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IDEAS ON THE INTERNATIONAL MINIMUM STANDARD FOR THE PRIVATIZATION, EXPORT, AND IMPORT OF ARMED COERCION

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I. INTRODUCTION: BETWEEN RECOMMENDATIONS FOR GOOD PRACTICES AND CONVENTIONAL REGULATION

As has already been mentioned, the Working Group on Mercenaries currently has a mandate from the UN Human Rights Council to study the necessity of adopting international regulation on new forms of mercenarism. In similar vein, the UN Human Rights Council has also set up an intergovernmental working group with a mandate to study the same proposition. The debate on conventional regulation on this matter has therefore been initiated by the states themselves.

The issue is rooted in two opposing viewpoints. On one hand, some argue that there are already norms in general international law to regulate the problem, so there is no need for any new conventional regulations. They add that it is principally a problem of state responsibility and there are already enough rules to regulate it, a series of recommendations for good practices having already been identified (the second part of the Montreux Document[1]) and private military and security companies (PMSCs) having already adopted their own self-regulation, in which states play a part (the International Code of Conduct – ICoC). As such, they say the variety of norms and guidelines is sufficient and no additional regulation is required.

On the other hand, from the alternative viewpoint there are those who argue that despite there being rules within general international law that regulate the problem, these rules are insufficient, incomplete and do not address all of the underlying problems. The same people add that, in any event, a treaty to systematize and codify these rules is required, one that should also provide regulation for existing gaps by means of progressive development.

[1] On the topic of armed conflicts, the first part of the Montreux Document aims to identify elements of general international law, but limits itself to state obligations in times of armed conflict. The second part of the Montreux Document identifies good practices, also for times of armed conflict. These could be considered as standards to be included in conventional regulation, as part of a progressive development of international law.

The first viewpoint is taken by the states that export most military and security services and by all those who defend the Montreux system. The second is taken by states that do not support this industry, although it should be noted that these states do not appear to be effectively unified or to have great influence. The second viewpoint is also taken by the UN Working Group on Mercenaries, which presented a draft for a possible convention in 2010.

This realm is therefore one that is mainly occupied by good practice recommendations made to states and to PMSCs. We seek to analyze ways in which it may be possible to help encourage states to establish international laws on the matter. To do so we try to identify the international minimum standard for the privatization and export of coercive power. The purpose is to offer states a basis for consensus regarding conventional regulation on this matter, something which is currently being looked at by the intergovernmental working group[2].

To do this we must consider the following:

1) Whether there are elements of general international law regulating aspects of the object of our attention.

2) Whether there are elements of private international law regulating aspects of the object for which regulation is sought, so as to study a potential extension of their application to more states, through progressive development towards inclusion in a multilateral international treaty.

3) Whether there are international lacunae in general international law and in private international law that could justify new regulation through an international treaty.

This will enable the bases to be established for their codification and progressive development[3].

In practice, the main problems turn out to be the international lacunae, which have been identified within this doctrine and can be summarized as follows, (as mentioned in the chapter by Rebecca de Winter-Schmitt[4]).

- Precise determination of which functions can be outsourced and which cannot.

[2] Although at its recent session in Geneva, December 12-16, 2016, there continued to be very little eagerness to address the issue.

[3] When it comes to regulation through international treaties containing obligations and rights, a distinction can normally be drawn according to what the treaties involve: codification occurs when the contents of general international law are systematized and put together in writing, while progressive development occurs when new laws are put together on a given matter. In practice, both can be used in combination in the same treaty.

[4] See chapter 5. Also see: De Winter-Schmitt, R. (Ed.), "Montreux Five Years On: An Analysis of State Efforts to Implement Montreux Document and Legal Obligations and Good Practices", Washington College of Law / NOVACT, Washington D.C., 2013. Buckland, B. and Burdzy, A., "Progress and Opportunities: Challenges and Recommendations for Montreux Document Participants", DCAF, Geneva, 2015.

- Exercising of due diligence in the protection of human rights, in the selecting, contracting, and authorizing of PMSCs, and in the monitoring of their activities. In particular, inadequate application of national legislation has been observed in PMSCs operating abroad.
- A lack sufficient resources being allocated to the system for authorizing, contracting and licensing, as well as low standards in the application of this system.
- Stipulating accountability for wrongful acts, addressing lacunae in civil and criminal accountability requirements, and providing access to effective remedies.

To make this proposal, we are using the following rationale: it is justifiable to propose codification and progressive development of the international minimum standard for the privatization, export, and import of armed coercion; (II) armed coercion is by nature part of the public domain (a function inherent to the state) and is complemented by a general international norm limiting the privatization of part of its content; (III) there is a norm under general international law that prescribes respect for other nations' sovereignty and rights, while also incorporating a general obligation towards prevention and protection; (IV) regarding the issue of the privatization of armed coercion, specific international obligations can be identified arising from the general obligation mentioned above; some of these obligations are based on customary law while others are still relatively unpracticed at state level and are therefore proposals for progressive development; (V) there is a general international norm holding states accountable for any wrongful acts committed by PMSCs and their personnel, which complements the aforementioned norms but is not sufficient on its own; (VI) lastly we shall offer our own final considerations.

REASONS FOR CODIFICATION AND PROGRESSIVE DEVELOPMENT AIMED AT THE PRIVATIZATION AND EXPORT OF ARMED COERCION

The impact PMSCs have had on the enjoyment of human rights has already been noted (chaps. 1 and 2). We have also looked at the limitations and inadequacies of the non-binding international instruments that have been adopted to date (chaps. 3, 4 and 5).

Whether or not conventional international regulation on the privatization of armed force is appropriate or not is one of the most important matters we have to address. Who would benefit from such a regulation and who would it suit? This is the first question. The answer is tied up within a particular conception of the privatization of the use of force and of the substantive functions of international law.

First, it should be noted that the object for which regulation is being sought appears, a priori, to be under the states' own authority, a function to be governed

internally. That is to say, the way in which a state internally manages its capacities in terms of security (domestically and abroad) has never been the object of international regulation. Ever since the Peace of Westphalia, the common practice among states has been to set up a national army under sovereign authority (over time becoming the authority of the government or parliament, depending on the regime) as well as a police force, the armed wing of the executive branch (again, under the authority of the government or parliament, depending on the regime). Although the creation of national armies and centralized police forces has been a common trait of modern states, the same states have still resorted to using mercenaries for certain undertakings, particularly outside or on the borders of their states[5]. With mercenaries' operations alongside armies, the continuation of this practice shows that this usage has been accepted by states as their right.

