

**THE LEGAL STATUS OF PRIVATE MILITARY AND SECURITY  
COMPANY (PMSC) PERSONNEL INVOLVED IN ARMED CONFLICT  
UNDER INTERNATIONAL HUMANITARIAN LAW**

**A THESIS**



By:

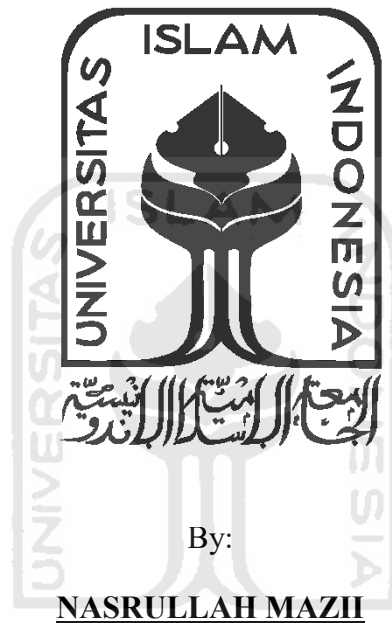
**NASRULLAH MAZII**

Student Number : 12.410.343

**INTERNATIONAL PROGRAM  
FACULTY OF LAW  
UNIVERSITAS ISLAM INDONESIA  
YOGYAKARTA  
2020**

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**A BACHELOR DEGREE THESIS**

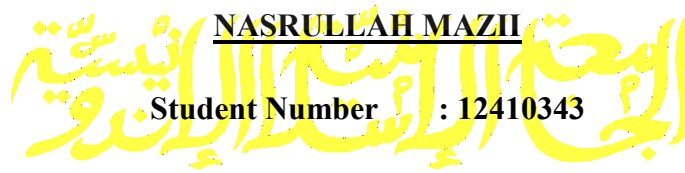
Presented as the Partial Fulfilment of the Requirements  
To Obtain the Bachelor Degree in Faculty of Law  
Universitas Islam Indonesia  
Yogyakarta



By:

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Student Number : 12410343



**INTERNATIONAL PROGRAM  
FACULTY OF LAW  
UNIVERSITAS ISLAM INDONESIA  
YOGYAKARTA  
2020**

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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

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**UNDER INTERNATIONAL HUMANITARIAN LAW**

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بِسْمِ اللَّهِ الرَّحْمَنِ الرَّحِيمِ

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**SURAT PERNYATAAN  
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MAHASISWA FAKULTAS HUKUM UNIVERSITAS ISLAM INDONESIA**

*Bismillahirrahmanirrahim*

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adalah benar - benar mahasiswa Fakultas Hukum Universitas Islam Indonesia Yogyakarta yang telah melakukan penulisan Karya Tulis Ilmiah (Tugas Akhir) berupa Skripsi dengan judul:

**THE LEGAL STATUS OF PRIVATE MILITARY AND SECURITY  
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3. English : Speak, Write, Listen currently
4. Arabic : Write, Listen currently



## MOTTO

*Every person has their own battle.*

N.M

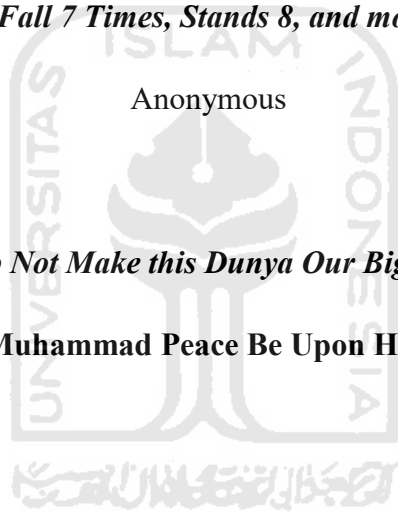
*Hadza Syayamuru (Everything Will Passed Away).*

*Never Give Up! Fall 7 Times, Stands 8, and more until the death*

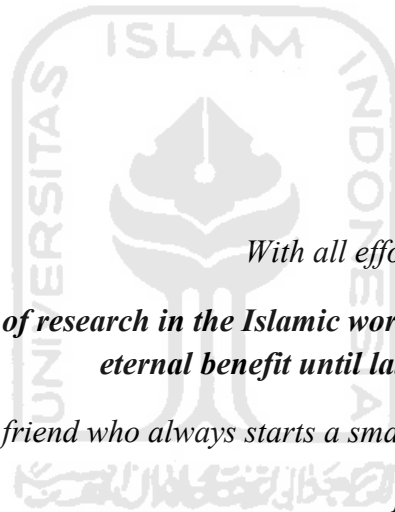
Anonymous

*O, Allah, Do Not Make this Dunya Our Biggest Concern*

**Muhammad Peace Be Upon Him**



## DEDICATIONS



*With all effort, this thesis is dedicated;*

*For the advancement of research in the Islamic world. Hopefully, it can be an eternal benefit until later it is met in His heaven.*

*And for friend who always starts a small talks during my College,*

*Mas Nahnu & Pak Mardi,*

*And a friend who always reminds me to back home*

*Fikri Fadhillah Abdulrachim S.H*

*And to All Lone fighters in the world*

*Life is just a war, either you'll lose or win.*

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*Si Vis Pacem, Para Bellum,* was a Latin adage (quoted by John Wick in his Films) translated as "If you want peace, get ready for war". Of course, the phrase does not necessarily mean, to realize peace always begins with war. However, in fact, peace and war always take turns filling life history. This paper discusses a small piece from a point of view in modern law of war (or better known as IHL) related to the existence of PMSC in a war. Many people think that PMSC is an evolutionary form of mercenary practice in war. But their actions do not always shows the direct participation in hostilities, which blurs the combatant's status. They are involved in a variety of activities that support warfare, such as security, supply, training, and even provide intelligence data. This research is discussing the possible legal status of the personnel in a conflict. It is hoped that this paper will be a contribution for humanitarian legal study, particularly in relation to the development of new actors in war, and also a reference for new research.

Finally, the writer recognizes that this thesis is still far from being perfect, so the writer want the reader to give some criticism and suggestions. However, the writer expects also that this thesis will be useful for anyone who reads this, although this research means the end of the status as a student here, but it could never be the end of the writer's study. It is a whole-life process. Last, but not least, approximately 8 years experiences here is something that the writer will always remember as molds into a better individual. *Blijf leren en vergeet niet gelukkig te zijn!*

Yogjakarta. Mav 17<sup>th</sup>. 2020



## ABSTRACT

*Private Military and Security Company is the private company provide military and security services. They works based on the contract and depends to the order of the tenants by giving military support, assist, adviser, training, providing escort duty as well as guard the importance resources in the conflict, until military combat. Their existence raised a problem especially on the legal status of their personnel involved in armed conflict, whether fall down into combatants or civilians. The aims of this thesis is to analyze the legal status of private military and security company personnel which involved in an armed conflict under international humanitarian law. This thesis using normative legal research by a juridical qualitative approach, by collecting and selecting materials in accordance with the law of the problem under study, then can be generated description more objective and systematic accordingly which resulting the view of the problem studied. The result shows the personnel of PMSC has stand on various legal status which are civilian, and unlawful combatant based on their duties and activities depending on the contract that they sign and their action on the hostilities. Regardless of their status, Private military company and its personnel are obliged to comply with applicable international humanitarian law and as a human being, they have fundamental guarantees that must be respected by all of the parties of the armed conflict.*

*Keywords: Armed Conflict, International Humanitarian Law, Legal Status, and Private Military and Security Company.*



## TABLE OF CONTENT

Cover of Thesis.....	i
Cover .....	ii
Cover.....	iii
Page Of Approval .....	iv
Page Of Approval .....	v
Page Of Final Thesis Approval.....	vi
Letter of Originality .....	vii
Curriculum Vitae .....	viii
Motto.....	ix
Dedications .....	x
Acknowledgements.....	xi
Forewords .....	xiii
Abstract.....	xiv
Table Of Content .....	xv
List Of Abreviations .....	xviii
<b>CHAPTER I</b>	
<b>INTRODUCTION .....</b>	<b>1</b>
A. Context of Study.....	1
B. Problem Statement .....	8
C. Research Objectives .....	9
D. Definition of Technical Terms .....	9
E. Theoretical Review .....	11
1. Types of Armed Conflict.....	11
2. General Principles on International Humanitarian Law.....	15
a. Humanity Principle.....	16
b. Distinction Principle.....	16
c. Necessity Principle .....	17
d. Proportionality Principle .....	17
e. Chivalry Principle.....	18
3. Private Military and Security Company.....	18

1. The Understanding of Private Military and Security Company and its Typology.....	18
2. Legal Regime of the PMSCs .....	22
F. Originality .....	25
G. Research Method.....	28
1. Type of Research.....	28
2. Legal Material .....	29
3. Legal Data Collection.....	29
4. Research Approach .....	30
5. Analysis of Legal Materials .....	30
H. Systematical of Writing.....	30

## **CHAPTER II**

### **THEORITICAL REVIEW**

<b>THE REGULATION APPLIED TO PMSCs PERSONNEL INVOLVED IN AN ARMED CONFLICT BASED ON INTERNATIONAL HUMANITARIAN LAW.....</b>	<b>32</b>
2.1 The Understanding and Development of International Humanitarian Law .32	
2.1.1 The Definition of International Humanitarian Law (IHL).....	32
2.1.2 History and Development of IHL .....	34
2.1.3 Subject of IHL .....	38
2.1.4 The Purpose of IHL .....	40
2.1.5 Source of IHL .....	41
2.1.6 Basic Principles of IHL.....	47
2.1.7 Theory of Responsibility applied in IHL.....	59
2.2 Types of Armed Conflict.....	63
2.2.1 International Armed Conflict (IAC).....	65
2.2.2 Non International Armed Conflict (NIAC).....	66
2.3 The Overview of Private Military and Security Company and Several Case related .....	67
2.3.1 Privatization of War.....	67
2.3.2 Definition of Private Military and Security Company.....	69
2.3.3 History and Development of Privatization Military and Security Services .....	72



2.3.4 The Involvement of PMSCs in Several Conflicts.....	77
2.4 The Regulation Applied to Private Military and Security Company Personnel.....	85
2.5 The Use of PMSCs according to Islamic Perspective.....	93
A. The Basis Islamic Law of War.....	93
B. The Use of PMSC According to Islamic Perspective.....	100
<b>CHAPTER III</b>	
<b>THE LEGAL STATUS OF PMSCs PERSONNEL INVOLVED IN AN ARMED CONFLICT BASED ON INTERNATIONAL HUMANITARIAN LAW.....</b>	<b>107</b>
3.1 The Legal Status of Private Military and Security Company Personnel involved in Armed Conflict Based on International Humanitarian Law.....	107
3.1.1 The Fact on involvement of PMSCs Personnel in Armed Conflict..	108
3.1.2 The Legal standing of PMSCs Personnel in International Humanitarian Law .....	111
3.2 The Right and Obligations of the PMSCs Personnel during the Armed Conflict.....	125
<b>CHAPTER IV</b>	
<b>CLOSURE.....</b>	<b>130</b>
A. Conclusion.....	130
B. Recommendations .....	131
<b>BIBLIOGRAPHY.....</b>	<b>133</b>
<b>APPENDIX.....</b>	<b>143</b>

## LIST OF ABBREVIATIONS

AP	: Additional Protocol
CBO	: Congress Budget Officer
DCAF	: Democratic Control of Armed Forces
GC	: Geneva Convention
HR	: Hague Regulation
IAC	: International Armed Conflict
ICC	; International Criminal Court
ICRC	: International Committee of Red Cross
IHL	: International Humanitarian Law
NIAC	: Non International Armed Conflict
OAU	: Organization of African Union
PMC	: Private Military Company
PMSC	: Private Military and Security Company
PSC	: Private Military Company
UN	: United Nations
UNAMSIL	; United Nations Mission in Sierra Leone
USA	: United States of America

## CHAPTER I

### INTRODUCTION

#### A. Context of Study

At present, relations between countries are growing and increasingly complex. This affects the mechanism of cooperation and application of rules in the international world that potentially cause disputes between one another<sup>1</sup> and the other parties who are subject to international law.<sup>2</sup>

Besides, the increasing number of independent states post-World War II; more non-state actors, in contemporary international relations; made the increasing number of world population which is not accompanied by the increasing of natural resources to fulfil human need,<sup>3</sup> making international relation within related actor is broadly wider and got more potentially cause disputes with each other. Disputes that arise in international relations are very diverse, it may happen between states, states vs. foreign private parties, private persons or foreign companies, among foreign companies, between countries with rebel groups in their own countries and in other countries, and others.<sup>4</sup>

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<sup>1</sup> As quoted by Sefriani, *Hukum Internasional Suatu Pengantar*, Rajawali Pers, Jakarta, 2011, p.2 in the book of Mochtar Kusumaatmadja, *Pengantar Hukum Internasional*, Book I General Chapter, Binacipta, Jakarta, 1982, p. 1

<sup>2</sup> Sefriani, *Peran Hukum Internasional dalam Hubungan Internasional Kontemporer*, Rajawali Pers, Jakarta. 2016. p.4, in this context international relation doesn't strictly mentioned State is the one only subject in International Law, but it is also coloured by the existence of non-state actor like Individual, Transnational Corporations, International Organization, and Non-Government Organization.

