



LawPublicus
The Legal Portal

Volume 1 : Issue 3
2021

January 2021

Email ID: Lawpublicusportal@gmail.com
Website: www.Lawpublicus.com
Address: A18 Dayanand Colony Lajpat Nagar - 4
New Delhi

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LawPublicus The Legal Portal

An Analysis of the Legal Status of Private Military Companies

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An Analysis of the Legal Status of Private Military Companies

By: Ashwin Rathan Kumar B

ABSTRACT

Private military companies (PMC's) are not a novel development on the battlefield. However, in recent times and wars, their number and influence have increased. They carry out a variety of activities, from strategic support to military operations. This latter role poses issues surrounding the applicable laws in particular. At first sight, you might think of classical mercenaries in battles. But several PMC's work out service activities in the meantime to keep the army going. It is not always possible to discern whether they only use force in self-defence or whether they still strike. This article examines the legality of PMCs and the privatisation of war. In recent years, parties to armed wars have gradually hired private military companies (PMCs) to carry out duties historically undertaken by the armed forces. The presence of these firms in or around combat activities posed concerns about the manner in which international humanitarian law (IHL) could be enforced.¹ The primary purpose of the essay is to address the legal position of private military companies and to describe their laws and obligations. The secondary goal is to research problems resulting from the application of international humanitarian law to PMCs. The paper seeks to answer what is the legal status of private military personnel. The paper further tries to answer does involvement of Private Military Companies in military operations intervene in application of International Humanitarian Law.

¹ Icrc.org. 2021. *Contemporary Challenges To IHL – Privatization Of War: Overview - ICRC*. [online] Available at: <https://www.icrc.org/en/doc/war-and-law/contemporary-challenges-for-ihl/privatization-war/overview-privatization.html> Accessed on 8 January 2021.

1. PRIVATE MILITARY COMPANIES

The participation of private parties in the war is not a recent development. Indeed, it is as old as war itself and, going back to antiquity, it is obvious that even the ancient Egyptians recruited men to finance their wars. However, following the conclusion of the Cold War, new changes in the private security industry have taken place. The prominent role of private fighters in these companies was a recent and evolving trend. In comparison, there are also far more players than when they employed PMCs, including nations, but also humanitarian groups, companies and business firms. As a result, PMCs are now delivering various types of operations with distinct roles and impacts on their tasks relevant to the needs of these particular actors.² A simple separation and categorization between all organisations and actors selling and delivering resources in the military and defence sectors is almost unlikely, as the current debate indicates. A helpful approach to categorization is proposed by Singer, which separates the private defence industry into three basic market segments, namely military manufacturers, military consultancy firms and military firms. While the first sector, defence provider companies, supports direct operational military assistance, including front-line combat, the second sector, military consultant firms, delivers technical advisory and preparation expertise.³ The third sector, military assistance companies, deals with logistics, intelligence and repair facilities. However, it is impossible to draw a straight line between the three sectors. The purpose of this article is to demonstrate that, under such conditions, every employee, as well as every organisation of a private company not belonging to the armed forces, must abide by the rules of International Humanitarian Law. This article uses the term 'employees' of PMCs, because those employees are most likely to be the ones concerned, since they often perform tasks of an active or offensive nature in armed conflict. However, workers of private security organisations may often find themselves in cases where they have to comply with international humanitarian law, for example in the case of the defence of a military item.⁴ In conclusion, it is the specific situation and action of an employee that determines the application of the rules of international humanitarian law to that person rather than the category to which the employee belongs.

² *Themenschwerpunkt*, 2021. Rules and Responsibilities of Employees of Private Military Companies under International Humanitarian Law. 26(4).

³ *Ibid.*

⁴ *Ibid.*

2. STATUS OF PMC'S

The status of employees of PMCs operating in the context of an international armed conflict must be determined as a starting point. It is only once the status has been established that the applicable rules can be established, since those rules depend on the status of a person in armed conflict. International humanitarian law recognises only two categories of persons in an international armed conflict. Therefore, on the one hand, it could be argued that PMC employees fall within the definition of "combatants" because some of them fight side-by-side with regular armed forces, who are certainly combatants, or may even fight alone. Article 43(2) of Additional Protocol I to the 1977 Geneva Conventions ('AP I') provides for the determination of who a combatant is. On the other hand, it also appears appropriate to describe the status of employees of PMCs in the category of "civilians" as defined in Article 50 of AP I. It has been noted in the API comments that "unlawful combatants" may best be categorised as having civilian status.⁵