However, in the context of contemporary international law, as of 1977 states progressively decided to prohibit or limit the use of mercenaries, having witnessed mercenary interventions in various wars of decolonization. As mentioned in a separate chapter, this prohibition first arrived in an African context (the 1977 OAU Convention), the context of international humanitarian law (the 1977 Additional Protocol I to the Geneva Conventions of 1949) and, later on, in a broader context with adoption of the 1989 United Nations Convention, although this was not ratified by many states[6].

Compared with texts from the previous conventions, what stands out as particularly relevant is the adoption by the General Assembly in 1970 of Resolution 2625 (XXV), which contains the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. This declaration was a clear demonstration that states understood that the employment of mercenaries was a prohibited use of armed force.

Currently, the internal organization of legitimate armed force is to some degree limited by international law: groups of mercenaries cannot be established under the principle that prohibits the threat or use of force (jus ad bellum), that is to say in the context of authorizing the use of armed coercion abroad. To maintain peaceful relations, states considered it essential to prohibit the use of mercenaries, i.e. the private organization of fighters, a practice known as the contracting of mercenaries.

As such, the legitimate internal organization of armed force in part comes under internal jurisdiction, but is also partly under international jurisdiction. In contrast with the notion that sovereign authority over armed coercion is organized internally (domestically and abroad) in accordance with the history and circumstances of each state, universal restrictions created by states have subsequently emerged. The matter to be addressed now in the international context is whether there are new state-run practices that should be limited by

[6] See chapter 3, by J. L. Gómez del Prado

states in their international relations. That is, should universal restrictions be identified regarding the internal organization of the sovereign authority over armed coercion.

Reasons for internationalizing such regulation can be seen in the nature of the object of protection. As has been discussed elsewhere already, ensuring public safety is in the global public interest[7]. This is essentially because the use of force and respect for basic human rights are concepts that are inextricably linked. In fact, sovereign centralization of the use of force ensures public safety and the protection of human rights. The link between this monopoly over the use of force and respect for human rights has a deep-rooted history, having been included in the 1789 Declaration of the Rights of Man and of the Citizen:

> "To guarantee the Rights of Man and of the Citizen, a public force is necessary; this force is therefore established for the benefit of all, and not for the particular use of those to whom it is entrusted." (Declaration of the Rights of Man and of the Citizen of 1789).

The modern day concept of human security underscores the importance of this statement. The outsourcing of armed force to private entities for subsequent export must also comply with proper respect for human rights. The ultimate basis for the internationalization of this authority relates to the human right to security (which must be understood as public security), as per Article 3 of the 1948 Universal Declaration of Human Rights.

III. THE NATURE OF ARMED COERCION AS A GOVERNMENTAL (OR INHERENTLY STATE) POWER AND THE GENERAL PROHIBITION ON PRIVATIZING, EXPORTING, AND IMPORTING SOME OF ITS FUNCTIONS

In relation to the creation and contracting of PMSCs by states as well as the authorization for their entry in a state's territory, an initial problem in the international arena is the question of whether, in terms of armed force, everything can be privatized. The question can be rephrased to ask whether there are areas of the state's coercive function that should be exempt from any form of privatization, based on general international law[8].

In international practice and according to most in this doctrine, the answer to this is yes, although there is little clarity over the terminology or delimitations regarding which functions cannot be privatized.

The Working Group on Mercenaries' 2010 project on a possible international convention introduced this idea using the expression "inherently state functions"[9].

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[7] TORROJA MATEU, H., "La gestión pública de la seguridad y defensa como interés público global" in N.BOUZA, C. GARCÍA Y A.J. RODRIGO (Dir.), *La gobernanza del Interés público global. XXV Jornadas de la Asociación Española de Profesores de Derecho Internacional y relaciones Internacionales*, Tecnos, 2015, passim.

[8] BARAK-EREZ, D. "The privatization continuum", en Chesterman, S. y Fisher, A., ed, *Private Security, Public Order. The Outsourcing of Public Services and Its Limits*, Oxford, Oxford University Press, 2009, pp. 71 y ss. .

[9] Expression from article 9 of the Working Group on Mercenaries' 2010 project on a possible international convention on the regulation of private military and security companies.

This was inspired by the US expression "inherently governmental functions"[10]. A preference for the word 'state' instead of 'governmental' was based on it being better suited for drafting a treaty aimed at regulating relationships between states, rather than governments. The notion referred to the existence of areas of armed force that under no circumstance should be privatized, in contrast to others that could. This thesis, which we can call Thesis A, is outlined below:

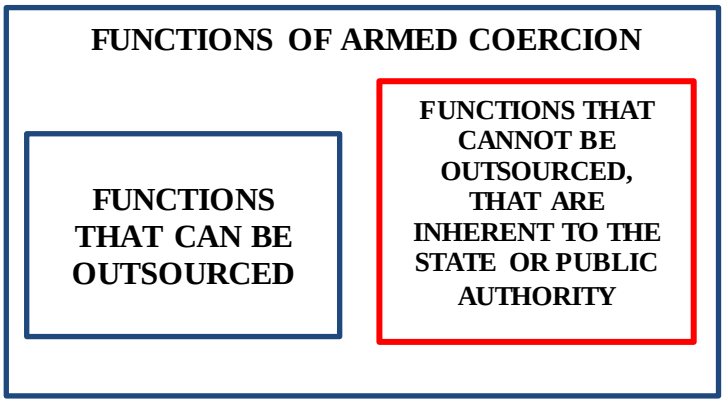

ILLUSTRATION OF FUNCTIONS INHERENT TO THE STATE – THESIS A

However, the Working Group changed its perspective on this notion, as described in the Concept Note presented at its 2011 session in New York:

> "The Working Group acknowledges that certain functions are inherent to the State. Functions that are inherent to the State are those for which the State retains ultimate responsibility regardless of whether or not the State outsources that function. The Working Group also believes that some inherent State functions may not be outsourced"[11].

This is a significant change in perspective. In a certain way, a step backwards is taken, considering that in terms of use of force – or the authority over use of armed coercion – the authority is always incumbent to the state, which must therefore be responsible for the acts carried out, regardless of whether they are performed by a government employee or not. Within this group of inherently state functions, it is considered that there are some that cannot be outsourced under any circumstances. However, all functions relating to armed coercion would be inherent to the state. This second thesis, Thesis B, is outlined below:

[10] This refers to functions that can only be carried out by government employees (Chesterman, S., "Intelligence Services", in Chesterman, S. & Fisher, A., eds., *op. cit.,* p. 199).
[11] WG on the Use of Mercenaries, "Concept note on a possible legally binding instrument for the regulation of private military and security companies", New York, 2011, p. 2.