<sup>3</sup> <http://www.fao.org/3/U3550t/u3550t02.htm> last seen on September 17, 2018

<sup>4</sup> Sefriani, *Peran Hukum Internasional*, *Op.cit*, p. 354

The disputes are prolonged without resolution is feared could disrupt the international relations between parties, even a threat to international peace and security.<sup>5</sup> The potential of the adverse relations in the international world has been accommodated in several rules,<sup>6</sup> which confront the establishment of an international dispute resolution mechanism. This is a part that has a very important role in the international world so that things like above does not happen.

The mechanism of dispute settlement in international law is broadly divided into two ways: peaceful solutions and violent means.<sup>7</sup> Peaceful dispute settlement itself is divided into two kind mechanism, pervades; namely political channels such as negotiation, mediation, inquiries, as well as legal channels such as arbitration and international courts. The second way of settling by force is also divided into two lines, namely through war and non-war such as diplomatic termination, blockade, embargo, and reprisal.<sup>8</sup>

The mechanism of dispute resolution through violent means by war is the last resort after all peaceful endeavours have faced a dead end or have not reached any agreement. War is indeed a mechanism that must be avoided as a way of dispute resolution because it is not in line with the obligations of the international community to uphold peace and order. However, the war is still recognized as an exception when peaceful efforts fail.<sup>9</sup> Therefore, it

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<sup>5</sup> *Ibid.*,

<sup>6</sup> See UN Charter Art 1, 2 (3), 2 (4) and Art 33 (1)

<sup>7</sup> Sefriani, *Peran Hukum. Op.cit.*, p.359

<sup>8</sup> *Ibid.*,

<sup>9</sup> *Ibid.*, p. 388

can be said war is a necessity<sup>10</sup> and the last way taken by the parties to the dispute. In practice, aggressor countries use self-defence masks to justify what they have done.<sup>11</sup>

In the war, the use of violence for the sake of the military to subdue the opponent and gain victory is permissible although the record is limited by the principle of humanity and balance.<sup>12</sup> Although it has become legal and regulated in international rules,<sup>13</sup> the truth war is a destructive, especially due to exists and involves physical violence and weapons.<sup>14</sup> Just as weapons are a special cause of death, wars or armed conflicts often have an impact on the death of the soul. This death incident exacerbates the conditions of conflict, becomes increasingly difficult to resolve because it not only impacts physically, but also psychologically.

Things were going to change, and develop. The laws of war were then drawn up<sup>15</sup> and agreed upon in the form of international humanitarian

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<sup>10</sup> In the political history of mankind, most of many events which were written are wars and peace. From the World War I, World War II, The Cold War, and apparently most of recent wars occurred, need an abundant of troops in which were/are expected to be able to fulfill the purpose of war of many countries. The expression that peace is to be merely a respite between wars shows, a situation of war and peace, continues alternately in human interaction. See, Ambarwati, Denny Ramdhany, and Rina Rusman, *Hukum Humaniter Internasional dalam studi Hubungan Internasional*, Rajawali Pers, Jakarta, 2010, p.2.

<sup>11</sup> Sefriani, *Peran Hukum. Op.cit*, p. 389

<sup>12</sup> Denny Ramdhany and friends, *Konteks dan Perspektif Politik Terkait HHI Kontemporer*, PT Raja Grafindo Persada, Jakarta, 1<sup>st</sup> Edition, 2015. p.225

<sup>13</sup> Ambarwati, Denny Ramdhany, and friends, *Hukum Humaniter Internasional Dalam studi Hubungan Internasional*. Rajawali Press. Depok.2009. p.xxvi to p.xx and explain more in p.32

<sup>14</sup> Tulus Yuniaasih, Riasa Rizky, and friends. *Dinamika Penegakan Hukum Humaniter Internasional; Analisis Kehadiran PMSC dalam Konflik Non Internasional*. As publish in Jurnal Hubungan Internasional Vol.5 Edisi 2/ Oktober 2016-Maret 2017. UMY. p.223

<sup>15</sup> There is a very famous term in the world of Law; *Ibi Societas, Ubi Ius*. Which means every development happens in social life will be followed by the development of the law. If not then the law will always lag behind, and there are many deviation irregularities, to a worse situation, i.e. chaos. This is applied in the development of war law. See, Scott. JB. *the Hague Peace Conference of 1899 and 1907*, Baltimore, the John Hopkins Press 1909, 2 Vols. as also quoted by Mohd. Akram, *International Humanitarian Law Hague and Geneva Conventions on War Crime*,

law under the Geneva Convention in 1949. Based on the Geneva Conventions and its Protocols, this law includes rules on armed conflict both at the international armed conflict (IAC) or non-international armed conflict (NIAC).<sup>16</sup> This law covers the identification and protection of parties to the conflict such as the main actors of the conflict, as well as other actors belonging to civil society, and some of them using armed forces uniforms. This law also regulates weapons and methods permissible to use by the actor of the conflict.

However, the context of the armed conflict in 1949 with the prevailing current is far different. The advancement of information and communication technology not only encourages the creation of military technology, which then also encourages evolution in the formulation of military strategy in the face of opposing parties. Technological sophistication and the stability of the war strategy also increase the need for both elements. This need is even necessarily by those who are not directly involved in the conflict in order to minimize the impact of the conflict. The challenge is the development of cyber warfare is not limited to intelligence warfare which can also attack the energy (electricity) systems and health facilities and drinking water.<sup>17</sup> Examples of other challenges are unmanned aircraft and the development of nanotechnology that can strengthen defense

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War Victims and Prisoner of War. International Law Book Services. Malaysian Book Publisher Association. p.3

<sup>16</sup> Arlina, Permanasari, Aji Wibowo, and friends. *Pengantar Hukum Humaniter*, International Committee of the Red Cross, Jakarta, 1999, p. 3.

<sup>17</sup> ICRC, 2015. *International humanitarian law and the challenges of contemporary armed conflicts*. A Report. See on <https://www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts>, on May 1, 2018 01:28 pm

and attack technology and their mobility as well as other automatic weapons.<sup>18</sup> In addition, other challenges arise from the presence of actors other than those clearly identified in IHL, namely private military and security companies (PMSCs) which are driven by privatization in conflict.<sup>19</sup>

The presence of this new actor not only invited discussion, but also debates about efforts to uphold international humanitarian law, especially since various human rights violations have taken place in conflict areas related to the existence of PMSC. PMSC is basically a commercial company engaged in the military and security sector that is hired as a form of outsourcing for military and security needs that are not easily owned in quality, quantity or cost.<sup>20</sup> Therefore, ideally, this actor should help the main conflict actors who hire their services in order to stabilize security. The positive contribution of this actor can be seen from its role as a protection service for aid and humanitarian personnel, protection of civil society, intelligence service providers, to the protection of military personnel.<sup>21</sup> However, this actor also proved to be exacerbating the conditions of conflict

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<sup>18</sup> Tulus Yuniaasih, Riasa Rizky, and friends. *Dinamika Penegakan Hukum Humaniter Internasional; Analisis Kehadiran PMSC dalam Konflik Non Internasional*. As publish in Jurnal Hubungan Internasional Vol.5 Edisi 2/ Oktober 2016-Maret 2017. UMY. p.223

<sup>19</sup> del Prado, Jose L. gomez and Margaret Maffai, *United Nations Working Group On The Use Of Mercenaries As A Means Of Violating Human Rights And Impeding The Exercise Of The Rights Of People To Self Determination & The Wisconsin International Law Society: Model Law For The Regulation Of Private Military And Security Companies*. Vol. 26, No. 4 Model United Nations Law. 2009

<sup>20</sup> Tulus Yuniaasih Riasa Rizky, and friends. *Dinamika Penegakan Op.cit.*,p.225

<sup>21</sup> del Prado, Jose L. Gomez. *The Privatisation of War; Private Security Company on Contract with UN Humanitarian and Peacekeeping Operations*. Global Research Online. July 9, 2013. Can be accessed on (<http://www.globalresearch.ca/the-privatisation-of-war-private-security-companies-on-contract-with-un-humanitarian-and-peacekeeping-operations/5342155> last accessed on December 08, 2018).

by causing the death of civil society. A popular example was an incident by Blackwater<sup>22</sup> personnel in 2007 in Baghdad that killed 17 civilians.<sup>23</sup>

This also shows the presence of the PMSC in Iraq raises its own problems. As happened in the Fallujah case in Iraq where Blackwater personnel fired on civilians as part of revenge for the deaths of their colleagues in an ambush in the area. This incident later became one of the sharp pebbles in relations between Iraq and the US. The perpetrators were then tried in the US, made the tensions increase between Iraq and the US government, because the Iraqi government wanted the perpetrators to be tried in Iraq. It is undeniable that their existence in conflict conditions raises consequences for victims who always fall. During the US occupation in Iraq more than 900 PMSC personnel were killed in Iraq and Afghanistan.<sup>24</sup> 27 Among the victims came from the Blackwater Company, which then triggered revenge from fellow colleagues at Blackwater. This incident indicates that there is no strong control over the existence of PMSC personnel in the field in this case by the US government as the party who hired the services of the company. Since this incident, the name and whereabouts of PMSC have become better known.

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<sup>22</sup> One of the example of PMSC, Blackwater (USA) is a private military association consisting of five companies: Blackwater Training Centers, Blackwater Target Systems, Blackwater Security Consulting, Blackwater Canine, and Blackwater Air. At 2009 renamed as Xe Services, and at 2010 change become academi, See, <https://en.wikipedia.org/wiki/Academi>, See also, the official websites on <https://www.academi.com/>, last accessed on April 11, 2019

<sup>23</sup> The New York Times, 2007. Reposted; *Blackwater Guards Found Guilty in 2007 Iraq Killings* By Matt Apuzzo, can be seen at <https://www.nytimes.com/2014/10/23/us/blackwater-verdict.html>

<sup>24</sup> Laura Parker, "What Exactly Happened that Day in Fallujah", Usatoday.com, 6 September 2007, [http://usatoday30.usatoday.com/news/world/iraq/2007-06-10-fallujah-deaths\\_N.htm](http://usatoday30.usatoday.com/news/world/iraq/2007-06-10-fallujah-deaths_N.htm), accessed on January 02, 2018.



The involvement of foreign personnel in providing military assistance has often occurred in armed conflict.<sup>25</sup> During the 1960-1970s, situations like these were often associated with the terms of covert operations involving mercenaries. However, in recent years there have been professional firms offering security services (military), which have legitimacy to operate in the eyes of the law. Blackwater,<sup>26</sup> Executive Outcomes<sup>27</sup> and Sandline International<sup>28</sup>, for example, have conducted a number of combat operations in various countries around the world.<sup>29</sup> Moreover, the use of PMSC personnel by the United Nations in international Peacekeeping operations due to the lack of regular soldiers from UN member countries as a manifestation of efforts to safeguard international security, makes a new paradigm for the existence of PMSCs in International Humanitarian Law.

The increasing use of PMSC in the modern sense raises further questions. PMSC tends to be viewed as having a primary monetary

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<sup>25</sup> *International humanitarian law and the challenges of contemporary armed conflicts*: Report Oct 2015, access on <https://www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts>, last seen on May 1, 2018 01:28 pm

<sup>26</sup> Blackwater is heavily involved in security operations in Iraq, as well as Pakistan and Afghanistan, even indicated also involved in assisting opposition forces in Syria. See Merle, Renae, "Census Counts 100,000 Contractors in Iraq". Washington Post. 2005. Additional Fact: On March 31, 2004, four American private contractors belonging to the company Blackwater USA were killed by insurgents in Fallujah as they drove through the town. They were dragged from their car in one of the most violent attacks on U.S. contractors in the conflict. Following the attack, an angry mob mutilated and burned the bodies, dragging them through the streets before they were hung on a bridge. (See also: 31 March 2004 Fallujah ambush, Operation Vigilant Resolve)

<sup>27</sup> Executive Outcomes helped the Angola Government against the rebels and the Sierra Leone Authority in defeating the Revolutionary United Front, then restored the power of the elected president. as mentioned by Jerry Indrawan. *Status Private Military and Security Companies (PMSC) dalam Hukum Humaniter Internasional*. Pusat Dokumentasi ELSAM. p.1

<sup>28</sup> Sandline claims to have run six international operations since 1993, including in Papua New Guinea and Sierra Leone, See by Jerry Indrawan. *Status Private Military and Security Companies (PMSC) dalam Hukum Humaniter Internasional*. Pusat Dokumentasi ELSAM. p.1

<sup>29</sup> *30 Most Powerful PMCS in The World*, <http://www.securitydegreeshub.com/30-most-powerful-private-security-companies-in-the-world/> last seen on May 1, 2017 01:28 pm

motivation rather than ideological or patriotic allegiances. This raises a debate by questioning on does the PMSC was a "mercenary" for the purposes of international humanitarian law. Their status was not clear under international humanitarian law. From The Hague, Geneva, also the protocols wasn't not clearly stated and regulated about those actor<sup>30</sup>. Furthermore, it is important to note that the term PMSC has no international legal instrument, which refers to or defines the term, or its synonyms. Countries increasingly hire PMSCs to deploy to zones where armed conflict occurs. Therefore, it would be better to create a regulatory mechanism for these companies. Aware on the confusion over the status of PMSC employees or personnel under humanitarian law, this writings will briefly explain the legal aspects of mercenaries and PMSCs, and explore whether PMSC employees fall into civilian or combatant categories.

