UDC 342 International Law

INVOLVEMENT OF PRIVATE COMPANIES IN ARMED CONFLICT: IMPLICATIONS UNDER INTERNATIONAL HUMANITARIAN LAW

Armine DANIELYAN

Keywords: *private military companies (PMCs), private security companies(PSCs), mercenary, international humanitarian law (IHL), Fourth Hague Convention, Geneva Conventions and Additional Protocols I, II, combatant, armed conflict, prisoner of war, direct participation.*

Բանալի բառեր. *մասնավոր զինվորական ընկերություններ, մասնավոր անվտանգության ընկերություններ, վարձկան, միջազգային մարդասիրական իրավունք (ՄՄԻ), Հաագայի չորրորդ կոնվենցիա, Ժնևյան կոնվենցիաներ և I, II լրացուցիչ արձանագրություններ, կոմբատանտ, զինված հակամարտություն, ռազմագերի, անմիջական մասնակցություն:*

Ключевые слова*: частные военные компании (ЧВК), частные охранные компании(ЧОК), наемник, международное гуманитарное право (МГП), Четвертая Гаагская конвенция, Женевские конвенции и Дополнительные протоколы I, II, комбатант, вооруженный конфликт, военнопленный, непосредственное участие.*

А. Даниелян

Участие частных компаний в вооруженных конфликтах: Последствия в международном гуманитарном праве

В течение последних лет резко увеличилось число и роль частных военных компаний и частных охранных компаний, работающих в условиях вооруженного конфликта. Найм военных услуг со стороны отдельных лиц и частных фирм развился в сфере, которую невозможно было предвидеть ранее. В многих странах частные компании работают в правовом вакууме, что приводит к новым вопросам в международном гуманитарном праве (МГП).

В этой статье нет суждений о законности частных подрядчиков, она не оценивает преимущества и недостатки государств и других субъектов, которые обращаются к услугам частных компаний. С одной стороны она анализирует статус персонала частной кампании с точки зрения международного гуманитарного права. С другой стороны, она обсуждает, какими будут последствия для государства, заключившего договор с такими компаниями, в случае, если их персонал совершил нарушение международного права.

Ա. Դանիելյան

Մասնավոր ընկերությունների մասնակցությունը զինված ընդհարումներին. Հետևանքները միջազգային մարդասիրական իրավունքում

Վերջին տարիներին կտրուկ աճել է զինված հակամարտություններում մասնավոր զինվորական ընկերությունների և մասնավոր անվտանգության ընկերությունների մասնակցության թիվը և դերը: Զինված ծառայություններ ստանալը առանձին անհատների և մասնավոր կազմակերպությունների կողմից զարգացավ այնպիսի ուղղությամբ, որը երևի նախկին տարիներին չէր կանխատեսվում: Շատ երկրներում մասնավոր ընկերությունները գործում են իրավական վակուումում: Եվ այս ամենը միջազգային մարդասիրական իրավունքի համար նոր հարցեր առաջադրեց: Այս հոդվածը նպատակ չի հետապնդում դատել մասնավոր կապալառուների գործնեության օրինականության մասին, այն չի գնահատում պետության կամ այլ սուբյեկտների թերությունները կամ առավելությունները, որոնք դիմում են մասնավոր ընկերությունների ծառայություններին: Մի կողմից այն վերլուծության է ենթարկում մասնավոր ընկերության անձնակազմի կարգավիճակը ՄՄԻ տեսանկյունից, մյուս կողմից այն քննարկում է, թե ինչպիսին կլինեն հետևանքները այն պետության համար, որը պայմանագիր ունի նման կազմակերպության հետ, եթե այդ կազմակերպության անձնակազմը խախտի միջազգային իրավունքի նորմերը:

The number and role of Private Military Companies (PMC) and Private Security Companies (PSC) operating in situations of armed conflict has extremely increased during the recent years. Procurement of military services by individuals and private firms has developed in a direction that had probably not been anticipated in previous years. In many countries, private companies operate in a legal vacuum. And it has led to new questions for International Humanitarian Law.

This paper does not purport to make a judgment on the legitimacy of private contractors, nor to evaluate the advantages and disadvantages for States and other actors to call upon the services of private companies. On the one hand, it analyses the status of personnel of private companies under international humanitarian law . On the other hand, it considers what are the implications for States that contract such companies if their personnel commit violations of international law.

The use of private military and security contractors has grown significantly in recent conflicts. At present, there is no commonly agreed definition of what constitutes a "private military company". The intentionally vague and generic term "private military/security company" is used to cover companies providing any form of military or security service in situations of armed conflict[1]. Whereas the tasks of these contractors initially related to logistical or administrative support, the past years have witnessed a significant growth in the involvement of PMCs in security and military functions in situations of armed conflict. Governments are increasingly hiring private companies for tasks such as protecting persons and objects, military and nonmilitary, training and advising armed and security forces, providing expertise on maintaining and operating complex weapons systems, collecting intelligence and, less frequently, participating in combat operations[2].