2.1 Combatant Status

Article 43 of the AP I describes the armed forces and the role of officers of the armed forces as combatants. As combatants, they have the right to participate directly in hostilities, which means that they are immune from prosecution for legitimate acts of war, but not in violation of international humanitarian law. In addition, a combatant is a legitimate target for the enemy and has a duty to distinguish himself or herself from the civilian population. Finally, pursuant to Article 44(1) of the AP I, combatants are granted prisoner status of war if they are captured. In order to determine whether the personnel of the PMCs have combatant status, it is first necessary to determine whether the PMCs are part of the armed forces of the state. The question of belonging to the armed forces of a state is generally considered to be a matter of domestic law. However, Article 43 of the AP I lays down three preconditions: firstly, that the group be organised and under the control of that State Party; secondly, that there is an internal disciplinary system and compliance with the rules of international law applicable to armed conflicts; and finally, in the case of the incorporation of a paramilitary or armed law enforcement agency, that notification be made. In the case of PMCs, it is difficult to see how these private companies could be assimilated to the national armed forces by a mere commercial contract. Such a contract may regulate the tasks of PMCs, lay down rules on liability and lay down payment terms. However, there has been little indication that states

⁵ *Supra* note 3

hiring PMCs intend to integrate them into their military structure, as the U.S. authorities have shown. Only the limited and discrete tasks of the armed forces are outsourced to the PMC. PMCs are therefore not part of the armed forces and therefore their employees do not have combatant status under this provision.

The provisions relating to the militia or voluntary corps of Article 4A(2) of the Third Geneva Convention ('GC III') provide for another possibility of possession of combatant status.. The actors must belong to an armed force and fulfil four criteria laid down in Article 4A (2) of GC III:

- (1) They must be commanded by a person responsible for his subordinates.
- (2) They must have a fixed distinctive sign recognizable at a distance.
- (3) They must carry their arms openly.
- (4) They must conduct their operations in accordance with the laws and customs of war.

In the case of PMCs, the first condition, belonging to the armed forces, is questionable. On the one hand, many non-state actors hire PMCs, and those PMCs hired by states operate separately from the armed forces. The PMCs therefore neither form part of nor belong to the armed forces, and therefore their employees do not have combatant status as part of the militia or volunteer corps, such as the French Resistance during the Second World War..⁶

2.2 Civilian Status

This conclusion leads to the conclusion that PMC personnel must be identified as civilians under international humanitarian law. In general, according to Article 13 of the Fourth Geneva Convention ('GC IV') and Article 51 of the AP I, citizens are shielded from attacks until and until such time as they engage specifically in warfare.⁷ This will mean that the staff of the PMCs cannot be the target of an assault, but also that they are not authorised to enter into action or take a direct part in warfare in another way, yet to be decided. If they do so, additional rules apply to them. On the one hand, one could think of mercenaries and their role in a conflict, on the other hand, there are exceptions if civilians take a direct part in hostilities.⁸

⁶ ibid

⁷ Loc.gov. 2021. [online] Available at: https://www.loc.gov/r/frd/Military_Law/pdf/GC_1949-IV.pdf Accessed 8 January 2021.

⁸supra note 9

2.3 Rules applicable to employees of PMC's

If they do, they will be subject to further instructions. On the one hand, one might think of the mercenaries and their role in the war, but on the other, there are exceptions when citizens are actively involved in warfare. If they are detained while accompanying forces in the background of an ongoing military conflict, they are entitled to the status of prisoners of war according to Article 4A(4) of GC III. In accompanying forces, they must be vigilant not to reach the criteria for active involvement in warfare, e.g. by assisting frontline forces with ammunition and guns or by participating in combat operations.⁹ The same threshold issue relates to security activities related to artefacts, e.g. houses. Furthermore, in such a situation, the staff of the PMCs must be aware that they could not engage specifically in conflicts which might be the case if the object involved were a military one pursuant to Article 52(2) of AP I and therefore a valid target. In a case where staff of PMCs are directly concerned. Once their rank has been created, which does not in itself grant the citizen the right to prisoner of war status, Article 75 of the AP I remains in effect and grants them minimal immunity with such basic guarantees.¹⁰ The ethnicity of a PMC employee does not matter, because the implications for Mercenaries under Article 47 of the AP I and civilians who are personally engaged in conflicts are equal under international humanitarian law. Both will then be prosecuted and convicted under national law for any crime committed. These laws apply to the status of staff of PMCs. However, other principles of international humanitarian law, such as war and the use of certain weapons, also apply to them.¹¹