## **B. Problem Statement**

1. What is the legal statutes of Private Military and Security Companies (PMSC) Personnel involved in Armed Conflict under International Humanitarian Law (IHL)?
2. What are the right and obligations of PMSC Personnel during Armed Conflict based on IHL?

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<sup>30</sup> Sommer Mitchell. *Becoming Legitimate: How PMSCs are Seeking Legitimacy in the International System*. Scholar Common; University of South Florida. 2018. p 33-34. It is stated without a clearly defined legal status, it is difficult to argue that PMSCs and mercenaries are not one and the same. As mentioned in the additional Protocol I Article 47.2 of the Third Geneva Conventions provides a definition of mercenary, and concluded in many ways PMSCs fall outside those definition. Further attempts at defining and outlawing mercenaries were made in the OAU Convention for the Elimination of Mercenaries in 1977 and the International Convention against the Recruitment, Use, Financing, and Training of Mercenaries in 1989 (Panke & Petersohn, 2011), See also; Singer, P.W. (2001). *Corporate warriors: The rise of the privatized military industry and its ramifications for international security*. *International Security*, 26 (3), p.186-220

### C. Research Objectives

1. To learn further on how international humanitarian law is applied on answering the challenge on how the legal status of Private Military and Security Companies (PMSC) Personnel involved in Armed Conflict
2. To analyse deeply the Implementation of International Humanitarian Law in the context of giving and explaining the Right and Obligations of PMSC Personnel during Armed Conflict.

### D. Definition of Technical Terms

There are terminologies used in this thesis. These terms will be explained in order to make analysis more clear and help the reader to understand easily:

1. Private Military and Security Companies;

A private military and security company (PMSCs) is a private company providing armed combat and/or security services. PMSCs refer to their staff as "private security contractors (PSC)" or "private military contractors (PMC)". Private military companies refer to their business generally as the "private military industry" or "The Circuit".<sup>31</sup> Publicly known as "Private Armies", "Guns for Hire", or "Private Military Contractor". While on International Code of Conduct for Private Security Services Providers (on PSCs): it defines as the 'companies whose business activities include the provision of security services either on its own behalf or on behalf of another, irrespective of how such a company describes itself.'

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<sup>31</sup> [http://www.thesun.co.uk/sol/homepage/news/campaigns/our\\_boys/3862186/Brits-are-No1-guns-for-hire.html](http://www.thesun.co.uk/sol/homepage/news/campaigns/our_boys/3862186/Brits-are-No1-guns-for-hire.html). and <http://www.circuit-magazine.com/> accessed on April 27, 2017

(personal & commercial protection, embassy services, secure money movement, investigation & intelligence, alarm systems, rapid response, logistics & equipment supply)

Geneva Centre for the Democratic Control of Armed Forces (DCAF)<sup>32</sup>: explain that PMC is business that offers specialized services related to war and conflict, including combat operations, strategic planning, intelligence collection, operational and logistical support, training, procurement and maintenance.

2. Personnel;

According to the Cambridge dictionary;

Personnel defines as the people who are employed in a company, organization, or one of the armed forces.<sup>33</sup>

3. Armed Conflict;

Armed conflict is a political conflict in which armed combat involves the armed forces of at least one state (or one or more armed factions seeking to gain control of all or part of the state), and in which at least 1,000 people have been killed by the fighting during the course of the conflict.<sup>34</sup> Other definitions offered by the Geneva

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<sup>32</sup> David M Law. 2006. *Private Military Company*. DCAF Backgrounder, also can be access: [http://www.davidmlaw.com/wp-content/uploads/2012/01/Private-Military-Companies\\_2006.pdf](http://www.davidmlaw.com/wp-content/uploads/2012/01/Private-Military-Companies_2006.pdf)

<sup>33</sup> <https://dictionary.cambridge.org/dictionary/english/personnel>, accessed on January 03, 2019

<sup>34</sup> Canadian Association for Refugee and Forced Migrants (CARFMS) – Online Research and Teaching Tools (ORTT), York University. Could be accessed on <http://rfmsot.apps01.yorku.ca/glossary-of-terms/armed-conflict/>, on January 29, 2019, See also *Project Ploughshares. (n.d.). Armed Conflict. Retrieved from http://ploughshares.ca/programs/armed-conflict/defining-armed-conflict/*, Accessed January 30, 2019.

Convention which stated;<sup>35</sup> “*All cases of declared war or of any other armed conflict which may arise between two or more... [States], even if the state of war is not recognized by one of them*”<sup>36</sup>.”

International Humanitarian Law distinguish two type of Armed conflict namely, International Armed conflict (IAC) and Non international Armed Conflict (NIAC).<sup>37</sup>

#### 4. International Humanitarian Law (IHL);

IHL It is a set of international rules of treaty or customary specifically aimed at solving problems arising directly from international armed conflicts and non-international, and protects this law, people who are affected or might be affected and property affected or may be affected by the armed conflict, as restricting the right of parties to the conflict to choose methods and means of warfare.

### E. Theoretical Review

#### 1. Types of Armed Conflict

There are two types of armed conflict in the International Humanitarian Law those are International Armed Conflict and Non-

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<sup>35</sup> Art. 2, Geneva Conventions I-IV, 1949 in International Organization for Migration (IOM). (2011). Glossary of Migration, 2nd Edition. Retrieved from <http://publications.iom.int/bookstore/free/Glossary%20nd%20ed%20web.pdf> Accessed on January 3, 2019.

<sup>36</sup> The conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state. See *Prosecutor v. Dusko Tadic, No. IT-94-I-AR 72*, International Criminal Tribunal for the Former Yugoslavia Appeals Chamber in International Organization for Migration (IOM). (2011). Glossary of Migration, 2nd Edition.

<sup>37</sup> International Committee of the Red Cross (ICRC). Opinion Paper, *How is the Term "Armed Conflict" Defined in International Humanitarian Law?*. March, 2008. See, <https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf>.

International Armed Conflict. In the general term, the difference between International Armed Conflict with NonInternational Armed Conflict under International Humanitarian Law was determined by the characteristic and the number of countries that are involved in the armed conflict.<sup>38</sup> In the settlement of international disputes, there are already some methods known for resolving disputes by peacefully and avoiding war.<sup>39</sup>

International Humanitarian Law is required to provide restrictions or set procedures for fighting, but not to ban war. This is because from the point of view of International Humanitarian Law, war is a reality that can't be avoided. International Humanitarian Law tries to regulate and set limitations so the war can still uphold humanity values.<sup>40</sup> There are several goals of International Humanitarian Law, those are:<sup>41</sup>

1. Providing protection against combatants and civilians from unnecessary suffering.
2. Ensuring human rights is fundamental for those who fall into enemy hands. Combatants who fall into enemy hands must be protected and hospitalized entitled to be treated as prisoners of war.
3. Preventing to commit a cruel war without limits. Here, the most important is the humanity principle.

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<sup>38</sup> Ambarwati, Denny Ramdhany, Rina Rusman, *Hukum Humaniter Internasional: Dalam Studi Hubungan Internasional*, 3<sup>rd</sup> Edition, Rajawali Pers, Jakarta, 2012, p. 53.

<sup>39</sup> Huala Adolf. *Hukum Penyelesaian Sengketa Internasional*, Sinar Grafika, Jakarta, 2004, p.24

<sup>40</sup> Arlina Permanasari, Aji Wibowo, and friends, *Op.cit.* p. 11.

<sup>41</sup> *Ibid.* p. 12.

In the international humanitarian law, there are two types of armed conflict, the international armed conflict and non-international armed conflict. Draper, an expert stated about international armed conflict that,<sup>42</sup> *any situation in which a difference between two states leads to the intervention of armed forces within the extended meaning conferred upon the later term by Art. 4 of prisoner of war conventions.*<sup>43</sup> From the opinion expressed by Draper about international armed conflict, it is understood that armed conflict can be said to be an international armed conflict if it involves two armed forces of different countries.<sup>44</sup>

According to Article 1 (3) and Article 1 (4) of Protocol I to note that international armed conflicts are grouped into two, namely:

1. The armed conflict between states;
2. The armed conflict between the peoples against colonial domination, alien occupation and racist regimes (CAR Conflict) which often called as the war of national liberation.<sup>45</sup>

In the international armed conflict, both parties have the same legal status, it is simply because both parties are state.<sup>46</sup> International Armed Conflict has been declared in the same provisions of Article 2

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<sup>42</sup> *Ibid.* p. 139.

<sup>43</sup> GPH. Haryomataram, *Bunga Rampai Hukum Humaniter*, Bumi Nusantara Jaya, Jakarta, 1988 p.19 as quoted by Arlina Permanasari, Aji Wibowo, and friends, *Pengantar Hukum Humaniter*, International Committee of the Red Cross, Jakarta, 1999, p. 139.

<sup>44</sup> Arlina Permanasari, Aji Wibowo, and friends, *Pengantar Hukum Humaniter*, International Committee of the Red Cross, Jakarta, 1999, p. 139.

<sup>45</sup> Additional Protocol I Article 1.3 – 1.4

<sup>46</sup> Arlina Permanasari, *Op.cit.*, p. 139

of the Geneva Conventions in 1994 as an armed conflict involving two or more countries.<sup>47</sup>

While the Non-International Armed Conflict, according to Additional Protocol II of 1977 is an armed conflict that occurs in the territory if a state between the armed forces of the country by rebel armed forces or other organized armed groups under responsible command, execute such control over a part of its territory that enables the group to unite and continue military operations. This also applies the rules of International Humanitarian Law which are contained in Additional Protocol II of 1977, so it is also can be said that a battle or war involving countries or states are against non-State armed groups.<sup>48</sup>

Non-International armed conflicts are characterized by fighting between the armed forces of a country with resistance from a group of people or rebel forces. However, the conflict in an area of the country between the two ethnic groups can also be classified as a non-international armed conflict, as long as the conflict fulfills the necessary requirements such as the intensity of the conflict, the length or the duration of the conflict and people's participation in it<sup>49</sup>

In the Geneva Convention, the armed conflict is not an international characteristic (conflict / non-international armed conflict

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<sup>47</sup> Ambarwati, Denny Ramdhany, Rina Rusman, *Hukum Humaniter Internasional: Dalam Studi Hubungan Internasional*, 3<sup>rd</sup> Edition, Rajawali Pers, Jakarta, 2012, p. 56.

<sup>48</sup> *Ibid.*, p.60

<sup>49</sup> Arlina, —Apa Arti Konflik Bersenjata Non Internasional’.

<http://arlina100.wordpress.com/2009/02/03/apa-arti-konflik-bersenjata-non-internasional/>, Accessed on Tuesday, January 20, 2018, 14:04.



or international conflict) was stipulated in Article 3 of the provisions of common articles of the Geneva Convention 1949 Article 3 verse (1), which stated:<sup>50</sup>

*(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.*

*To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:*

*(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;*

*(b) taking of hostages;*

*(c) outrages upon personal dignity, in particular humiliating and degrading treatment;*

*(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.*

That third articles reflects the existence of legal protection and is greatly against the group known as —*hors de combat*. It also reflects that any provisions of the Convention at the same time accommodate the principles of Humanitarian Law, and it is about chivalry and humanity principles. People who are no longer able to carry out the attack, according to this verse, have rights which must be protected and treated humanely.