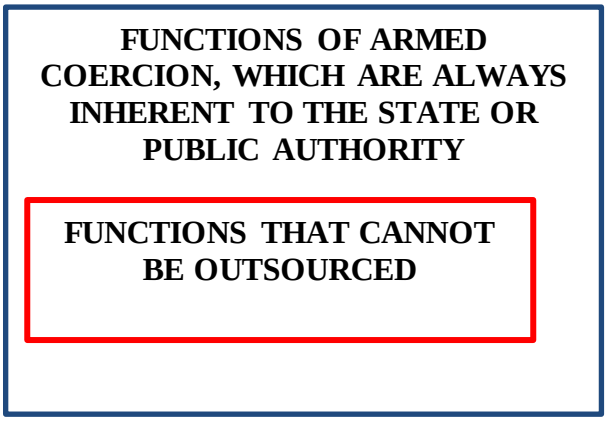

ILLUSTRATION OF FUNCTIONS INHERENT TO THE STATE – THESIS B

States must reach a consensus regarding which of these two theses they agree with. It is a highly relevant question because, in terms of international responsibility, it has a strong bearing on states' accountability for the acts performed by PMSCs and their personnel. Another problem is that of which state is accountable, a matter to be studied further on, in section VI.

For now, let us focus on the terminology and the concept currently adopted by the Working Group. I believe the best place to start is the commentaries made by the International Law Commission (ILC) for its Draft Articles on Responsibility of States for Internationally Wrongful Acts. Specifically, the project's commentary on article 5 (in which it considers acts performed by private entities that exercise "governmental authority" as attributable to the state) asserts that

> "… Beyond a certain limit, what is regarded as "governmental" depends on the particular society, its history and traditions"[12]

There are two important ideas here. First, that although in principle the boundaries around what is considered governmental are set by each state, there do exist some universal limits as to what is governmental, which do not depend on each particular society or its history and traditions. Second, that although these governmental functions might be outsourced, they will always be

[12] International Law Commission, commentary on article 5 of the 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts, paragraph 6, p. 43.

incumbent to the state and will therefore be attributable to the state[13]. However, it is not specified or defined which functions these are[14].

In relation to the first idea, according to general international law there are public authority functions that, using the terminology currently being proposed, would be classified as inherently state functions that are always incumbent to the state. As such, even if they are performed by private agents, they are attributable to the state that privatized or contracted them, in accordance with each case, as we shall see.

However, whether or not there are some of these state functions that can never be outsourced is a separate question upon which states must reach a consensus. Prominent figures in this doctrine are of the opinion that such functions do exist[15].

The problem involves finding agreement on the list of functions. The 2010 proposal by the Working Group on Mercenaries included a list that was considered to be too inclusive, with difficulties to reaching a consensus generated by variances in the military terminology used by different states[16]. Relating to this, it is worth noting the particularities of some states, such as the US, which, to interpret what counts as governmental, follows a logic very different that followed by some others: the basis of the US position is that everything can be privatized and the setting aside of anything that is 'inherently governmental' is established as an exception to this rule[17]. In other words, they have not chosen this expression in order to protect and keep certain functions within the public domain, as would appear to be the most logical approach in the eyes of the Working Group on the use mercenaries.

Now let us see whether general and private international law have established anything in this regard. This shall be done taking into account tenets from *jus in bello*, from *jus ad bellum* and from international human rights law.

In terms of *jus in bello*, the 1949 Geneva Conventions establish clear limits to privatization. It can also be considered that these limits are covered by general international law, according to a study produced by the ICRC[18]. The limits would be:

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[13] The ILC asserts that in any event, when determining these governmental activities "[o]f particular importance will be not just the content of the powers, but the way they are conferred on an entity, the purposes for which they are to be exercised and the extent to which the entity is accountable to government for their exercise. These are essentially questions of the application of a general standard to varied circumstances". International Law Commission, *Ibid*.

[14] Additionally, the ILC assumes that these functions can be attributed by law to non-state entities, whether they are government agencies or private companies. Its logic is that functions can be privatized, and therefore the delimitation of government (or public) authority functions would be to determine whether wrongful acts can be attributed to the state. It uses as its basis the premise that it is possible to outsource any governmental function; it does not appear that the ILC considered the possibility that some functions cannot be outsourced under any circumstances.

[15] At least the functions involving the exercise of coercion and the armed forces must be included in the notion of governmental functions (such as maintaining law and order) in its strictest sense. De Schutter, O., "The Responsibility of States", in Chesterman, S. & Fisher, A., eds., *op. cit.,* p. 31.

[16] Article 9

[17] Chesterman, S., "Intelligence Services", in Chesterman, S. & Fisher, A., eds., *op. cit.* P. 199.

[18] HENCKAERTS, J.M y DOSWALD-BECK, L., *Droit international humanitaire coutumier*, Bruylant, CICR, 2006.

- The detention or interrogation of prisoners of war or civilians in detention centers may never be outsourced (Art. 39 of the III Geneva Convention of 1949; and Art. 99 of the IV Geneva Convention of 1949)[19].

- Direct participation in hostilities may not be outsourced (Art. 43 of the Additional Protocol I to the Geneva Conventions of 1949, adopted in 1977)[20].

In the context of *jus ad bellum*, it is important to understand that the rules of general international law prohibiting states from using or threatening to use force also extend to any functions states might want to achieve by outsourcing coercive power to be used abroad. Accordingly, under the same prohibition, the delimitation provided by the General Assembly's Resolution 2625 (XXV) of October 24, 1970, includes a prohibition on states authorizing or contracting PMSCs to commit acts involving the use of force or threat of using force in the territory of another state, as prohibited by the UN's fundamental principles. General international law is quite clear on this matter. It is perhaps worth reiterating that the prohibition made in Resolution 2625 (XXV) covers the following:

> - the "organizing or encouraging the organization of irregular forces or armed bands including mercenaries, for incursion into the territory of another State."
>
> - the "organizing, instigating, assisting or participating in acts of civil strife or terrorist acts in another State or acquiescing in organized activities within its territory directed towards the commission of such acts, when the acts referred to in the present paragraph involve a threat or use of force."
>
> - the use of force in any way that deprives peoples of their right to self-determination and freedom and independence.

A separate question altogether is that of the territorial state giving its consent for a PMSC contracted by another state to enter its territory. In this case, it may be that there are reasons justifying its legality, but it would be necessary to examine the matter in full knowledge of the specific circumstances, the parties to the conflict, etc.

Ultimately, in the context of international human rights law, there are also parts of general international law that limit the privatization of inherently state functions. In this regard, it must be stressed that the monopoly over the legitimate use of

[19] In the Montreux Document, the first part detailing the existing international laws applicable to states in relation to PMSCs does contain this limitation: in point 2 it is established that PMSCs must not be contracted to carry out activities that international humanitarian law explicitly assigns to a state agent or official, for example exercising the power of an official responsible for a prisoner of war camp or a detention center for civilians. This is in conformity with the Geneva Conventions.