And it has led to new questions for International Humanitarian Law (IHL). It is often asserted that there is a vacuum in the law when it comes to their operations. Here we must answer a few questions, which are necessary for us to have some representation about this problem:

1. Are there differences between private military and private security companies?
2. Are employees of private companies 'mercenaries'?
3. Which status does the personnel of private companies under international humanitarian law have?
4. Are the States responsible of contract private companies?

1. Are there differences between private military and private security companies?

Public international law and international humanitarian law do not specify the exhaustive list of functions that can be transferred to the implementation of PMSCs.

The theory often distinguishes between private military companies and private security companies carried out on a functional basis. Thus, the definition put forward by the Geneva Centre for the Democratic Control of Armed Forces (DCAF) Private Security Company is a business which has implemented the activity of providing goods and services for implementation of conservation and protection of persons and property in order to have a profit. And by private military companies is meant activities which provide military services in the fields of counseling, logistical and military activity undertaken for profit. It should be noted that there is not generally accepted or universally binding normative of the international legal definition of PMSCs.

Private military companies (or "PMCs"), as traditionally understood, provide services to replace or back-up an army or armed group or to enhance effectiveness. This category is further broken down into two sub-categories by some authors: "active PMCs, willing to carry weapons into combat and passive PMCs, that focus on training and organizational issues[3]."

Private security companies (or "PSCs") provide services aimed at protecting business and from criminal activity. These types of companies have existed for a very long time and are found everywhere, but their number seems to be on the increase especially in conflict regions, where businesses feel they cannot always adequately rely on State security forces for their protection.

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[1] E.C. Gillard, Business Goes to War: Private Military/Security Companies and International Humanitarian Law, ICRC Review, Volume 88, Number 863, September 2006, p. 530.

[2] M. Cottier, Elements for Contracting and Regulating Private Security and Military Companies, ICRC Review, Volume 88, Number 863, September 2006, p. 638

[3] D. Brooks, Protecting People: the Private Military Companies Potential: Comments and Suggestions for the UK Green Paper on Regulating Private Military Services, 25 July 2002, p. 3. Available from International Peace operations Association (IPOA) website: www.ipoaonline.org

The traditional distinction between PMCs and PSCs is found in various documents and certainly reflects a reality of the market. With regard to international humanitarian law, however, the limit between these concepts is not as clearly delineated as it might appear. As it will be shown, it would be incorrect to assume that only a few PMCs seeking active combat duties are concerned with the applicability of this body of law. Being frequently active in countries where an armed conflict is ongoing, personnel of PSCs could become embroiled in armed confrontation. For instance, the facility that they are providing security to could be attacked, and it is worth considering what the implications would be, under humanitarian law, if security companies personnel returned fire in such a case.

Besides, some of the activities carried out by private companies may, under certain circumstances, be considered as direct participation in the hostilities. This raises a number of questions regarding the fundamental distinction between civilians and combatants, that lies at the core of international humanitarian law[1].

2. Are employees of private companies 'mercenaries'?

Term "mercenary" can be used in a generic – and often politically loaded - sense, it has a precise meaning from a legal viewpoint. The definition of mercenary is found in three documents: Article 47 of Protocol I, the "Convention on the Elimination of Mercenarism in Africa" of 1977, and the "International Convention against the Recruitment, Use, Financing and Training of Mercenaries" adopted in 1989 by the United Nations General Assembly.

According to Article 47 of Protocol I, a mercenary is any person who:
(a) is specially recruited locally or abroad in order to fight in an armed conflict;
(b) does, in fact, take a direct part in the hostilities;
(c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
(d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
(e) is not a member of the armed forces of a Party to the conflict; (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

This definition, which requires that all six conditions must be fulfilled, has been judged unworkable by many authors [2] and will very seldom be applicable to personnel of private companies.

In July 1977, the African States adopted in Libreville the OUA Convention for the Elimination of Mercenarism in Africa. This Convention integrates the six criteria of the definition of a mercenary containd in Article 47 of Additional Protocol I, which had been adopted in Geneva only a few weeks before OUA Convention defines very clearly in its article 6 of the States obligations[3].

The Convention, however, only criminalizes the "unlawful" use of mercenaries according to the terms of the convention, i.e. when they oppose by armed violence a process of self-determination stability or the territorial integrity of an African State.

The International Convention against the Recruitment, Use, Financing and Training of Mercenaries of 1989 was finally adopted in 1989 and it entered into force twelve years later, on 29 October 2001, after the twentieth instrument of ratification had been deposited with the UN Secretary-General. Many of the States where private military and security companies are active, have not ratified the Convention.