## **2. General Principles on International Humanitarian Law**

In a rule, there are general principles that act as a barrier of a legal instrument. In this regard, international humanitarian law also has general

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<sup>50</sup> Geneva Convention 1949 Common Article 3 verse (1)

principles that must be adhered to in each country relating to humanitarian law. The general principles are:

a. Humanity Principle

Humanity principle is interpreted as a prohibition on the means and methods of warfare which are not essential for the achievement of a real military advantage. Jean Pictet in his book *Development and Principle of International Humanitarian Law*, he interprets the meaning of humanity as follows:<sup>51</sup> *“the arrest precedence over injuring the enemy, and injuring the enemy is better than killing; that non-combatant should be kept out as far as possible from the battlefield; that the injured victim should be kept to a minimum injuries, so that they can be treated and cured; that the injuries that happen to be undertaken as small as possible causing pain.”* The humanity principle is intended to give respect and protect human existence.

b. Distinction Principle

There is also a principle, which distinguishes or divides the population of a country that is at war or is engaged in armed conflict into two groups, namely, combatants who are groups of people who actively participate in warfare and civilian are population groups that do not participate in warfare, which is called the "principle of differentiation" or "Distinction Principle".<sup>52</sup>

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<sup>51</sup> Jean Pictet, *Development Principles of International Humanitarian Law*. Martinus Nijhoff Publisher, 1985, as caption in the book of *Pengantar Hukum Humaniter Internasional*, Arlina Permanasari dkk, ICRC, Jakarta, 1999, p.11.

<sup>52</sup> Ahmad Baharuddin Naim. *Humanitarian Law*. Bandar Lampung. University of Lampung. 2010., p.35.

### c. Necessity Principle

International humanitarian law has given the limitations and group or class of distinction that can be as the object to be attacked, the military objectives and military objects, but in international humanitarian law also regulates the provisions concerning civilian objects which possible can become a military object if it meets two requirements. Two of those conditions are:<sup>53</sup>

1. *These objects provide an effective contribution to enemy military actions.*
2. *The destruction action, seizure or neutralization of the object of military benefits.*

In connection with necessity principle, there is also provision as follows: If the choice was possible between several military objectives for obtaining a similar military advantage, then the target that will be selected is the target which is attacked can be expected to result in less danger to the lives of civilians and civilian objects.<sup>54</sup>

### d. Proportionality Principle

In doing crackdown or attack, whatever tools and how, the hostilities party must referring to the proportional principle. According to the proportional principle, any offensive military operations must be preceded by measures to ensure that such attacks will not cause civilian casualties which following the form of loss of life, injuries, or property damage that is

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<sup>53</sup> Additional Protocol I of 1977, Article 52.2

<sup>54</sup> Ambarwati, Denny Ramdhany, Rina Rusman *Hukum Humaniter Internasional: Dalam Studi Hubungan Internasional*, Ctk. Ketiga, Rajawali Pers, Jakarta, 2012, p.43.

excessive in relation to the military advantage that directly as a result of the attack.<sup>55</sup>

e. Chivalry Principle

This principle implies that in war, the honestly shall be precedence. The use of tools that are not honored, the various wiles and ways that are betray is prohibited.<sup>56</sup> For example, in ancient times, before war began, the enemy will be given advance warning. Then to avoid excessive injuries so the arrow will not be directed to the heart and liver. And as soon as there were killed and wounded the battle will stop for 15 days.<sup>48</sup>

### **3. Private Military and Security Company**

#### **1. The Understanding of Private Military and Security Company and its Typology**

The employment of private military companies in the context of armed conflicts raises manifold concerns with respect to the legality and legitimacy of the transfer of state functions to private actors. The conflicts in Afghanistan and Iraq brought privatization within the scope of peace, war, and security to the fore. Indeed, private contractors had already been used before in African or South American states in internal conflicts or in the fight against drug trafficking.<sup>57</sup> Today, however, the focus has shifted from a mercenary-like deployment of military companies by warlords or rebel

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<sup>55</sup> See Additional Protocol I of 1977, Article 57.2.iii

<sup>56</sup> Arlina Permanasari, Aji Wibowo, dkk, *Pengantar Hukum Humaniter*, Op.cit, p.11-13.

<sup>57</sup> For a survey of the applications of private military companies see Alexander. Kees, *Privatisierung im Völkerrecht – Zur Verantwortlichkeit der Staaten bei der Privatisierung von Staatsaufgaben* (2008), p. 51-69. See also Alexander Kees, *Regulation of Private Military Companies*. Goettingen Journal of International Law 3 (2011) 1, p. 199

groups towards a long-term policy of outsourcing sovereign functions by highly industrialized, often western states. This systematic extension of privatization into spheres where the monopoly on the use of force and the laws of war are concerned provokes calls for a strong international regulation of activities of private military and security companies.<sup>58</sup>

There is a general consensus in the research community regarding the term “private military and security companies” or PMSCs. Other terms such as “private military firms” or “private military contractors” (PMC) are also present, but for the sake of clarity the initial one is employed. In addition, private military security companies is also in use of various internationally recognised organisations such is the ICRC whose task is, among others, to highlight challenges of modern battlefield and reveal new means and methods of warfare.

This term is applied regardless of how the companies identify themselves. Many of them are rejecting to be termed “military” offering “security” or “consulting” meaning instead to avoid public pressure and operate more freely not falling under existing legal norms. Andrew Beapark, now one of the top British PMSC lobbyists suggests that ;

*In the UK, we refer to private security companies rather than private military companies. It better expresses the wide range of services companies are offering, but it also obviously has to do with cultural reservations with the term private military companies, which may imply that services at the front lines in conflicts are included.<sup>59</sup>*

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<sup>58</sup> See the statements of the UN Working Group on the use of mercenaries, ‘Guns for hire’ available at <http://www.ohchr.org/EN/NewsEvents/Pages/Gunsforhire.aspx> (last visited April 28 2018)

<sup>59</sup> Interview with Andrew Bearpark. International Review of the Red Cross. Volume 88, Number 863, September 2006. p.451. as quoted by Son- *Regulating Global Private Military*

In that sense, clear and correct classification of actors playing on the private security market is critical for application of relevant legal and ethical norms; that application in fact covers two dots provided in the research: status of private military companies under International Law which concerns their qualification as international actors as well, and also setting out realistic regulation criteria upon the activities of private military companies.

It is to define what to term “security” and less controversial, and what comes as “military”, more dangerous and deserving more expertise. In fact, the differentiation between security and military services the companies offer is uneven. Private security service finds itself in peacetime or at post-conflict reconstruction and involves no actions related to use of the armed force or taking direct part in hostilities. As a rule, private security contractors are unarmed or armed for the purpose of self-defence, and provide mainly static facility protection, convoy escort, and technical maintenance for military personnel in conflict zones. The industry might be divided into three basic sectors allowing enough criteria for classification of PMCs by services they offer.<sup>60</sup>

1. ***Military provider companies*** (also known as "private security firms") which offer on-the-ground tactical military assistance, including

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*Companies: Political Implications and Legal Mechanisms.* UN Working Group on mercenaries and the Draft Convention on PMSCs

<sup>60</sup> Son- *Regulating Global Private Military Companies: Political Implications and Legal Mechanisms.* UN Working Group on mercenaries and the Draft Convention on PMCs p.4

actual combat services, to their clients. This group includes, for instance, former Blackwater, DynCorp and Erynis International.

2. **Military consulting firms**, which employ retired officers to provide strategic advice and military training on operational level. The latter does not imply providing tactical training for client to improve combat skills; military consulting is a more serious approach to overseas security business. Consulting PMCs like Military Professional Resources Inc or Blackwater USA (also offering this service) are contracted when clients, mostly governments that wish to modernise or westernise their militaries, police and security services or re-build military strategic thinking whereas consulting PMC's host state (in majority of cases the US) wishes to offer those hired services calmly on political reasons.
3. **Military support firms**, which provide logistical support, intelligence gathering and maintenance services to conventional armed forces, allowing the latter's soldiers to concentrate on combat and reducing their government's need to recruit more troops or mobilise reserves. Such private military companies operate in more than 50 countries on every continent except Antarctica<sup>61</sup>

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<sup>61</sup> Available at <http://www.stripes.com/news/pentagon-aims-to-bolster-security-in-caspian-sea-region-.36759> also on Peter W. Singer, "Corporate Warriors: The Rise of The Privatized Military Industry" (2003).

## 2. Legal Regime of the PMSCs

Punishment, brutality, and criminal cases that are often done by the PMSC in the field, then raises an unpleasant criticism of PMSC.<sup>62</sup> Kofi Annan gave an assessment of the initiative of the Coalition forces when it decided to invade Iraq in 2003.<sup>63</sup> He appreciates this initiative as an effort for humanitarian purposes. However, he did not explain anything when the presence of Coalition forces was followed by the entry of private soldiers (PMSC). It is then called Peter W. Singer as a "dilemma" in his book entitled; "*Corporate Warriors; The Rise of The Privatized Military Industry*".<sup>64</sup> In his book, he reveals the dilemma of the existence of PMSC. First, the PMSC could replace the crucial tasks of peacekeeping troops that were later rejected by various armed forces. Secondly, in the midst they plunge into various areas of conflict, unfortunately there is no legal umbrella that regulates their operations. Third, on the one hand their presence can help, but on the other hand it raises fear to the public. For example, when they are given the task of conducting covert intelligence operations.

The presence of PMSC has created a strong motivation for professional soldiers, to immediately leave its unity. Singer is worried about

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<sup>62</sup> James Scahill, in his book; '*BLACKWATER; The Rise of The World's Most Powerful Mercenary Army*', said that, PMC is nothing but the incarnation of a mercenary company. They employ the cold-blooded professional killer, the most frightening in the world, capable of carrying out every task and mission without fear and responsibility. In fact, they did not hesitate to kill ordinary civilians with their "cold blood". Also can be accessed on <https://abdupmc.wordpress.com/category/private-military-company/> with titled Dangerous is Our Business, accessed on December 20, 2018

<sup>63</sup> *Ibid.* See also, *Dangerous is Our Business*. Magazine; Private Military Companies – Sepak Terjang Tentara Swasta. Terbitan Angkasa Edisi Koleksi No. 66 Tahun 2010

<sup>64</sup> Peter W. Singer, "*Corporate Warriors: The Rise of The Privatized Military Industry*" (2003).



a new problem in the future if the number of private troops in the conflict area is much greater than the number of regular troops. What will happen if everything is then in business? Will the guilty personnel be held in private prisons? That is not an excessive worried. Because, according to the record, the tendency towards it has begun to appear to the surface. In wartime bay, for example, the Pentagon only presents a PMSC force for every 50 regular soldiers. In the conflict in Yugoslavia, that number increased one PMSC force for every 10 regular soldiers. In Iraqi Freedom (2003) operations, deployed PMSC personnel are the second largest force after US forces. Until now the dilemma was never answered. Regulation stick on the un-clarity and grey area. Question after question, only considered as a wind.

Thus, at the point, obviously, there is no specific international legal regime for the regulation of private military companies. In fact, states usually are very reluctant to commit to new regulations that will restrict their scope of sovereign decisions. The failure of important international treaty projects in various fields in the last few years – like environmental law, criminal law, and the restriction of certain weapons – is only one result of this reluctance. Thus, when considering existing standards and the perspective of regulation from an international point of view, the following distinction should be drawn. On the one hand, it has to be taken into account to what extent the current international legal regime contains principles and rules that may directly or indirectly affect the use of private military companies in certain cases. Only then, after having ascertained existing standards, can the development and enhancement of this legal regime be

tackled successfully, not only on the international level, but also by incorporating general international legal standards into more detailed national legislation.

In default of a specific legal regime, limits and guidelines for the use of contractors have to be deduced from the rules of general international law that govern the deployment of non-state actors. Such rules are not only those that reserve certain functions explicitly for state organs. In other cases, states may have to exercise due diligence in a way that the private contractor must be supervised by state organs. To a certain degree, this general framework restricts and regulates the use of private military companies. It is up to states and their national administration to implement this general framework by adopting effective legislative and administrative measures that govern the use of private military companies in detail.

In response to the increased presence of PMSCs, several international initiatives have been undertaken with a view to clarifying, reaffirming or developing international legal standards regulating their activities and, in particular, ensuring their compliance with standards of conduct reflected in IHL and human rights law.

As a result of an initiative launched jointly by Switzerland and the ICRC, the Montreux document was adopted in September 2008. The Montreux Document restates and reaffirms the existing legal obligations of States with regard to PMSCs activities during armed conflict. It also recommends a catalogue of good practices for the practical implementation of existing legal obligations. From an initial 17 states in 2008, the number

of participants supporting the Montreux Document has now risen to 54 states and three international organizations.<sup>65</sup>

The Montreux Document is the result of an international process launched by the Government of Switzerland and the ICRC. It is an intergovernmental document intended to promote respect for international humanitarian law and human rights law whenever private military and security companies are present in armed conflicts. The Montreux Document was finalized by consensus on 17 September 2008 by 17 States, and the number of participating States is growing steadily.