[20] This, however, is not mentioned in the first part of the Montreux Document, but only in the second part, which relates to recommended good practices. It is only considered a good practice (equally for the contracting states, territorial states and home state) to take into account whether a service entails direct participation in hostilities: states will determine which services may or may not be contracted out, taking into account factors such as whether a particular service could cause PMSC personnel to become involved in direct participation in hostilities (good practices 1, 24 and 53).

force is an inseparable part of the obligation to respect, protect and uphold basic human rights, a fundamental principle of general international law and a norm of *jus cogens* in the contemporary international legal system.

From this perspective, general international law prohibits any privatization of armed coercion that affects the exercising of basic human rights, which, within the doctrine and the practice, are understood to include at very least a hard core of the following: the right to life, liberty and security, the right to physical and moral safety, the right to a fair trial and a prohibition on discrimination. I consider it a valid argument that making use of PMSCs in a way that could affect any of these rights is prohibited by general international law. As such, the apprehension or detention and interrogation of members of the population is prohibited under any circumstances[21], but it is far from being the only scenario.

Finally, it is worth highlighting the contradictions that arise in practice from the ICoC used by private security companies for self-regulation. Indirectly it assumes that PMSCs can perform some of the activities that, as we understand it, cannot be outsourced according to general international law. This can be seen in the case of detention activities, for which it is specified that PMSCs will only "*guard, transport, or question detainees if: (a) the Company has been specifically contracted to do so by a state; and (b) its Personnel are trained in the applicable national and international law.*" (Principle no. 33). It can also be seen in the case of apprehending persons, which is prohibited "*except when apprehending persons to defend themselves or others against an imminent threat of violence, or following an attack or crime committed by such persons against Company Personnel, or against clients or property under their protection, pending the handover of such detained persons to the Competent Authority at the earliest opportunity*" (Principle no. 34). This is a very important detail: the ICoC addresses these functions in the assumption that they may be carried out by private security companies, whereas the Working Group on Mercenaries' 2010 project on a possible international convention and even the Montreux Document view these as inherently state functions that cannot be outsourced under any circumstances.

Meanwhile, it is also worth pointing out that by recognizing that cases of detention require a contract specifying this function from a state, and that in cases where persons are apprehended they should be handed over to the competent authority at the earliest opportunity, the ICoC equally recognizes that these are functions inherent to the public authority, inherently state or governmental functions. Therefore, international recognition of the limits to privatization is strengthened, as is the thesis that acts committed by these companies are to be attributed to the contracting state, as we will look at in section VI.

[21] Interrogating people under detention is an inherently governmental function (CHESTERMAN, S., "Intelligence services", op. cit., p. 202).

The list of inherently state functions that cannot be outsourced under any circumstances could be summarized as follows:

FUNCTIONS PUB. INT. LAW SAYS CANNOT BE OUTSOURCED		
	FUNCTION/ACTION	LEGAL SOURCE
Jus in bello (in times of armed conflict)	Officiating prisoner of war camps: detentions and interrogations during international armed conflicts	Art. 39, III GC Customary international law
	Officiating prisoner of war camps: detentions and interrogations during domestic armed conflicts	Customary international law
	Officiating civilian detention centers: detentions and interrogations	Art. 99 IV GC Customary international law
	Direct participation in hostilities	Art. 43 AP I Customary international law
Jus ad bellum	Threat or use of force in any form or for any purpose prohibited by the fundamental principle that prohibits the threat or use of force between states, including: - the organizing of mercenaries, armed bands or bands of irregular forces, civil strife or terrorist acts. - infringement upon peoples' right to self-determination.	Art. 2.4 UNC Art. 51 UNC GA Res. 2625 (XXV), 1970 Customary international law
International human rights law	Armed coercion and violation of the right to life	Principle of human dignity GA Millennium Declaration
	Armed coercion and violation of the right to freedom and security (apprehension, detention and interrogation of persons). Prohibition of forced disappearances	Principle of human dignity GA Millennium Declaration
	Armed coercion and violation of the right to physical and moral safety (prohibition on torture and other humiliating and degrading treatments)	Principle of human dignity GA Millennium Declaration
	Armed coercion and violation of the right to a fair trial	Principle of human dignity GA Millennium Declaration
	Armed coercion and violation of the prohibition on discrimination	Principle of human dignity GA Millennium Declaration

IV. IN THE EVENT OF PRIVATIZATION, EXPORT, AND IMPORT, THE GENERAL OBLIGATION TO EXERCISE SOVEREIGN COMPETENCIES (FUNCTIONAL SOVEREIGNTY) AND THE GENERAL DUTY TOWARDS PREVENTION AND PROTECTION

We now move on to outline general international law for cases involving the privatization and export of coercive power. The starting point is the sovereignty and independence of each state to decide whether or not to privatize the use of force and authorize its export. As a matter of fact, many states have not resorted to this practice in relation to military armed force. The stronger trend is that of privatizing domestic security, and in most cases the exporting of this service is not envisaged.

Nevertheless, we hold to our belief that it is appropriate that public international law regulate the obligations of states that decide to privatize coercive force and authorize its export. This is because every state in our international society has the right to see this privatization and export carried out under certain legal guarantees that respect not only their sovereignty and independence, but also international human rights law and international humanitarian law. This is worthy of being made a basis for further development.

The legal foundation is based firstly on the functional notion of state sovereignty and specifically on the authority that states have over territories and persons. And secondly, stemming from what has been mentioned previously, it is based on the general duties all states have as regards prevention and protection.

In relation to the first fundamental point, the functional exercising of sovereignty, we may start by recalling the classical definition given by Judge Max Huber in the 1928 Island of Palmas (or Miangas) case:

> "Territorial sovereignty, as has already been said, involves the exclusive right to display the activities of a State. This right has as corollary a duty: the obligation to protect within the territory the rights of other States, in particular their right to integrity and inviolability in peace and in war, together with the rights which each State may claim for its nationals in foreign territory. […]. Territorial sovereignty cannot limit itself to its negative side, i.e. to excluding the activities of other States; for it serves to divide between nations the space upon which human activities are

> employed, in order to assure them at all points the minimum of protection of which international law is the guardian[22]."

This functional aspect of sovereignty recognizes states' right to exercise their functions on an equal footing with other states, but also their duty to respect other states' rights and to comply with international law.

The exercising of coercive power is therefore limited by the rights of other states and by international law, as applicable.

In this context, it cannot be forgotten that the monopoly over the legitimate use of force is inherent to the notion of the state, such that decisions over privatization affect not only the state itself but also the sovereignty that legitimizes said use[23]. It is also to be noted that the concept of sovereignty has taken on a more humanitarian focus. This has come following the process begun in 1945 to internationalize human rights. Nowadays, human dignity is at the heart of sovereignty. The notion of functional sovereignty, already rooted in classical international law[24], relates to another norm of general international law that we consider to be an additional legal foundation underpinning the international limits to the privatization, export, and import of armed coercion. This is the general duty towards prevention and protection, which traditionally has been limited to acts committed in a state's territory that could affect public representatives from another state or foreigners.