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[1] Alexandre Faite "Involvement of Private Contractors in Armed Conflict: Implications under International Humanitarian Law", 25.01.2008, Vol. 2, Summer 2004, pp. 3-14

[2] F.J Hampson, "Mercenaries: diagnosis before proscription", Netherlands yearbook of international law; Vol. 22, 1992, p. 30. W.T. Mallison and S.V. Mallison, "The Juridical Status of Privileged Combatants under the Geneva Protocol of 1977 Concerning International Conflicts. Law and Contemporary Problems, Duke University, 1978, p. 29. R.C Hingorani, Prisoners of War, Oceana Publications, inc., Dobbs ferry, New York 1982, p 63.

[3] Chaloka Beyani and Damian Lilly, "Regulating Private Military Companies", International Alert, London, 2001.

The definition of a mercenary is contained in paragraph one of Article 1 of the Convention. It applies to international and internal armed conflicts. The definition is also applicable in other situations where there exists a situation of a concerted act of violence aimed at "overthrowing a government or otherwise undermining the constitutional, legal, economic or financial order or the valuable natural resources of a State"

Contrary to Article 47 of Additional Protocol I, the Convention:

- establishes mercenary acts as international offences (Article three);
- establishes the recruitment, use, financing and training of mercenaries as international offences (Article two);
- establishes as an offence to be accomplice of a person who commits or attempts to commit a mercenary activity (Article four).

To the shortcomings and loopholes of international law with regard to mercenary activities and activities carried out by military and security transnational companies one has to add the fact that very few countries foresee in their domestic legislations provisions to deal with this phenomenon.

3. Which status does the personnel of private companies under international humanitarian law have?

In a country at war, the first question that must be considered to assess the status of personnel of private companies is whether such personnel must be categorized as civilians or combatants. It is a cornerstone of international humanitarian law that, while civilians must be protected to the largest possible extent from the effects of armed conflict and may not be attacked, enemy combatants represent military targets and may be attacked lawfully as long as they are not "hors de combat". Only combatants have the right to take part in the hostilities.

In international armed conflicts, members of the armed forces of a party to a conflict are defined in the Regulations annexed to the Fourth Hague Conventions of 18 October 1907 (hereinafter "the Hague Regulations"), Article 4 A (1), (2), (3) and (6) of the Third Geneva Convention and Article 43 of Protocol I.

In addition to situations where they would be integrated in the regular armed forces of a belligerent, personnel of private companies would be categorized as combatants if they formed part of militias belonging to a party to the conflict and fulfilled the conditions provided by Article 1 of the Hague Regulations, and Article 4 A (2) of the Third Geneva Convention:

1. to be commanded by a person responsible for his subordinates;
2. to have a fixed distinctive emblem recognizable at a distance;
3. to carry arms openly;
4. to conduct their operations in accordance with the laws and customs of war

In situations where Protocol I is applicable, personnel of private companies would be considered as combatants, according to Article 43, if they belong to an organized group or unit which is under a command responsible to a party to the conflict for the conduct of its subordinates, and is subject to an internal disciplinary system which enforces compliance with the rules of international law applicable in armed conflicts.

With regard to the issue of internal disciplinary system and compliance with the rules of international law applicable in armed conflicts, it is interesting to note that some private companies pledge in their public communication that they respect international law, especially human rights and humanitarian law.

If members of private companies are categorized as combatants, they have the right to participate in the hostilities but, as a consequence, they are not immune from military attack. Their legal status and, therefore, rights and obligations do not differ from other members of armed forces. If they are captured, for instance, they are a priori entitled to prisoner of war status.

Although the term "combatant" is frequently used in its generic sense, the status of combatant does not exist in non-international armed conflicts. In a civil war, members of organized armed groups are

not entitled to prisoner of war status upon capture. Their status is essentially a matter of domestic law, and they can be prosecuted for taking up arms.

As the provisions of humanitarian law applicable in non-international armed conflicts do not provide for a definition of combatant, the distinction and protection afforded by international humanitarian law rests mainly on the distinction between those who take a direct part in hostilities and those who do not. During such time as they conduct sustained and concerted operations under responsible command, a wording provided for in Article 1, paragraph 1, of Additional Protocol II, private contractors would not be entitled to the protection afforded to civilians under international humanitarian law.

In international armed conflicts, according to Article 50 of Protocol I, persons that are not categorized as members of the armed forces of a party to the conflict are civilians. If they are civilians, private contractors are protected against direct attacks "unless and for such time as they take a direct part in the hostilities[1]".

It does not matter that private contractors are armed, for instance. The simple fact of carrying a weapon does not imply per se that the bearer takes a direct part in the hostilities. The use of a weapon may happen in the context of common criminal activity, with no relationship with an ongoing armed conflict. Interestingly, many security firms exclude themselves from the definition of mercenary on the basis that, precisely, they do not take a direct part in the hostilities[2].