#### F. Originality

As in scientific papers in general, there are also some differences/similarities content with other works. This section explain the differences of this writings with various similar research, which will be described, below;

No	Title	Types of Paper	Writers	Problem Statement and Conclusion	Comparison
1.	Dinamika Penegakan Hukum Humaniter Internasional; Analisis Kehadiran PMSC dalam Konflik Non Internasional	Journal (Jurnal Hubungan Internasional Vol.5 Edisi 2/ Oktober 2016- Maret 2017. UMY)	Tulus Yuniasih, Riasa Rizky, Claudia Natasha	The article aims to discuss the private military and security companies/PMSC, International Humanitarian Law/IHL and the fourth generation warfare/4GW in contemporary non-international armed conflict. Discussion on PMSC varies in terms of its contribution to the development of weapon system and intelligence gathering in combating terrorism, and of its	These thesis are specifically discuss on how the legal status of PMSC employee during the armed conflict (include International Armed Conflict or Non International Armed Conflict), distinct to these article which more analyse on the existence of PMSC toward 4GW, which several fact on its contributions and violations were made as the

<sup>65</sup> *Ibid.*, <https://www.icrc.org/en/document/privatization-war>

				violation towards humanity that has caused civilian casualties. The results show that PMSC creates both potentials and challenges to the effort of upholding IHL in three non-international conflict areas, i.e. Lebanon, Somalia, and Ukraine. In relation to 4GW, PMSC also reflects some characterisation of 4GW trends in such contemporary conflict.	background of the study in this thesis.
2.	Private military companies: their status under international humanitarian law and its impact on their regulation	Research article/ journal  (International Review on Red Cross, Vol 88 Number 863 Sept 2006)	Lindsey Cameron	Cognizant of much confusion as to the status of the employees of private military companies under international humanitarian law, this article explains the laws on mercenaries, combatants and civilians and explores how private military companies' employees may fall into any of those categories. It demonstrates that the concept of mercenarism is unhelpful for regulating these companies and that it is unlikely that many of the employees of these companies can be considered to have combatant status. The article considers possible consequences of private military companies' employees having the status of civilians under international humanitarian law and their potential impact on regulating these companies effectively.	This thesis also explains the laws on mercenaries, combatants and civilians and explores how private military companies' employees may fall into any of those categories. Even this thesis and that article has similarity of idea. This thesis trying to elaborate more how qualification of the category fall down to the personnel who involved in any armed conflict. By focusing on what activities amount to "taking direct part in hostilities" is obviously crucial to determining the protections to which the staff of PMSC are entitled.
3.	The legal status of employee of Private Military/ security Companies participating in U.N. Peacekeeping operations	Journal (Northwestern Journal of International Human Rights, Vol. 13   Issue 1	M.d Ghazy Janaby	This paper finds and elaborate on how legal status of PMSC employee which participate in UN Peacekeeping Operations. The result is legal status of the personnel of PMSCs used in U.N. peacekeeping	This thesis were seen in general perspective based on IHL not limited to Peacekeeping Operations. The article could took as reference in developing arguments on this thesis.

		Article 4 (2015)		operations under peacekeeping rules differs from their status under international humanitarian law. Under the latter, they are regarded as civilians, forbidden from taking part in hostilities lest they lose their protected status and face prosecution.	
4.	Status hukum kontraktor Private Military dan Private Security Companies dalam Hukum Humaniter Internasional	Journal (Yustisia Edisi 94 Januari - April 2016)	Sefriani	The legal status of PMSCs cannot be categorized as mercenaries because they do not meet the criteria as mercenaries as stipulated in article 47 Additional Protocol 1977. In this paper it is concluded that the legal status of PMSCs contractors is civilian, given that the majority of contractors are not assigned to fight in armed conflict in the country's armed forces, and does not hold a continuous combat function so that it clearly does not qualify to directly participate in hostilities. Thus, PMSCs can enjoy the status and protection of civilians, unless they take part directly in combat.	Although both research reviews the clarity of the legal status of PMSC specifically how IHL is applied to personnel. This thesis also provides a brief additional explanation of the responsibilities and rights that occur after the status is clearly identified. This elaboration will be discussed to answer the second problem statement of this thesis
5.	Status Hukum Anggota Private Military Company Berdasarkan Hukum Humaniter Internasional	Journal	Agis Ardiansyah	The aims of this journal is to analyse the legal status of private military company and its personnel under international humanitarian law. These writing result shows that private military company and tis personnel has various legal statuses which are civilian, civilian accompanying the armed forces and unlawful combatant based on their duties and activities	More close to same, this paper and the writers research are has the same object and purposes, but this thesis take more specific on the legal status of PMSCs personnel who involved in/ during armed conflict, and giving more explanation on the right and duties appears to the personnel

6.	Status Hukum Perusahaan Tentara Bayaran Dan Jasa Keamanan Serta Hak Dan Kewajiban Negara Pengguna Jasa Menurut Hukum Humaniter	Bachelor Thesis	Dwi Syahrul Alam PM	This paper find out what is the legal status of PMSC according to IHL? How do state rights and obligations use military and private security companies if they occur against IHL? The conclusion shows PMSC personnel consisting of PMCs can be said to be combatants and the PSC can be said to be civilians accompanying the armed forces, and they can be said to be prisoners of war when caught by the enemy. PMSC personnel must still be treated as non-combatants who have taken part in hostilities, have the right to be treated humanely, to be protected from murder, torture, physical punishment, and humiliation of one's dignity. Violations of humanitarian law carried out by or toward PMSC personnel provide obligations or responsibilities to the country of service users	Even the titles showing a distinct on the object of research but the article and this thesis have similar discussion on how the personnel are categorize in various status in a war. This thesis will use juridical and historical approach to answer the problems. This thesis has limitation on the deeply analyse on personnel legal status and its right and duties during the armed conflict, using elaborative fact in many cases.
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## G. Research Method

### 1. Type of Research

The method used for this thesis is a normative legal research. The research focus is conducted by the author which focuses on obtaining results and answers about legal statutes of Private Military and Security Companies (PMSC) Personnel involved in Armed Conflict and his right and duties during The Armed conflict which based on perspective of international humanitarian law.

## **2. Legal Material**

- a. Primary Legal Material, is a legally binding material consisting of Geneva Convention 1949, Hague Convention 1954, Additional Protocol I and II of 1977, International Convention against the Recruitment, Use, Financing and Training of Mercenaries, and also the Montreux Document; On pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict.
- b. Secondary Legal Materials, defined as materials that are not binding the law, but to explain the primary legal materials that are processed or opinion of the expert or experts who study in a particular field, such as books, papers and scientific journals related to the object of research. Therefore, the author also use secondary legal material in the form of literature and journal literature on humanitarian law which has close links as well as support and help analyze the primary legal materials.

## **3. Legal Data Collection**

Collection of legal data materials is done by:

- a. Library Studies, by reviewing journals, books on humanitarian law, and literature related to research problems.
- b. Study Documents, by reviewing legislation regarding sanctions for violators of the rules of war in the Geneva Conventions 1949, Hague Conventions 1954 , and Additional Protocol I and II of 1977.

#### **4. Research Approach**

A legal research should use a juridical, conceptual, and historical approach, because in this case analyzed the problem in terms of the various sources of law that are the focus at the main theme of research. The approach used in this paper will be focused on several conventions, the Geneva Convention 1949, Hague Convention 1954, the general principles of international humanitarian law, as well as the rules and sources of other international law that have relevance.

#### **5. Analysis of Legal Materials**

Legal materials obtained from the results of the study were analyzed by normative descriptive qualitative, by collecting and selecting materials in accordance with the law of the problem under study, then can be generated description more objective and systematic accordingly which resulting the view the problems studied

#### **H. Systematical of Writing**

This thesis will be divided into four chapter as follows; Chapter I Introduction; Chapter II Theoretical Review on The Regulation applied to PMSC Personnel who Involved in Armed Conflict based on IHL; Chapter III Discussion on The Legal Status on PMSCs Personnel and Their Right and Duties in Armed Conflict based on IHL; and Chapter IV Closure which contains Conclusion and Recommendation.

In the Chapter I, it is explained that the context of study, problem statement, research objectives, theoretical review, research method and systematical of



writings. In this research, there are two research problems; how the legal status of Private Military and Security Companies Personnel involved in armed conflict under International Humanitarian Law and how the right and duties of them during the armed conflict based IHL? To answer the problems, the writer analyzes The Hague and Geneva Conventions and its Protocol, The Montreux Document, and other related laws, regulations, books, journals, and research reports.

Chapter II describes about the regulations applied to PMSC Personnel who involved in an armed conflict based on IHL. This chapter is divided into five subchapters; The Understanding and Development of IHL; Types of Armed Conflict; The Overview and Development of PMSC and Several cases related; The Regulation of PMSCs and it's Personnel;

Discussion in Chapter III is divided into two sub chapters; the legal status of private military and security personnel involved in an armed conflict which analyzed based on International Humanitarian Law, and the right and duties arises to the private military and security companies' personnel during armed conflict.

At last, Chapter IV enlightens the summary result of the discussion as the answer of two problem statement in this thesis. At the end, the writer adds some recommendations to the reader in handling both problems.

## CHAPTER II

### THEORITICAL REVIEW

#### THE REGULATION APPLIED TO PMSCs PERSONNEL INVOLVED IN AN ARMED CONFLICT BASED ON INTERNATIONAL HUMANITARIAN LAW

##### 2.1 The Understanding and Development of International Humanitarian Law

###### 2.1.1 The Definition of International Humanitarian Law (IHL)

International Humanitarian Law was an old parts of International Law.<sup>66</sup> At the beginning, Humanitarian Law was called as the Law of War.<sup>67</sup> In its developments, the naming of the law of war are deemed be too hard and cruel. Then the terminology is started to be changed into humanitarian law.<sup>68</sup> As a new field of international law, there are a few opinions of experts on humanitarian law.<sup>69</sup> There is an opinion from Mochtar Kusumaatmadja, he argues that humanitarian law is part of the law governing the war itself and everything related to the conduct of war itself.<sup>70</sup> Meanwhile, according

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<sup>66</sup> Mochtar Kusumaatmadja, *Hukum Humaniter Internasional dalam Pelaksanaan dan Penerapannya di Indonesia*, in the M. Iqbal Asnawi, *Konsistensi Penegakan Hukum Humaniter Internasional dalam Hubungan Antar Bangsa*, Jurnal Hukum Samudra Keadilan , Vol.12 No.1, Universitas Samudra, 2017, p. 115

<sup>67</sup> Arlina Permanasari, Aji Wibowo, and friends, *Pengantar Hukum Humaniter*, International Committee of The Red Cross, Jakarta, 199, p. 5

<sup>68</sup> *Ibid.*, p. 6-7. The use term of war basically are loathing, especially caused by the traumatic of World War II insulting many victims, more than 60 million people killed. In 18<sup>th</sup> century, the sum of victims coming out at 5,5 million peoples; in 19<sup>th</sup> century are up to 19 million lives; World War I are resulting 38 million peoples killed and conflicts happen at 1949-1995 reach 24 million victims; See *Defense Nationale*, p.217, as quoted in ICRC-IPU, *Respect for International Humanitarian Law, Handbook for Parliamentarians* No.1, 1999, p. 10.

<sup>69</sup> *Ibid.*, p. 8

<sup>70</sup> Mochtar Kusumaatmadja, *Hukum Internasional Humaniter dalam Pelaksanaan dan Penerapannya di Indonesia*, 1980, p.5

to Geza Herzegh, it is found that international humanitarian law is the part of the rules of public international law which serve as the protection of the individuals in time of armed conflict. Its place is beside the norm of warfare and closely related to them. However, it must be clearly distinguished from those purpose because the spirit being different.<sup>71</sup> Before known as humanitarian law, laws governing armed conflict is known as the law of war. Humanitarian law is the new name of the Laws of War. There is a part of international law that addresses doctrine about just war. The doctrine of humanitarian law is divided into two parts, namely;<sup>72</sup> (a). *Ius ad bellum*, is the laws of war. (b). *Ius in bello*, is the law that applies in the war.