This norm is often posited by those conversant in the doctrine and by those practicing the law in the context of state responsibility. Specifically, when it is not possible to attribute wrongful acts performed by an individual to the state, it is argued that general international law offers another course: that of non-fulfillment of the general duty towards prevention and protection, a duty pertaining to all states (also referred to as the general duty towards due diligence). This duty is a primary norm of general international law. It does not mean that the state must answer for acts committed by individuals, but that it must answer for non-fulfillment of the primary norm binding it to the duty towards due diligence in its territory. This has been highlighted by the International Court of Justice in the

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[22] United Nations, Reports of International Arbitral Awards, Island of Palmas case (Netherlands, USA), 4 April 1928, Volume II pp. 829-871. Accessed from http://legal.un.org/riaa/cases/vol_II/829-871.pdf

[23] As asserted by the Swiss Federal Council, "the state monopoly on the use of force undoubtedly constitutes the core of the state security system"; "privatisation of such tasks would call into question the existence of the State per se and certainly its legitimation as the entity responsible for public order. The privatisation of such tasks can therefore only be considered in limited specific instances and in a complementary context". *Report by the Swiss Federal Council on Private Security and Military Companies (report to the Parliament in response to the Stähelin Postulate 04.3267 of 1 June 2004. Private Security Companies)* of 2 December 2005, pp. 9-10.

[24] A modern version of the functional conception of humanized sovereignty is that which, in my opinion, is defined by the expression 'responsibility to protect'. While this version does have some new elements, essentially it is little more than an adaptation of Max Huber's vision (which already included the obligation to respect the minimum standard of treatment towards foreigners as a duty of a sovereignty) taken forward into a modern context in which human rights are internationalized. The move from 'sovereignty as control' to 'sovereignty as responsibility' that is assumed by states upon signing the United Nations Charter, as explained in the International Commission on Intervention and State Sovereignty's 2001 report, is not a new idea. It is in fact rooted in the previous vision. As such it is defensible as a fundament in general international law, and it is better to move away from the notion of a responsibility to protect, which states have preferred to limit in terms of its legal scope and content due to its connotations of 'humanitarian intervention'.

case of the United States v. Iran[25] and more recently in the case of the Democratic Republic of the Congo v. Uganda, in 2005[26].

The norm indicates the duty to prevent, to monitor, and to take all measures necessary to avoid any individual acting in a way that violates international law, and furthermore to adopt sufficient diligence as regards the repression of acts committed in the state's territory[27]. The consequences of individuals' acts can remain within the state territory or can spread further afield, causing damage to other states or international spheres, as is established in the field of international environmental law[28]. Currently there is an argument being made for an extraterritorial application of the duty towards diligence, such that it would extend to acts committed beyond state borders.

This general duty towards prevention is always connected to, and defined by, a second primary norm regulating the specific acts committed by individuals in violation of international law[29]. For example, the international law on diplomatic and consular relations, human rights law, international humanitarian law, a friendship treaty, etc. The source of the international norm does not matter; it can be general or private international law.

In light of this, it can be asserted that under general international law there is an obligation to adopt prevention and protection measures when states decide to privatize, export or import armed coercion, respecting also the *jus cogens* principle of respect for basic human rights, international humanitarian law, and any other norms applicable in each specific case.

V. DETERMINING GENERAL OBLIGATIONS AND PROGRESSIVE DEVELOPMENT AS REGARDS PRIVATIZATION, EXPORT, AND IMPORT

Having turned to customary international law to form an outline of the international obligation towards due diligence regarding the respect, protection, and upholding of human rights and international humanitarian law when privatizing and exporting armed coercion, it is now time examine in closer detail the exact nature of this obligation.

For this matter, the Working Group on Mercenaries focused its perspective on indirect regulation of the companies and their personnel. However, this perspective is dangerous in that there is a risk of the process of international regulation becoming blurred together with that of the regulation of business and human rights that is also being carried out in a generic manner by the Human

[25] ICJ, Sentencia, Asunto relativo al personal diplomático y consular de los Estados Unidos en Teherán, EE.UU c. Irán, ICJ Reports, 1980, Paragraph 67.

[26] The ICJ ruled that Uganda held responsibility in occupied Congo territory in relation to a "lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory" (CIJ, Sentencia, Asunto relativo a las actividades armadas en el territorio del Congo, R D Congo c. Uganda, 19 de diciembre de 2005, ICJ Reports, 2005, parr. 79, paragraph 79).

[27] RODRIGUEZ CARRION, A.J., Lecciones de Derecho Internacional público, 5ª Ed., Tencos, Madrid, p 324. REMIRO BROTONS, A., et al, *Derecho Internacional*, Tirant lo Blanch, Valencia, 2007, p .754-755; DIEZ DE VELASCO, M., *Instituciones de Derecho Internacional Público*, Tecnos, 16ª Ed, Madrid, p. 833.

[28] United Nations, "Trail smelter case (United States, Canada)" in Reports of International Arbitral Awards, 1941.

[29] DUPUY, PM., *Droit International Public*, 3ª Ed, Dalloz, Paris, 1995, pp. 369-370.

Rights Council[30]. States are very reluctant to impose international obligations on companies. Even when legal language that is respectful of their sovereignty is used (including obligations for states towards companies contracted by them or companies created or operating under their jurisdiction, i.e. indirect obligations), they stand opposed to it.

This risk and the very nature of coercive power call for a different approach. It is necessary to define states' obligations as regards respect for human rights and international humanitarian law when they privatize governmental (or inherently state) functions relating to the power of armed coercion. The companies involved are not comparable with those in businesses such as textiles or technology, or those producing other consumer goods. Their product – if that is an appropriate word for what they offer – is security, something which pertains by nature to the public authority, as has already been discussed.

It is key not only to respect, protect and uphold the right to "life, liberty and security of person" (Art. 3 of the Universal Declaration of Human Rights) but also the rest of the human rights that could be affected (as discussed in previous chapters) by this privatization and export.

From this perspective, all powers of the state – legislative, executive and judicial – are linked and are jointly responsible for taking measures to regulate the privatization and export of coercive power, for controlling respect of the regulations, and for prosecuting infractions, including those occurring abroad, in accordance with one particular doctrine and practice. As such, the international minimum standard may take shape in the following manner.

1. Regulation of privatization respecting the principles of legality, transparency, and proportionality, and ensuring respect for human rights and international humanitarian law

In this scenario, the state would have the duty to regulate the privatization, export, import and contracting by law of coercive force, always striving to ensure respect for human rights and sufficient prevention of violations against them or against international humanitarian law.