2.4 Responsibilities of employees of PMC's

In the light of these laws applicable to employees of PMCs, it is in their benefit to restrict the services they offer. They can stop actively assisting the front line of any military equipment and defending structures that are military objects or in increasingly insecure zones where they can become military objects.. As civilians, they are not allowed to take a direct part in hostilities and thus they must be careful not to pass over this thresholdAs citizens, they are not permitted to engage actively in conflicts, and so they must be vigilant not to exceed the line. As it is very difficult to define direct involvement, the preferred solution is to fully eliminate circumstances that may lead to a possibility for direct participation..¹² If PMC staff

⁹ *Supra* note 3

¹⁰ *ibid*

¹¹ Icrc.org. 2021. [online] Available at: https://www.icrc.org/en/doc/assets/files/other/irrc_863_cameron.pdf
Accessed on 8 January 2021.

¹² *Supra* note 11

plan to take part in military activities, they must be informed that they are valid targets for the enemy and punishable by national law for their actions.¹³

LEGITIMACY OF USING PMC'S

The role of PMSCs in the war is not fresh. However, in recent military conflicts, their numbers have grown dramatically and the scope of their operations has shifted, causing some observers to talk about an increasing "privatisation" of war.

These provide the security of military staff and assets, educating and advising of armed forces, retaining gun structures, interrogating prisoners and, on occasion, combat.

The status of the businesses and their workers is not straightforward. Non-state actors are bound by IHL during armed conflict whether they are party to the war or if they participate in conflict-related activities. PMSCs may not necessarily be party to the dispute, but their workers, as individuals, are more likely to come under IHL laws based on their unique positions and practises.

The majority of PMSC workers fall under the civilian group as defined by IHL. Both international military conflicts and non-international armed conflicts are governed by and covered by the Fourth Geneva Convention, the Additional Protocols of 1977 and customary law. However, if they engage actively in warfare, attack defence would be lost.

Despite the sporadic use of media coverage of the word "mercenary" in reference to PMSC staff, the phrase has, in particular, a narrow meaning under IHL and does not refer to any private contractors in recent conflicts.¹⁴

This has to be explained when it comes to the responsibility of the Governments. In very general terms, a State which hires private corporations must ensure that these companies comply with IHL and that their employees are made aware of their obligations. States which have authority over private corporations engaged in military conflicts often have responsibility to ensure that IHL is upheld by those companies.

¹³ Icrc.org. 2021. [online] Available at: <https://www.icrc.org/en/doc/assets/files/other/pmc-article-a-faute.pdf> Accessed on 8 January 2021.

¹⁴ Supra note 11

In reaction to the increased involvement of PMSCs, numerous international efforts have been conducted with a view to clarifying, reaffirming or improving international legal principles governing their operations and, in particular, ensuring that they conform with the standards of behaviour reflected in IHL and human rights law.

The Montreux paper was adopted in September 2008 as a result of the effort initiated jointly by Switzerland and the ICRC. The Montreux Document reiterates and reaffirms the current legal commitments of the States with respect to the actions of the PMSC during the armed conflict. It further recommends a catalogue of good practise for the realistic application of current legal obligations..¹⁵

CONCLUSION

Although existing international humanitarian law can discourage the status of mines and the rules and obligations of PMC workers, the above-mentioned criticism indicates that the use of PMCs has an effect on all parties engaged in a conflict situation, whether willingly or not. Despite the clear propensity of states to privatise military activities, main areas remain insufficient for privatisation. One of these fields is the use of power by governments. The use of PMCs for conflict support or defence is one thing, but the use of PMCs on the front line goes too far. The laws of international humanitarian law applied to staff of PMCs show that there is a restriction to their participation in military operations. It is imperative that these rules and obligations be taught to the PMCs themselves, as also, and in particular, to all PMC workers.¹⁶

This case study is for information purpose only. Nothing contained herein shall be deemed or interpreted as providing legal or investment advice.

¹⁵ *ibid*

¹⁶ *Supra* note 11