*Ius ad bellum* discuss about 'when or in a what condition' the state was justified to fight. Meanwhile, *ius in bello* is applicable provision in a war that is set in the sources of humanitarian law.<sup>73</sup>

Jean Pictet in his book with the tittle, *The Principle of International Humanitarian Law* which humanitarian law in the sense that the broad sense, includes Geneva Convention, Hague Convention, and Human Rights Law. Otherwise Geza Herzegh has a narrow affiliations, according to him, humanitarian law is only covering by Geneva Convention. Meanwhile, Haryo Mataram has a middle stating that humanitarian law consists of the law of Geneva and Hague.<sup>74</sup> In various documents and literature, the term of IHL (International Humanitarian Law) is often used interchangeably with

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<sup>71</sup> Arlina Permanasari, *Op.cit*, p.9

<sup>72</sup> Haryo Mataram, *Pengantar Hukum Humaniter*, PT. Rajagrafindo Persada, Jakarta, 2012,

<sup>73</sup> *Ibid.*

<sup>74</sup> Arlina Permanasari, *Op.cit*, p.10

the term humanitarian law and IHL applicable in armed conflict. The latter term is the most complete and used term in Additional Protocol I/1977 over the 1949 Geneva Convention in detail, the ICRC described the purpose of the terms contained in the Geneva Convention as follows:

*International Humanitarian Law means international rules, established by treaty or custom, specifically, are expected to address the humanitarian problems that arise directly from the disputes of international and non-international armed, and for reasons of humanity, restrict the rights of the parties to the conflict to use the methods and tools of their choice or extending the war to protect people and their property which may be affected by the conflict.*<sup>75</sup>

From the description above, it can be concluded that humanitarian law is a branch of international law which appears to regulate and provide limits in the war, including the rules, principles and international regulations in order to maintain human rights, humanize, while upholding the values of humanity and respect for human dignity.

### **2.1.2 History and Development of IHL**

Lately, a new term arose in the repertoire of international law. The term is meant International Humanitarian Law.<sup>76</sup> During its development, international humanitarian law has been amended at every age, but almost impossible to find documentary evidence of when and where the rules of humanitarian law were raised and more difficult to find out who is the creator.<sup>77</sup>

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<sup>75</sup> Ambarwati, Denny Ramdhany, Rina Rusman, *Hukum Humaniter Internasional: Dalam Studi Hubungan Internasional*, 3<sup>rd</sup> edition, Rajawali Pers, Jakarta, 2012, p.29

<sup>76</sup> Haryo Mataram, *Hukum Humaniter*, Rajawali Pers, Jakarta, 1984, p.1

<sup>77</sup> Arlima Permanasari, *Op.cit.* p.12

Up to the present form, international humanitarian law has been progressing very much. In a very long time, it has made efforts to humanize war. These efforts have obstacles and difficulties as well as divided into stages of the development of humanitarian law, following:<sup>78</sup>

#### **a. Ancient Times**

At this time, the military leaders ordered their forces to save the captured enemy, treat them well, save the enemy's civilian population and at the time of cessation of hostilities, the hostilities parties usually agree to treat prisoners well.<sup>79</sup>

Even in the great civilizations during the years 3000-1500 BC's that efforts still continue to run as an example, Jean Pictet expressed as follows:<sup>80</sup>

(1) At the time of the Sumerian civilization, the war was an organized institution, characterized by the first declaration of war, the possibility of holding arbitration, immune messenger enemy and the peace agreement.

(2) In Ancient Egypt, as described in Seven Works of True Mercy, which describes the command to provide food and beverages, clothing and shelter to the enemy.

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<sup>78</sup> *Ibid.*

<sup>79</sup> Arlina Permanasari, *Op.cit*, p.13

<sup>80</sup> As quoted from Arlina Permanasari, Aji Wibowo and friends, *Pengantar Hukum Humaniter*, International Committee of The Red Cross, Jakarta, 1999, p. 14 See also; Jean Pictet, *Development and Principles of International Humanitarian Law*, Martinus Nijhoff Publisher, 1985, p.6-12

(3) In the culture of Hattite's nation, war is also be done in a humane manner. They signed a declaration of war and treaties.

(4) In India, as stated in the epic Mahabarata and the laws of Manu, the knights are prohibited to killing enemies with disabilities, who surrendered, the wound should be repatriated after they were treated. Even that set of laws on the use of toxic weapons and fire arrows.

### b. Middle Age

In the middle ages, international humanitarian law is influenced by the teachings of Christianity, Islam and the chivalry principles. In Islam even been listed on the command concept of fair war of a just war, the rule is in the Al-Qur'an Q.S Al-Hajj : 39 and QS. Al-Baqarah : 191.<sup>81</sup>

أَذِنَ لِلَّذِينَ يُقَاتَلُونَ بِأَنَّهُمْ ظَلِمُوا ۗ وَإِنَّ اللَّهَ عَلَىٰ نَصْرِهِمْ لَقَدِيرٌ

Which mean:

—Allowed to fight for the people (Muslims) who fought (by careless groups), because they are wronged and verily Allah Has a Power to help them (to victory).(39)<sup>82</sup>

وَقَاتِلُوا فِي سَبِيلِ اللَّهِ الَّذِينَ يُقَاتِلُونَكُمْ وَلَا تَعْتَدُوا ۗ إِنَّ اللَّهَ لَا يُحِبُّ الْمُعْتَدِينَ

وَأَقْتُلُوهُمْ حَيْثُ ثَقِفْتُمُوهُمْ وَأَخْرِجُوهُمْ مِّنْ حَيْثُ أَخْرَجُوكُمْ ۗ وَالْفِتْنَةُ أَشَدُّ مِنَ الْقَتْلِ ۗ وَلَا تُقَاتِلُوهُمْ عِنْدَ الْمَسْجِدِ الْحَرَامِ حَتَّىٰ يُقَاتِلُوكُمْ فِيهِ ۗ فَإِن قَاتَلُوكُمْ فَاقْتُلُوهُمْ ۗ كَذَلِكَ جَزَاءُ الْكَافِرِينَ

<sup>81</sup> Masjhur Effendi, Moh. Ridwan, Muslich Subandi, *Pengantra dan Dasar-dasar Hukum Internasional*, IKIP Malang, 1995, p.16

<sup>82</sup> Q.S Al-Hajj Verse 39

Which mean:

—Fight in the way of Allah those who fight you but do not transgress. Indeed. Allah does not like transgressors. (190) –And kill them (enemies who fight you) where ever you found them, and turn them out from where they have turned you and (remember that greedy) slander are worse than murder and don't you fight them around Masjid Al-Haraam so they fight you there. By that if they attack you (there) then slay them. That is the reward of those who disbelieve.(191).<sup>83</sup>

### c. Modern Age

Decisive progress occurred from the 18th century and after the end of Napoleonic wars, especially in the 1850s until the outbreak of World War I. The practices of the country then becomes law and custom in war (*jus in bello*).<sup>84</sup>

One important milestone in the development of international humanitarian law is the establishment of the Red Cross and the signing of the Geneva Conventions of 1864 at the same time in the United States, President Lincoln asked to Liber to draw up the rules which called Lieber Code which contain detailed rules at the time of war on land, acts of the true war, the treatment of certain groups of people such as prisoners of war, the wounded, and so on.<sup>85</sup>

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<sup>83</sup> Q.S Al-Baqarah Verse 190-191

<sup>84</sup> Arlina Permanasari, *Op.cit*, p.16

<sup>85</sup> *Ibid*.

The 1864 Convention is the Convention for the Wounded Army Repair Situation in Battlefield, 1864 is seen as a convention that started the next Geneva Conventions relating to the protection of war victims. This convention is the first step to codify the provisions of war on land.<sup>86</sup> Under this convention, the units and health personnel is neutral. The Convention introduces the sign of the Red Cross on a white base as identification for building and health personnel. Identification is as the emblem of International Committee of the Red Cross, formerly known as the International Committee for the Aid of The Wounded, which was founded by some citizens of Geneva and Henry Dunant in 1963.<sup>87</sup>

### 2.1.3 Subject of IHL

IHL bind all actors to an armed conflict; in international conflicts, it must be observed by the states involved, whereas in internal conflict it binds the government, as well the groups fighting against it or among themselves.<sup>88</sup> Thus, IHL lays down rules that are applicable to both state and non-state actor. This law also imposes obligations on individuals and provides that person may be held individually criminally responsible for 'grave breaches' of the conventions, and for other serious violations of the laws and customs of war (war crimes). It establish universal jurisdiction

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<sup>86</sup> *Ibid.*, See also; Haryomataram, *Sekelumit tentang Hukum Humaniter*, Sebelas Maret University Press, 1994, p.16

<sup>87</sup> *Ibid.* As mention by Jean Pictet... *Op.cit.*, p.29

<sup>88</sup> Mohd. Akram, *International Humanitarian Law Hague and Geneva Conventions on War Crimes, War Victims, and Prisoners of War*. International Law Book Services; Selangor Malaysia. 2005, p.10-11. See also footnote 16 supra and Verhaegan. J., *Legal Obstacles to Prosecution Breaches of Humanitarian Law*, IRRRC No.261, 1987, p.607-620



over person suspected of having committed all such acts. With entry into forces of the International Criminal Court (ICC), individuals will be also accountable for war crimes committed in non-international armed conflict.<sup>89</sup>

Therefore, there are at least three subjects in the IHL, namely the state, non-state armed groups, and individuals. The state is a party to the conflict and an instrument of the IHL. Non-state armed groups are also parties to the conflict.<sup>90</sup> Individuals are those who are part of the parties to the conflict, such as civilians, and others who are protected (*Hors de combat*), and combatants, who have rights and obligations towards IHL. IHL protect civilians or persons who do not, or are no longer taking part in hostilities through rules on the conduct of hostilities. Parties to a conflict must at all times during the war distinguish between combatants and non-combatants and between military and non-military targets. Neither the civilians populations as a whole nor individual civilians may be object of attack. All parties protected are mainly people who do not take part or do not participate

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<sup>89</sup> Jean Pictet, on *The Conference of the Red Cross*, and M. Mushkat, *The Development of International Humanitarian Law and the Law of Human Rights*, Pictet argue Humanitarian Law comprises two branches; the law of war and the law of human right. However, A.H Robertson and J.G Merrills in *Human Rights in the World*, Manchester University Press, 1989, 3<sup>rd</sup> Ed., Chapter 8, p 226-227 took a different stand; they stated that humanitarian law is one branch of the law of human right, and that human rights provide the basis for humanitarian law. Reference to the human right was only found in 1948 that the universal declaration was adopted in Paris, just a year before humanitarian law, already highly developed, and was codified in Geneva Conventions 1949. Looking to the substance of both, it is apparent that human rights law is the genus of which humanitarian law is the species. Human right law relates to the basic right of all human being, at all time, while humanitarian law comply to the rights of particular categories of human being (principally, the sick, wounded, and prisoner of war, in particular circumstances; during the period of armed conflict. And its proven that two disciplines are stand for the right of human being by the establishment of *ad hoc* International Criminal Tribunal for the former of Yugoslavia and Rwanda, as well as the prospective permanent of ICC, have or will have jurisdiction over violations of both International Humanitarian Law and International Human Right Law.

<sup>90</sup> Umar Suryadi Bakri. *Hukum Humaniter Internasional Suatu Pengantar*. 1<sup>st</sup> Edition. Prenada Media Group; Jakarta. 2019. p.6-7

in hostilities, and those who are included in Hors de combat are regulated in Article 3 of Geneva Convention I-IV.

Besides, the Geneva Convention IV and the 1977 protocol provide additional basic guarantees to protect civilians generally, children, sick and wounded combatants, medical personnel, religious military personnel, detainees and prisoners of war, medical transport and facilities (including units and missions), registration, emblems and signals, symbols.<sup>91</sup>

#### **2.1.4 The Purpose of IHL**

Humanitarian law is a branch of international law governing the procedures in the war. The purpose of the humanitarian law itself is not to prohibit war, because from the perspective of humanitarian law, war is a difficult thing to be avoided so that it gives the boundaries of things or actions that are allowed and what is prohibited in the war. In humanitarian law, according to Mohammed Bedjaoui that the purpose of humanitarian law is to humanize war.<sup>92</sup> There are several goals of humanitarian law, as follows:<sup>93</sup>

1. Providing protection against combatants and civilians from unnecessary suffering.

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<sup>91</sup> Aldo Zammit Borda, *Introduction to International Humanitarian Law*. In *Commonwealth Law Bulletin*, Vol 34. No.4. 2008. p.745. See also Appendix III of the Geneva Convention, Additional Protocol I Part II, retrieved from Mohd. Akram, *Op.cit.*,p.93-99

<sup>92</sup> Arlina Permanasari,,*Op.cit.* p.12

<sup>93</sup> *Ibid.*

2. Ensuring human rights is a fundamental for those who fall into enemy. Combatants who fall into enemy must be protected and cared for and are entitled to be treated as prisoners of war.
3. Preventing cruel act war without limits. Here is the most important is the humanity principle.

### **2.1.5 Source of IHL**

A provision must have a legal source of both written and unwritten. Similarly with the international humanitarian law, in which there are also sources of law which are the basis of the rules of war. In the discussion of sources of humanitarian law, the author discusses the sources of written law contained in international humanitarian law where can be found in the form of declarations, conventions, and protocols and in other agreements. From several types of sources of law, and of course there is the main source of law used in international humanitarian law. As discussed above, that international humanitarian law has a major convention, The Hague Convention, the Geneva Convention and Additional Protocols.