Outsourcing of the use of force would be proportional to the number of police and armed forces, and would be considered supplementary to the centralized coercive force.

This duty towards regulation would extend not only to the state privatizing and authorizing the export of the coercive force, but also to the state authorizing its import into its territory. And of course, it would also extend to the state contracting the service.

One of the problems that arises is whether home state legislation and contracting state legislation on PMSCs and their personnel both have extraterritorial effect. This may be considered a question for progressive development that states would

[30] See Chapter 5

need to find agreement on, unless it is shown that some kind of extraterritorial application already has a foundation in general international law.

2. Establishment of a central authority and register as a means of vetting

In this scenario, each state would have to strive to ensure application of the rules adopted for the private use of coercive power both in their own territory and abroad (through progressive development, as applicable) in conformity with respect for human rights and for international humanitarian law.
As part of progressive development, states would have to evaluate creating an international obligation to establish a central control authority in each state, with powers over PMSCs and their personnel. This central authority would be established in the home state, the contracting state, and the territorial state. Depending on the territorial structure of the state, this function could be performed by local authorities, although a single authority would always be identified for the purposes of international law.
Control would be established by means of a system of licenses, which would be issued, registered, supervised (through obligatory renovation mechanisms) and, where appropriate, revoked by the central authority.
As part of progressive development, states would have to evaluate the need for an international mechanism to facilitate coordination between the central authorities as well as exchanges of information.

3. Establishment of a system of licenses as a basic instrument for prevention and control

As part of progressive development, states would have to agree upon the obligation for each state to establish a licensing system for the creation of these companies, for entering in their territory and for contracting them[31].

The granting of licenses would be governed by internationally shared principles. Potentially, the procedure could be public and transparent, conducted in writing, with the licenses issued and registered by the central authority (or local authority, where appropriate).

One key detail is that of establishing what studies must have been completed by those seeking to work as personnel of a PMSC. States need to agree upon a specific university level, covering ethical and moral training on the use of force, and knowledge in the fields of law, human rights, international humanitarian law, and the United Nations Principles on the Use of Force and Firearms by Law Enforcement Officials, among others. In other words, thought needs to be given to whether theoretical and practical training is required providing a similar level of specialization as demanded in careers in the military or the police.

[31] This system would be different and complementary to the state system already in place for the creation of companies in accordance with internal trade law.

It should be taken into account that those running the companies and those working for them must not have criminal records, and they must be trained and prepared in due diligence procedures. There must be specific references to the international minimum standards as regards employment law.

The question of whether PMSCs and their personnel would be prohibited from using certain weapons is very relevant, particularly as regards weapons already prohibited by international law. States would need to evaluate whether to establish these prohibitions explicitly in the licenses and authorizations.

It would also be necessary to establish obligations as regards PMSCs and their personnel informing the central authority in the event of observing irregularities or violations of the law.

States would need to evaluate needs regarding the establishment of international coordination over the licensing system, as well as the pledging of a commitment not to contract companies nor authorize their entry in the state's territory if the company's license does not comply with the requirements internationally agreed upon.

The license would thus constitute a key internal mechanism for demanding that PMSCs and their personnel comply with the international minimum standards that are set. The license will also provide a way of verifying that the state has adopted sufficient measures for due diligence.

4. Attributing responsibility to PMSCs and their personnel in the event of violations

In this scenario, states would have to agree upon how to establish a system to attribute responsibility in the event of violations committed by PMSCs and their personnel. This would encompass a classification of the different types of potential infractions and crimes, the granting of authority to courts, the prosecution of those responsible, and the remedies provided for the victims.

Once again, the problem is that of reaching a consensus between states, not only on the details of these infractions and crimes, but also on the authority of the courts, a question relating to private international law and to public international law.

We believe there to be valid arguments, according to general international law, that the establishment of a system attributing responsibility to individuals – and, where applicable, legal persons – pertains to the home state, the contracting state, and the territorial state. All three of these are linked by a duty towards due diligence, which, we may recall, also covers the prosecution of crimes. This relates to general international law.

Meanwhile, in terms of progressive development, it must be determined whether there are new crimes to be classified, as well as the scope attributed to the state jurisdictional authority.

In this regard, a legal problem arises regarding the extraterritorial application of states' jurisdiction, particularly as regards the home and contracting states when PMSCs have committed violations abroad. This extraterritorial application can relate to the prescription of conducts (prescriptive extraterritorial jurisdiction) or to the attribution of jurisdiction to courts to prosecute and punish violations (adjudicative extraterritorial jurisdiction)[32]. In practice, this translates into adoption of either the principle of active personality or nationality (of the company and its personnel in this case) in the context of internal criminal law, and the principle of universal jurisdiction for the courts.

For the purposes of defining the international minimum standard, the problem is whether this extraterritorial application is an obligation under general international law or if it is a matter for progressive development.

As noted by Professor Olivier De Schutter, the obligation to protect human rights exists beyond the territory of a state. This is founded in general international law and the general principles of law[33]. Based on Articles 55 and 56 of the United Nations Charter as well as the general obligation towards prevention, De Schutter asserts that "just as a state has no right to allow the use of its territory to cause environmental damage on the territory of another state, it should not allow a company domiciled under its jurisdiction to operate abroad in a way which causes violations of human rights"[34].

As part of the same argument, De Schutter questions whether "[b]y agreeing to a PMSC being incorporated under its laws, is a state accepting a responsibility to ensure that it complies with human rights wherever it develops its activities?"[35] When this relates to the delegating of governmental authority, for us the answer is clearly: yes, of course.

To summarize, according to De Schutter, home states have an obligation towards extraterritorial application (adjudicative and prescriptive), and this has a foundation in general international law[36]. This assertion can lead to the conclusion that under their own jurisdiction home states must regulate the principle of active personality in relation to criminal law as well as the principle of universal jurisdiction, something that perhaps goes too far, in our opinion. In practice, it comes up against states' reluctance to attribute universal jurisdiction to their courts.

This argument will therefore have to be examined further still, and it will also be necessary to look at whether the obligation towards extraterritorial application also exists for contracting states. In any event, it can always be considered a matter for progressive development, in which case it would be up to states to decide whether they want to agree to a convention involving a commitment to practicing adjudicative and prescriptive extraterritorial jurisdiction as regards the privatization, export, and import of coercive force.

[32] DE SCHUTTER, O., op. cit., p. 36.
[33] Ibid, p. 34
[34] Ibid, p. 35
[35] Ibid, p. 35
[36] Ibid, p. 36.

This question is very relevant when it comes to demanding states take international responsibility in the event of PMSCs and their personnel committing violations of the law, something we shall be looking at next.

