered by state law to exercise government authority).

185. CAMERON & CHETAIL, *supra* note 179, at 219-20 (referencing the academic debate over which entities may be held responsible for *ultra vires* acts by private actors under effective state control).

These arguments are closely linked to basic and traditional principles of responsibility. In fact, a traditional principle that has inspired the rules of domestic legislation in responsibility issues is that of *in eligendo* or *in vigilando* fault.¹⁸⁶ The ultimate basis of the attribution criterion contained in article 5 of the 2001 ILC Draft may be this principle commonly accepted by domestic legal systems.¹⁸⁷ According to it, the employer responds for his employees' acts when they intervene in fulfilling the employer's obligation on their own initiative.¹⁸⁸ Thus, it is possible to appreciate *in eligendo* or *in vigilando* fault when the employer entitles another person to comply with his own obligations in its own interest. This responsibility also arises when the performance of the employee develops without a dependent relationship with the employer or, rather independently.¹⁸⁹ The attribution criterion follows the same legal logic that is behind the *in eligendo* or *in vigilando* fault doctrine.¹⁹⁰ Inasmuch as it refers to a State delegating or contracting public functions to persons or entities, the factual situation contemplated is exactly the same.¹⁹¹ Hence, the legal remedy should be exactly the same: the responsibility lies with the State who delegates the state function.

Bearing in mind that the underlying premise of the draft convention is no delegation or contract of inherently state functions, article 5 criterion must be applied to cases concerning hiring PMSCs. The lack of precedents does not exclude the reasonableness of this solution. In other cases, it would be difficult to explain the interest of the U.S. Department of Defense to pass a regulation in 2005 in which it becomes clear "that the private sector is excluded from exercising

186. Saura Estapà, *Las Empresas*, *supra* note 35, at 17-18 (defining *in eligendo* fault as corporate responsibility where violations are committed by poorly skilled personnel of PMSCs under little control and that perform military functions without clearly understanding the lines of control and explaining *in vigilando* fault as where PMSCs are responsible for the lack of verification and control of the illegal activities of their employees).

187. Saura Estapà, *Algunas reflexiones*, *supra* note 157, at 254-55.

188. Saura Estapà, *Las Empresas*, *supra* note 35, at 17-18.

189. Saura Estapà, *Algunas reflexiones*, *supra* note 157, at 255.

190. *Id.*; Saura Estapà, *Las Empresas*, *supra* note 35, at 17-18 (noting the internationalist doctrine refers to the fault *in eligendo* and *in vigilando* not to reinforce the argument for state attribution of private contractors' behavior, but to consider the PMSC responsible and asserting that PMSCs may incur responsibility in applying these two principles of civil law).

191. Saura Estapà, *Las Empresas*, *supra* note 35, at 17-18.

functions and duties that are inherently governmental in nature.”¹⁹² Similarly, in the context of international responsibility, it may not be rational for the State to be disassociated from a contractor, when guaranteeing their immunity grants them the same treatment as dispensed to the members of their armed forces.

In this sense, “private military and security companies form part of the war machine of the States;” in the Pentagon words, they “constitute one of the elements of the ‘Total Force’ of the United States,” together with “active and in the reserve military and civil servants.”¹⁹³ This is one of the reasons why this State has negotiated impunity of PMSC employees in conjunction with the members of their armed forces.¹⁹⁴ As Kai Ambos notes, Washington strived to ensure the immunity of its military, as well as PMSC employees.¹⁹⁵ By Security Council Resolution 1422 of June 12th, 2001 (extended by the June 12th, 2003 Resolution 1478), which expressly refers to “civil servants, former civil servants, staff, or former staff of any State not party to,” the United States sought to exclude from the jurisdiction of the International Criminal Court not only the members of its armed forces, but also private contractors, such as mercenaries of private security companies.¹⁹⁶ In the same way, immunity is achieved at the bilateral level through treaties known as non-delivery of their national agreements.¹⁹⁷ Like the mentioned Resolutions, the

192. Perrin, *supra* note 42, at 316, 319.

193. Pastor Palomar, *supra* note 116, at 428 (noting that this particular characterization of PMSCs impacts whether Blackwater employees should be construed as “functionally” or “structurally” part of the armed forces).

194. *Id.* (commenting that increased interdependence of PMSCs and armed forces should not undermine the “essence of the international legal order”).

195. Kai Ambos, *Inmunidades en derecho (penal) nacional e internacional*, ANUARIO DE DERECHO CONSTITUCIONAL LATINOAMERICANO 691, 708 (2005) (pointing out that the United States sought to extend immunity to PMSC employees and its own forces due to their involvement in previous and current wars).

196. *Id.*; see also S.C. Res. 1422, U.N. Doc. S/RES/1422 (Jun. 12, 2001) (requesting the International Criminal Court not to proceed with an investigation or prosecution into cases “involving current or former officials or personnel from a contributing state not a Party to the Rome Statute over acts or omissions relating to a United Nations established or authorized operation” without the Security Council’s approval).

197. Ambos, *supra* note 195, at 709 (quoting the agreements, which state that the term “person of the United States” should be interpreted as “any officer, employee (including any contractor), or member of the military, current or former

conventions are extended not only to the militaries but also to PMSC employees.¹⁹⁸ Could the United States' attitude be interpreted as a way to equate militaries and contractors? These concerns of Washington to procure identical immunity are not a clear indication of the equalization in their job and mission.

In sum, in the last six years, more and more voices calling for the acts of PMSC employees to be regarded under article 5 of the 2001 ILC Draft.¹⁹⁹ However, along with these doctrinal positions in favor of the solution, this article supports the third comment to Rule 149 of the ICRC study on the customary rules of international humanitarian law.²⁰⁰ Indeed, under the heading "Responsibility of the State for violations committed by persons or entities authorized to exercise prerogatives of governmental authority," it expressly states that the States are still responsible for the acts of private companies employed for armed forces to perform tasks that usually are developed by the army.²⁰¹

service").

198. *Id.* at 710 (commenting that the agreements are analogous to Security Council Resolution 1422, in that they extend to all U.S. citizens, not just members of the military).

199. See René Värk, *State Responsibility for Private Armed Groups in the Context of Terrorism*, 11 JURIDICA INT'L 184, 188 (2006) (arguing it would be imprudent to deny state responsibility for private conduct when State is using individuals as its de facto agents); see also CANO LINARES, *supra* note 31, at 76 (arguing for the need to regulate the actions of PMSCs on a national level in light of the insufficient response of the international actors towards PMSCs); Pozo Serrano & Hernández Martín, *supra* note 64, at 348-49 (highlighting the establishment of organizations, such as the British Association of Private Security Companies or the Private Security Company Association Iraq, which aim to improve the standards of PMSCs and increase compliance with the principles of international humanitarian law and human rights law).

200. See JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, *EL DERECHO INTERNACIONAL HUMANITARIO CONSUECUDINARIO* 599 (2007). The authors argue that a State is: responsible for the international humanitarian law violations that are attributable to it, in particular: a) violations committed by its bodies, including their armed forces; b) violations committed by persons or entities authorized to exercise elements of their governmental authority; c) violations committed by persons or groups of persons acting in fact obeying their instructions or under their command or control; and, d) violations committed by persons or groups whose conduct it recognizes and accepts as proper. *Id.*

201. *Id.* at 602.