The main objective of the four Geneva Conventions of 1949 and their two Additional Protocols of 1977 is such instrument is to protect the victims of armed conflict. One of the basic principles of international humanitarian law, namely the right if belligerents to choose the weapon to injuring the enemy which is not unlimited. This principle flows from the principle of balance or proportionality and the distinction principle which aims to distinguish between military targets in civilian and objects associated with

the protected area.<sup>94</sup> There are three main pillars which give contribution to the formulation of international humanitarian law. Those three pillars is (1)the Law of Geneva, awarded by international conventions and protocols are established by International Committee of the Red Cross (ICRC) with a focus on the protection of victims of conflicts; (2)Law of The Hague, based on the results of the Peace Conference on the capital of the Netherlands in 1899 and 1907, which in principle regulate the means and methods of warfare which allowed; and (3)UN efforts to ensure respect for human rights in armed conflict and limit the use of certain weapons.<sup>95</sup>

When the French and Australian armies fought in the battle of Solferini in northern Italy in June 1859, it comes to the idea in the mind of Henry Dunant, a young Swiss citizen, on international measures to reduce the suffering of the sick and wounded army in the war.<sup>96</sup>

a. Hague Law 1899 and Hague Convention 1907

Den Hague Convention done twice, The Hague Convention of 1899 is the result of the Peace Conference I in Den Haag,<sup>97</sup> which is then carried out improvements in 1907. In the Hague Convention, more specifically regulate the tools and procedures for fighting. The first argument of principle or in this Convention reads as follows: “*the rights of belligerents*

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<sup>94</sup> C. de Rover, *To Serve & To Protect Acuan Universal Penegakan HAM*, ICRC-Geneve, 1998, p. 406

<sup>95</sup> Hukum Humaniter Internasional Dan Hak Asasi Manusia, *Kampanye Dunia untuk Hak Asasi Manusia*, Lembar Fakta No. 13, p. 3

<sup>96</sup> *Ibid.*

<sup>97</sup> Ambarwati, Denny Ramdhany, Rina Rusman, *Op.cit.* p. 29, see also Arlina Permanasari, Aji Wibowo, and friends., *Op.cit.*, p.22 as quoted from Dietrich Schindler-Jijr Toman, *The Laws of Armed Conflict*. Henry Dunant Institute, Geneva, 1981, p.49

*to adopt means of injuring the enemy is not unlimited.*”<sup>98</sup> This means that the restriction in the use of tools to fight.<sup>99</sup> The Hague Convention of 1899 produced three conventions, namely:<sup>100</sup>

1. Convention I about on International Dispute Peace Resolution
2. Convention II about Laws and Customs of War on Land
3. Convention III about adaptation Geneva Convention Principles of August 22, 1864 on the law of war at sea,

And to produce three declarations, as follows:

1. Prohibit the use of dum-dum bullets (the bullets that it is packaging is not perfectly cover the inside so that it can rupture and enlarged in the human body).
2. The launching of projectiles and explosives from ballons, for a period of five years ending in 1905 are also prohibited.
3. The use of projectiles that cause choking gases and toxic prohibited.<sup>101</sup>

Then carried to the second conventions and this conventions is the result of Peace Conference II as a continuation of the Peace Conference I in 1899<sup>102</sup>, as described above. Hague Convention of 1907 resulted in some convention as follows:<sup>103</sup>

1. Convention I on International Peace Dispute Resolution;
2. Convention II on Limitation of Violence Weapon In Debt Payment Demanding Originating Civil Agreement;
3. Convention III on How to Start a War;
4. Convention IV on Law and Customs of War on Land in Complete with Hague Regulations;

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<sup>98</sup> Haryo Mataram, *Pengantar Hukum Humaniter*, *Op.cit.*, p.46

<sup>99</sup> Haryo Mataram, *Hukum Humaniter Op.cit.*, p.16-17

<sup>100</sup> Arlina Permanasari, Aji Wibowo, and friends, *Op.cit.*, p.23

<sup>101</sup> Arthur Nussbaum, *Sejarah Hukum Internasional*, Jilid I, Bina Cipta, Bandung.1970, p.159.

<sup>102</sup> Haryo Mataram, *Hukum Humaniter Op.cit.*, p.18

<sup>103</sup> Arthur Nussbaum, *Op.cit.* p.160-161

5. Convention V on the Rights and Duties of States and Citizens Neutral in War on Land;
6. Convention VI on the Status of Trade Ship Enemy at Startup/Beginning of war;
7. Convention VII on the Status of Trade Ship Becoming Warship;
8. Convention VIII on Automatic Mines Placement at Sea;
9. Convention IX on bombings by the Navy in Time of War;
10. Convention X on adaptation of principles of Geneva Convention on war at sea;
11. Convention XI on Certain Restriction Against Right of Arrest In Naval War;
12. Convention XII on the Court of Confiscated Goods;
13. Convention XIII on the Rights and Duties of States Neutral In War at Sea.

The Hague Convention is more concerned about the war which occurred in the sea, but there are also conventions governing war on land, which stated on Convention IV. As an important note that in the Convention IV there is annex which is referred to as the Hague Regulations 1907,<sup>104</sup> in which the regulation become the guideline until now.

b. Geneva Law

Geneva Convention 1949 and the rules of non-international armed conflict since 1945, Article 3 and Additional Protocol II have set regarding non-international armed conflict and had introduced a set of rules to protect the civilian population, as well as requiring humane treatment with regard to those who took part in the hostilities, including those *hors de combat*. It also regulates the Non-State Armed Groups (NSAGs) does not enjoy the

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<sup>104</sup> Haryo Mataram, *Pengantar Hukum Humaniter*, Op.cit, p.48

privilege of combatants and cannot claim protection as a POW (prisoner of war).<sup>105</sup>

As with any other conventions, the Geneva Convention also contains two kinds of provisions, namely the general provisions and other provisions which merely regulate the implementation. The provisions of a general nature earlier load fundamental principles.<sup>106</sup>

Geneva Convention 1949 is also referred to as the Red Cross Convention, because it governs the protection of war victims. The Geneva Convention 1949 consists of four principal conventions or agreements, namely:

1. Geneva Convention for Amelioration of the Condition of the Wounded and Sick in Armed Forces in battlefield;
2. Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Member of Armed Forces at Sea;
3. Geneva Convention relative on the Treatment of Prisoners of War;
4. Geneva Convention relative on the Protection of Civilians Person in Time of War.<sup>107</sup>

Another matter with the Hague Convention, the Geneva Convention is more to the protection for those who are victims of war. Contained in the

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<sup>105</sup> Tom Ruys , *The Syrian Civil War And The Achilles' Heel Of The Law Of Non-International Armed Conflict*, Board of Trustees of the Leland Stanford Junior University, 2014, See ICRC, Lesson 10; *The Law of Armed Conflict; Non-International Armed Conflict*. Geneva; Switzerland. 2002., p.19-20, combatant status does not apply to the members of opposition groups and civilians taking part in military action. Further search on Geneva Convention I-IV Common Article 3, Additional Protocol II, Art. 13 (3)

<sup>106</sup> Haryo Mataram, *Pengantar Hukum Humaniter, Op.cit*, p.53

<sup>107</sup> *Ibid.*

Geneva Convention and the Additional Protocol as a complementary of that convention.

c. Additional Protocol 1977

Additional Protocol aims to enhance the content of the Geneva Convention 1949 and not deleting the principles which contained in the Geneva Convention 1949, meaning that those principles is still valid.

Special treatment is also given to medical personnel, whether civilian or religious and to transport equipment and medical supplies. In the 1977 Additional Protocol consists of two books, namely:

- Additional Protocol I, which contains the rules of war or armed conflict of an international character, namely and armed conflict where the parties to the dispute is the state.<sup>108</sup> Protocol I also used to protect the civilian population, as well as for civilians who fall into enemy sides. Parties involved in the dispute must always distinguish between civilians and combatants. Deliberately let the starving civilian, destruction of cultural property and natural environment is prohibited. There are some special efforts to protect women and children and journalists in dangerous task should be treated as civilians.<sup>109</sup>

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<sup>108</sup> Haryo Mataram, *Pengantar Hukum Humaniter*, *Op.cit.*, p. 50

<sup>109</sup> Hukum Humaniter Internasional Dan Hak Asasi Manusia, *Kampanye Dunia*, *Op.cit.*, p.



- Additional Protocol II, which contains the rules of war or armed conflicts which are non-international aspect, which mean is armed conflict in region of one of the participant are among countries with rebel forces<sup>110</sup>. The same rules are also contained in Protocol II regarding the situation of internal conflict. Protocol II contains rules relating to victims of non-international armed conflict, and thus completes the basic principles contained in Article 3 (Annex 1949 Convention).<sup>111</sup>

Either protocol further urges humane treatment of those who are not, or no longer involved in the violence or conflict. Murder, torture, mutilation and corporal punishment was banned. There are some provisions about care for the sick, injured or stranded, and on the protection of the civilian population from acts or threats of violence, neglect as a tactic of war and force destruction. The act of destruction of historical monuments, works of art, or places of worship or abusive to support the interest of military is also prohibited.<sup>112</sup>

### **2.1.6 Basic Principles of IHL**

Humanitarian law has principles that act as a barrier to taking action in situations of war. In these principles, must be obeyed by all countries associated with international humanitarian law. These principles, pervades:<sup>113</sup>

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<sup>110</sup> *Ibid.*,p. 50

<sup>111</sup> *Ibid.*,p. 3

<sup>112</sup> *Ibid.*

<sup>113</sup> Arlina Permanasari, *Op.cit.*,p. 11

1. Humanity principle.

The Humanity principle is interpreted as prohibitions on the means and methods of warfare which are not essential for the achievement of a real military advantage. Jean Pictet in his book with the title *The Development and Principle of International Humanitarian Law*, he interprets the meaning of humanity as follows:<sup>114</sup>

*“...The arrest is more precedence over injuring the enemy, and injuring the enemy is better than killing him; that noncombatant should be kept as far as possible from the battlefield; that the victims were injured must be kept to a minimum level, so that they can be treated and cured; that the injuries that happen to be cultivated lenient painless.”*

The humanity principle insists on treatment for the parties to the dispute to continue to give respect for human dignity. That mean, although in a state of war, the disputing parties are prohibited from doing acts that are likely to cause suffering to the enemy. From the principle of humanity, it is known that humanitarian law is not merely gave the restrictions on the war, but also pay attention to the values of humanity.<sup>115</sup> The humanity principle is intended to pay respect and to protect the existence of human life.

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<sup>114</sup> Jean Pictet, *Development an Principle of International Humanitarian Law*, as quoted in the book of *Pengantar Hukum Humaniter Internasional*, Arlina Permanasari dkk, ICRC, Jakarta, 2000

<sup>115</sup> Arlina Permanasari, *Op.cit.*,p. 11

## 2. Military Necessity

Based on this principle, the disputing party is justified in using violence to subdue opponents to achieve the objectives and success of the war. This principle is often elaborated in the implementation by the application of the following principles:<sup>116</sup>

- 1) Limitation Principle is a principle that requires the limitation of means or means as well as methods or methods of warfare carried out by the disputing parties.
- 2) The principle of proportionality (Proportionality Principle), which states that the damage that will be suffered by civilians or civilian objects must be proportional.

## 3. Chivalry

This principle implies that in war, honesty must take precedence. The use of disrespectful instruments, various kinds of tricks and methods that are treasonous are prohibited.

In practice, the three principles are implemented in a balanced manner, as Kunz said:

*"Law of war, to be accepted and to be applied in practice, must strike the correct balance between, on the one hand, the principle of humanity and chivalry, and on the other hand, military interest".<sup>117</sup>*

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<sup>116</sup> Ahmad Baharudin Naim. *Humanitarian Law*. Bandar Lampung. University of Lampung. 2010. p.32.

<sup>117</sup> Joseph Kunz, *The Changing Law of National*, dalam Haryomataram. p. 34.

#### 4. The Distinction Principle

One of the basic principles adopted in the law of war is the distinction between combatant and civilian. This distinction needs to be held firstly which is to find out who can / should be made the object of violence and who should be protected. In other words, the existence of the distinction principle<sup>118</sup> can be known to anyone who may participate in hostilities that made the object of violence (killed), and who should be protected because they do not participate in hostilities.<sup>119</sup> This principle is a milestone in the establishment of Humanitarian Law, it is often referred to as the 'corner stone of international humanitarian law'.<sup>120</sup> The distinction principle has been split peoples involved in armed conflict into two groups, combatants and civilian. Combatants are group of the population which actively participating in hostilities, those who have the duty to fight and enter to war (including if they have to injure, destroy, carry out other military actions, even if they have to kill the enemy)<sup>121</sup> Everyone who belongs to this combatant group is the target or object of attack. Whereas the civilian is a group of people who do not participate in hostilities.<sup>122</sup> Thus it shouldn't be targeted or object of violence.<sup>123</sup>

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<sup>118</sup> This principle has been codified in Articles 1 and 2 of the Hague Convention 1907, Article 13 of the Geneva Conventions I and II of 1949, Article 4 of the Geneva Convention III, Article 43, Article 44 and Article 48 of Protocol I.