VI. RECOGNITION OF THE GENERAL NORM OF ATTRIBUTING WRONGFUL ACTS COMMITTED BY PMSCS AND THEIR PERSONNEL TO THE STATE

Lastly, we must examine a different problem, which is sometimes confused with that of suppressing the wrongful acts of PMSCs and their personnel.

The problem of attributing wrongful acts committed by PMSCs and their personnel to the state is distinct from that of determining which state has the duty to exercise its jurisdiction over PMSCs and their personnel[37] – in other words, the duty to exercise sovereign authority in the regulation and monitoring of conducts as well as the adjudication of responsibility where necessary in order to protect human rights and international humanitarian law, as mentioned in section IV.

The problem we now address revolves around proving a state's international responsibility in the event of violations of international law committed by PMSCs and their personnel. In this scenario, it is not assumed that responsibility belongs solely to an individual (or a legal person), neither in internal law nor in international law (in the event of crimes against international law). Depending on the circumstances, a state's responsibility may be determined in parallel or subsidiary to that of the persons involved[38].

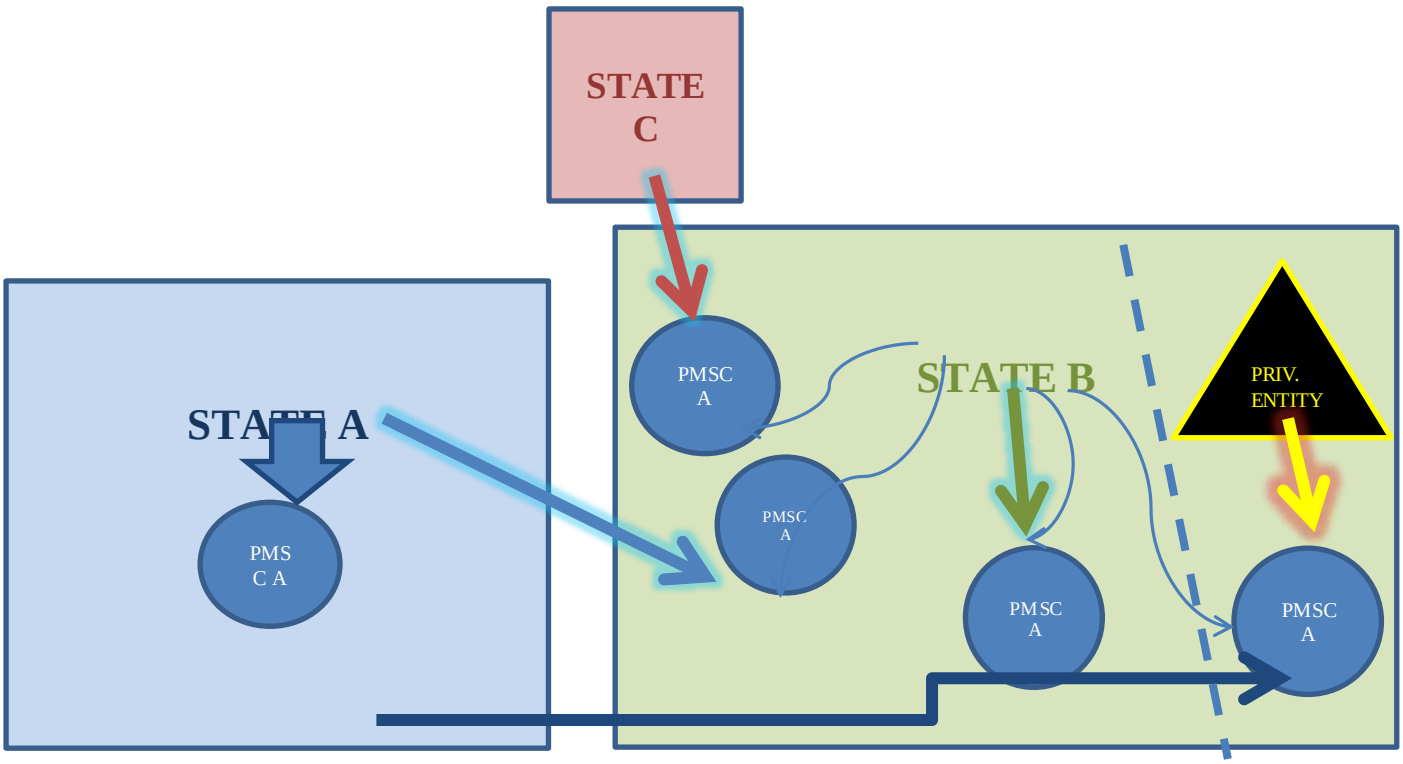
This matter is regulated by general international law and was rigorously systematized by the ILC's 2001 Draft Articles on Responsibility of States for Internationally Wrongful Acts. We shall now see how this law applies in our hypothetical scenario, which is outlined in the following illustration[39].

[37] Ibid, p.33

[38] In fact, when there is an international wrongful act attributable to a state, there arises a relation of international responsibility, and subsequently an international claim demanding full reparation for the injury caused may or may not be made.

[39] PMSC A is a company founded in state A, the home state. We shall suppose two different scenarios:

1. PMSC A operates within state A (many companies only do security work, those doing military work are much less common).
2. PMSC A operates in another state, which we shall call state B. It does so under the following legal terms:
   a. Contracted by state A
   b. Contracted by state B
   c. Contracted by a third state, which we shall call state C
   d. Contracted by a private entity



In line with this illustration, we can identify the following scenarios.

Scenario 1: PMSC A is operating within the territory and jurisdiction of its home state. In this case, any attribution for its acts will conform to one of the following principles of general international law:

a) Following Thesis A of functions inherent to the state (see section III), it is necessary to consider the nature of the armed coercion function that has been outsourced. If it is a function inherent to the state, the home state is directly responsible for the acts of PMSCs. If not, the home state may be responsible due to non-fulfillment of the general duty towards prevention.

b) Following Thesis B of functions inherent to the state (see section III), it has to be remembered that armed coercion will always be a governmental (or inherently state) power, meaning that the home state is always directly responsible for the acts of PMSCs and their personnel.

Scenario 2: PMSC A is operating in another state (which we shall call state B) under different possible mandates: contracted by state A, by state B, by state C, or by a private entity. To summarize, there are three scenarios resulting in the problem of attributing responsibility for the wrongful acts of PMSCs acting outside their home state's territory – the most common situation, as you may remember.

a) First: attribution of the act to the contracting state (regardless of whether this is state A, B or C).

As highlighted by Professor De Schutter, the potential legal relations are as follows:

- A relationship as state organs: employees of the PMSC are considered part of the state's armed forces, as per Art. 4 (A) (1) of the III Geneva Convention of 1949. This is a relatively exceptional scenario[40]. The state has obligations regarding control and is of course internationally responsible for any violations by these employees acting as its organs.