However, under international humanitarian law, direct participation in the hostilities is not restricted to situations where individuals are involved in military deployment or are armed with a view to taking an active part in combat operations. A precise definition of "direct participation in the hostilities" is not readily available in the Geneva Conventions and their additional Protocols of 1977 but the commentary on Additional Protocol I states that "direct participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.[3]"

The direct participation in the hostilities is arguable that private contractors involved in transportation of weapons and other military commodities, intelligence, strategic planning or procurement of arms, may lose the protection afforded to civilians under international humanitarian law [4].

With regard to intelligence activities, this is confirmed by the United States Naval Handbook, that classifies as direct participation in hostilities "Collecting information or working for the enemy's intelligence network[5]". It must be noted that if they take a direct part in the hostilities, private contractors that are categorized as civilians lose their protection only for the duration of such direct participation. Unlike combatants, whose "organic" membership makes them liable to attack at all times, civilians enjoy the protection afforded by humanitarian law "unless an for such time as they take a direct part in the hostilities[6]"

4. Are the States responsible of contract private companies?

States cannot absolve themselves of their obligations under international humanitarian law by contracting PMCs. They remain responsible for ensuring the relevant standards are met. Should the staff of the PMCs commit violations of international humanitarian law, the state that has hired them may be

[1] This rule is provided for in Article 51 (3) of Protocol I for international armed conflicts, and Article 13 (3) of additional Protocol II for non-international armed conflicts.

[2] D. Shearer, "Private Armies and Military Intervention", Adelphi Paper 316, International Institute for Strategic Studies, Oxford University Press, p. 18

[3] Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, op.cit., § 1944, p. 618

[4] According to J.L. Taulbee, "companies such as Vinnel, Armor holdings, Levdan, Dyncorp, TSI and MPRI provide strategic planning, advice, intelligence, training, active procurement and logistical support to clients who lack their own capabilities in these areas". J.L. Taulbee, op. cit., p. 4

[5] United States Naval handbook (1995), Par. 11.3

[6] Article 51of Protocol I and Article 13. 3 of Additional Protocol II.

responsible if the violations can be attributed to it, in addition to the company and its staff. States must ensure that the staff of such companies respects international humanitarian law.

States have a number of obligations under international law with regard to the activities of PMCs. These obligations need to be clarified in order for States to put adequate legislation and mechanisms into place. Under Article 1 common to the four Geneva Conventions, all States have an obligation to respect and ensure respect for IHL.

The responsibilities of states hiring PMCs are based in general public international law. Very briefly, there are four principle obligations:

First, States cannot absolve themselves of their obligations under IHL merely by hiring a company to carry out particular acts. If a State hires a PMC to run a prisoner of war camp, the state nonetheless remains responsible for ensuring that the standards set out in the 3rd Geneva Convention are met. Secondly, States are under an obligation to ensure respect for IHL by the PMCs they hire. Thirdly, states are responsible for violations of IHL committed by the staff of PMCs that can be attributable to them. These are the acts of their agents or of persons or entities empowered to exercise elements of governmental authorities, or persons acting on the instructions of a State or under its direction and control. Finally, states must investigate and, if warranted, prosecute violations of IHL alleged to have been committed by the staff of PMCs. This obligation exists for all states, not just the states that hire PMCs, but obviously they have all the more responsibility if they have hired the PMCs themselves.

On 26 July 2001 the international Law Commission of the United Nations completed text of the "Draft Articles on Responsibility of state for international Wrongful Acts". These articles were submitted to the General Assembly of the United Nations at its 53th session and, although an international convention has yet to be adopted, they constitute the most authoritative source to determine whether a violation of international law may be attributed to a State.

States are directly responsible for violations of international humanitarian law that are attributable to them. The fact that States are responsible for violations of international humanitarian law committed by their organs, including their armed forces, is clearly expressed in Article 3 of the Fourth Hague Convention and Article 91 of Protocol I.

According to the Article 3 of the 1907 Fourth Hague Convention, a belligerent party is responsible "for all acts committed by persons forming part of its armed forces".

According to Article 4 of the Draft Articles, 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. An organ includes any person or entity which has that status in accordance with the internal law of the State. States are not only responsible for their organ, but also for act by parastatal entities that they have empowered to exercise elements of governmental authority, provided the person or entity is acting in the capacity which is vested in them.

In addition to situations where entities which are empowered by internal law to exercise governmental authority, the acts of private companies could also engage the responsibility of States if they are carried out by a person or group of persons who are de facto "acting on the instructions of, or under the direction and control of, that State in carrying out the conduct."

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Information about the author:

Armine Danielyan - ArSU, Competitor of Jurisprudence Department.
e-mail: arminedanielyan-2013@mail.ru

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