- A contractual relationship: the employees operate like an independent militia (Art 4 (A) (2) of the III Geneva Convention of 1949) or as "[p]ersons who accompany the armed forces without actually being members thereof" (Art. 4 (A) (4) of the III Geneva Convention of 1949). In any event, this contractual relationship may translate into different legal relations, as described in the ILC's 2001 Draft Articles[41].

i. Complete dependence on the state, meaning that the state is responsible for acts committed by PMSCs and their personnel, who can be classified as de facto state agents[42].

ii. The carrying out of acts having been legally empowered with governmental authority to do so, and when acting in this capacity (Art. 5, ILC's 2001 Draft Articles).

iii. Actions taken on the instructions of the state or under its direction or control (Art. 8, ILC's 2001 Draft Articles).

iv. The carrying out of activities under governmental authority in the absence or default of the official authorities (Art. 9, ILC's 2001 Draft Articles).

v. Actions acknowledged and adopted by a State as its own (Art. 11, ILC's 2001 Draft Articles).

Following this thesis, the contracting state would always be responsible for the acts of PMSCs and their personnel.

b) Second: attribution of the act to the territorial state (state B).

[40] De Schutter, O., op. cit., p. 26.
[41] *Ibid*, pp. 26-27.
[42] *Ibid*, pp. 29-32.

The territorial state (not the contracting state) is always under the obligation to control the activities of PMSCs acting in their national territory[43] or jurisdiction. Therefore, in application of the theory stated earlier, international law carries the obligation to adopt due diligence measures. In the event of violations of international law by PMSCs and their personnel, it may be evaluated whether responsibility should be attributed to the territorial state due to a non-fulfillment of its general duty towards prevention and protection. This responsibility may be deemed as parallel or complementary to that of the contracting state, or as the greatest responsibility when the PMSC has been contracted by a private entity.

The practical problem is that in most cases seen in practice, the territorial state's government apparatus is not working and its situation is that of a so-called 'failure state'. In these cases, Professor De Schutter asks the question: "is the home state under a duty to act?"[44]

This leads us on to the last scenario, that of the PMSC's home state's potential extraterritorial obligation to protect human rights.

c) Third: attribution of the act to the home state (the exporting state, not the contracting state) – state A.

If the PMSC has registered in a state and it is carrying out operations abroad from this state, and if the territorial state cannot or does not want to perform its general duty towards prevention, can international responsibility be attributed to the home state? This problem arises especially when there is not a contracting state to which responsibility can be attributed, because the PMSC has been contracted by a private entity.

The answer relates directly to the obligations states are under, as identified previously. As we have already seen, under general international law the home state has obligations to regulate, monitor and adjudicate responsibility in relation to the actions of its companies; at very least in the case of privatized armed coercion this obligation is clear, according to the doctrine[45] to which I subscribe.

The attribution of acts to the home state can take two courses, which are analogous to those already described for scenario 1:

- Following Thesis B of functions inherent to the state (see section III), it has to be remembered that armed coercion will always be a governmental (or inherently state) power, meaning that the home state is always directly responsible for the acts of PMSCs and their personnel. In this case, a private entity is empowered by the state to exercise a function of governmental authority for the purpose of exporting these activities. *De lege ferenda*, I believe the clearest way forward is to suppose that in these scenarios Article 5 of the ILC's 2001 Draft Articles applies. This is based on the fact that a function of governmental authority has been outsourced for its export; whether this function is then contracted by a private entity or

[43] Ibid, p. 33 and note 29.
[44] I*bid*, p. 34.
[45] Ibid, p. 24 .

by another state does not alter the link to the origin, i.e. the home state, as coercion must always be incumbent to the state.

- Following Thesis A of functions inherent to the state (see section III), it is necessary to consider the nature of the armed coercion function that has been outsourced. If it is a function inherent to the state, the home state is directly responsible for the acts of PMSCs. If not, the home state may be responsible due to non-fulfillment of the general duty towards prevention. The legal problem is to determine whether this general duty has extraterritorial application, whether the home state must strive to ensure that PMSCs operating abroad respect human rights. This question brings us back to our analysis of the primary norm that is the general duty home states and exporters of armed coercion have towards prevention, a matter discussed at the end of the previous section, to which we turn may our attention once again.

In any event, general international law on state responsibility for internationally wrongful acts need not be repeated in an international convention on the minimum standard for the privatization of coercive power and respect for human rights. This issue would not be the purpose of the convention. Rather, what is required is the codification and progressive development of the relevant primary norms, given that it is a lacuna in international law that is hindering the application of this general system of state responsibility.

VII. FINAL CONSIDERATIONS

This chapter has pointed out the appropriateness of states recognizing an international minimum standard as regards the privatization, export, and import of armed coercion. Said international minimum standard can be established by means of an international convention. This would address minimum requirements and would not be as long or detailed as the draft of a possible convention presented by the Working Group on Mercenaries in 2010. This would mean a reduction of the previous content, from around 29 articles to no more than 20.

The convention could be supplemented by protocols and annexes, to be used for subsequently incorporating any aspects upon which consensus had not yet been reached at the time of adopting the convention. It could also include recommendations for good practices directed at states.

The convention would be addressed towards states and international organizations. It would apply in all circumstances, not being limited only to armed conflict situations. Furthermore, it would include the Martens Clause.

Much of its content would have its application in internal law, meaning that it would mostly be made up of non-self-executing rules.

The convention would address areas requiring codification and progressive development. It has been demonstrated that there are general international law norms relating to the issue that would be recognized by states and codified

through the convention. Furthermore, the argument that this issue is covered within the laws of state responsibility and is already regulated by its norms, as argued by certain parties, has also been shown to be false. On the contrary, we have shown that for these secondary norms to be applied they must first be systematized, and that primary norms must be created to regulate the privatization of armed coercion. It has also been demonstrated that even though there do exist some norms in general international law, there are also international lacunae that justify progressive development.

In this regard, international recognition of this minimum standard by way of a convention is a requirement given the evolution of our contemporary international society. Just as classical concepts are nowadays often seen as apt for explicitly highlighting the social flaws in historical and current events (for instance expressions such as *decent work*, *inclusive development* and *human security*), the issue we are dealing with needs emphasizing in a similar way. The classical concept of the state monopoly over armed coercion must take on a descriptor so as to underscore current flaws. Accordingly, coercive sovereignty should nowadays be exercised by state in a way that is respectful of the basic human rights. As such, we should move from simply coercive sovereignty to *lawful coercive sovereignty*, or *coercive sovereignty with respect for human security*.

In summary, the purpose of the convention would be to promote respect for human rights in the processes and practices of outsourcing, contracting, exporting, and importing armed force by states. Essentially, it is to promote the exercising of a lawful coercive sovereignty, one that is respectful of human security.