<sup>119</sup> Haryomataram, *Pengantar Hukum Humaniter*, PT. Rajagrafindo Persada, Jakarta.2012, p.75.

<sup>120</sup> Haryomataram, *Hukum Humaniter*, *Op.cit.*, p. 63.

<sup>121</sup> Because if it isn't, then they will be the target of enemy attacks as the known term, "to kill, or to be killed".

<sup>122</sup> Arlina Permanasari, Aji Wibowo, dkk, *Pengantar Hukum Humaniter*, *Op.cit.*, p.73.

<sup>123</sup> Jean Pictet, *Development and Principles of International Humanitarian Law*, Martinus

According to Jean Pictet, the principle of differentiation stems from the general principle/principle of limitation of *ratione personae* which states that civilians must obtain general protection from the dangers posed by military operations. In the implementation of this principle requires further elaboration in a principles of application, namely:

- a. The disputing parties must at all times distinguish between combatants and civilians in order to save civilians and civilian objects.
- b. The civilian population, as well as individual civilians, may not be made the object of attack even in the case of reprisals.
- c. Acts or threats of violence whose main purpose is to spread terror against civilians are prohibited.
- d. The dispute parties must take all reasonable precautions to save the civilian population or, at the very least, to reduce the accidental loss or damage to the minimum.
- e. Only members of the armed forces have the right to attack and hold the enemy.<sup>124</sup>

The term distinction principle implicitly exists in the Hague Convention IV (Convention on the Law and Customs of War on Land), especially in its annex namely Regulations respecting Laws and Customs of War, better known as the Hague Regulations (HR).

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Nijhoff Publisher-Henry Dunant Institute, 1985, p. 72, See also, Pietro Vierri, Dictionary of the International Law of Armed Conflict, ICRC, 1992, p. 32

<sup>124</sup> *Ibid.* p.72-73

The first part of the HR deals with the requirements of belligerents. Article 1 of the Hague Regulations 1907 stipulates that:

*"The laws, rights, and duties of war apply not only to the army but also to the militia and volunteer corps fulfilling the following conditions:*

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

*In the countries where militia and volunteer corps constitute the army, or form part of it, they are included under the denomination army".<sup>125</sup>*

It is confirmed that the law, rights, and obligations of war do not only apply to the army, but also to the militias and volunteer corps, as long as they meet the requirements as mentioned in numbers 1 to 4 of Article 1 of the Hague Regulations. In the next, there are other groups that can be categorized as combatants according to the Hague Regulations. Article 2 The Hague Regulations, which read: *"The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war".<sup>126</sup>* Whereas Article 3 states that the armed forces of a war party consist of combatants and non-combatants. If captured by the enemy,

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<sup>125</sup> The Hague Regulations Art.1

<sup>126</sup> The Hague Regulations Art.2 regarding with *leeve en masse*

both must be treated as prisoners of war. However, it should be underlined that the non-combatants in question are not civilians, but are part of the armed forces who do not fight such as medical personnel and clergy or religion man.<sup>127</sup>

Different from the provisions contained in the Hague convention, Geneva convention doesn't state the combatant, but only determines whose has right to get protection,<sup>128</sup> and whose entitled to treatment of prisoners of war if it falls into enemy.<sup>129</sup> Those mentioned in the provision must be distinguished from civilians.<sup>130</sup> Moreover the Geneva Convention also add Organize Resistance Movement as in part of the combatants if they fulfil the requirement of; (1) those who have leaders who are responsible for their subordinates;(2) they use certain signs that can be recognized from a certain distance; (3) those who carry weapons openly (4) in their operations comply with the law of the customs of war.<sup>131</sup>

According to Mochtar Kusumaatmadja, has function:

1. to Provide protection against both combatants and civilians from unnecessary suffering.
2. Guaranteeing Human Rights is very fundamental for those who fall into the hands of the enemy
3. Preventing the cruelty of war without knowing boundaries that violate the principle of humanity

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<sup>127</sup> Haryomataram, *Hukum Humaniter, Op.cit*, p. 63

<sup>128</sup> Art 3, Conv I and II

<sup>129</sup> Art 4 Conv III

<sup>130</sup> Haryomataram, *Hukum Humaniter, Op.cit*, p. 72

<sup>131</sup> Arlina Permanasari, et. al, *Pengantar Hukum Humaniter, Op.cit.*, p.82.

The distinction is aimed to find out which groups are engaged in hostilities that occurred, and also to determine which group can be made the object of violence and who should be protected. Regarding this issue of Manual of Military Law for the United Kingdom which quoted by Draper, said that the two groups, namely combatants and civilians, each group having privileges, duties, and disabilities. Furthermore, in that manual is said that one should choose in the group where they went, and they are not allowed to enjoy the privileges of two groups at a time.<sup>132</sup> From these quotations have shown that each group, both combatants and civilians have the rights and obligations, for example, civilians are entitled to protection only if he did not take part in armed conflicts that occur. Although the status of the parties in an armed conflict has been distinguished namely combatants and civilians, Starke also distinguishes combatants into two groups, namely lawful & unlawful combatants.<sup>133</sup> Based on Additional Protocol 1977, Combatants defined as the people who have the right to participate directly in warfare, and if caught by the opposing party should be treated as prisoners of war, and they are members of the Armed Forces of the warring parties.<sup>134</sup>

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<sup>132</sup> Haryomataram, *Loc. cit*

<sup>133</sup> IHL recognized the concept of Unlawful Combatant proposed by Starke which divided combatants into two groups; lawful and unlawful. See J.G. Starke, *Introduction to International Law*, 10<sup>th</sup> Edition, Butterworth, 1989. p.547, as quoted by Arlina Permanasari, Aji Wibowo, and friends, *Pengantar Hukum Humaniter, Op.cit.*, p. 106. IHL recognized three subjects include as Unlawful Combatants; Mercenaries, Spies, and Children soldier, see Arlina, *Pengantar Hukum Humaniter, Op.cit.*, p. 89-107

<sup>134</sup> Additional Protocol I of 1977, Art. 43-44



The members of the Armed Forces did not include health workers and clerics.<sup>135</sup> The 1977 protocol stated that there was no distinction between regular troops and irregular troops which the protocols imposed a single standard for all armed forces,<sup>136</sup> which must meet the following conditions;

1. the existence of an organization
2. there is discipline
3. there is a command that is responsible for obeying the provisions of the humanitarian law

Then it is said to be a lawful combatant if they meet these requirements. Whereas combatants who do not meet the above criteria are not legitimate or can be called as unlawful combatants. The characteristics of Unlawful combatants are those who when captured are not considered a prisoner of war status.<sup>137</sup> This understanding is also explained by the legal counsel of the ICRC that they are all people involved in a battle or war but they are not considered a prisoner of war when it falls into enemy hands, and that person must be a civilian population.<sup>138</sup> The unlawful combatants face more severe risks or harsher special treatment if they are caught,<sup>139</sup> they can also be tried

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<sup>135</sup> Additional Protocol I of 1977, Art. 43 (2)

<sup>136</sup> Haryo Mataram, *Hukum Humaniter, Op.cit.* p.72-73

<sup>137</sup> Gary D. Solis, *Law of Armed Conflict; International Humanitarian Law in War*, Cambridge University Press; Cambridge. 2010, p.232

<sup>138</sup> *Ibid.*,

<sup>139</sup> J.G. Starke, *Introduction.Op.cit.* p.547, Permanasari, Aji Wibowo, and friends, *Pengantar Hukum Humaniter, Op.cit.*, p. 107

and sentenced by the Military Court for the actions they have committed.<sup>140</sup>

Humanitarian law itself exists as it aims to keep applying humanity even in conditions of war. Due to war is the last way to resolve a dispute, humanitarian law is necessary because it upholds the values of humanity in it. United Nations (UN) as a universal international organization that has the authority and power to create and maintain peace<sup>141</sup>, but they have to maximize their function and its role. UN efforts in reducing that conflict has not always produced good results, so that the conflict is still ongoing and more civilians be the object of violence. In the Protocol I on article 48, which reads:

*In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.*<sup>142</sup>

From the article explained that the existing distinction between combatants that can be used as an object in a war and civilians can't be the object of the war. But there needs to increase in the application of these regulations because the civilian population is still just a victim of war. Violations of the principle of distinction are carried out in several forms including;

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<sup>140</sup> *Ibid.*,

<sup>141</sup> Mohd. Burhan Tsani, *Hukum Organisasi Internasional*, Universitas Gadjah Mada. Yogyakarta, 2012, p.109

<sup>142</sup> Additional Protocol I of 1977, Art. 48, as quoted by Schindler, and Jijr Toman (ed.) *The Law of Armed Conflict, A Collection of Conventions, Resolutions and Other Documents*. Henry Dunant Institute, Geneva, 1981, p.580

## 1. Indiscriminate Attack

The prohibition regarding indiscriminate attack is contained in Article 54 protocol 1. The definition of indiscriminate attack is stated in the sentence that follows.

- (a) Those which are not directed at specific military objective*
- (b) Those which employ a method or means of combat which cannot be directed at a specific military objective; or*
- (c) Those which employs a method or means of combat the effect of which cannot be limited as required by this Protocol; and consequently, in each such case, are not a nature to strike military objectives and civilian or civilian objects without distinction.<sup>143</sup>*

The provision above strongly reflects the basic concept of the distinction principle, provision (a) is the application of a prohibition to direct attacks on civilians and civilian objects. Provision (b) also contains a similar application with the addition that under this provision the use of weapons which cannot be directed at specific targets because the nature of the weapons will also be prohibited. Furthermore, the provision of (c) is based on the logical argument that the tools or methods of warfare whose effects cannot be limited are prohibited. The use of biological weapons is one example that is prohibited because the nature of these weapons has a dangerous effect that cannot be controlled, and widespread.

## 2. Violence aimed at spreading terror among civilian population

Another form of violation of the distinction principle is acts and threats of violence whose main purpose is to spread terror against

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<sup>143</sup> Additional Protocol I of 1977, Art. 54

civilians. The regulations on this matter are listed in article 51 point 2 of the additional protocol which reads; "*..Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.*"<sup>144</sup>

Some examples of acts of violence that cause terror against civilians include bombardment in areas where civilians live, torture, harassment, rape of women and children and mass killings

Sanctions imposed if the law of war is violated addressed to the provisions of "penal sanctions" contained in the Geneva Conventions of 1949. The means that can be used to guarantee the continuity of a "welfare legitimacy" divides the facilities into 3 classes, namely:

- a. Measures of self-help, such as reprisal, the punishment of soldiers who carry out war crimes, hostage-taking;
- b. Protests submitted to the enemy, or to the neutral State, good service, mediation from the neutral State;
- c. Compensation.<sup>145</sup>

#### 5. The Principle of Prohibition of Causing Unnecessary Suffering

One of the basic rules in IHL is the principle of limitation which regulates the methods and instruments of war that are allowed. This principle is related to the provisions which stipulate that the correct method of warfare is implemented only to weaken the opponent's military strength. This principle provides provisions regarding the

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<sup>144</sup> Additional Protocol I of 1977, Art. 51(2)

<sup>145</sup> The Hague Convention IV 1907, Art. 4

prohibition of causing unnecessary suffering, which is formulated as follows;

- a. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.<sup>146</sup>
- b. It is prohibited to employ weapons, projectiles and material<sup>147</sup> and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.<sup>148</sup>
- c. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.<sup>149</sup>

In addition to general rules, there are international treaties regulating certain weapons and methods of war, such as prohibiting the use of poisons, development bullets, biological weapons, and bacteriological methods, as well as restrictions on the use of incendiary weapons, and laser weapons.

### **2.1.7 Theory of Responsibility applied in IHL**

There are at least 2 theories of responsibility in IHL, among them were;

#### **1. Command Responsibility**

In international humanitarian law, a commander has responsibility for acts of crime (war crimes and crimes against humanity) committed by forces under his control. The doctrine of command responsibility was first

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<sup>146</sup> The Hague Convention IV, Art 22, and Additional Protocol I 1977, Art. 35(1)

<sup>147</sup> The Hague Convention IV, Art 23.e, and Additional Protocol I 1977, Art. 35(2)

<sup>148</sup> Additional Protocol I 1977, Art. 35(2)

<sup>149</sup> Additional Protocol I 1977, Art. 35(3)

utilised in war crimes prosecutions following the end of the Second World War.<sup>150</sup> It has its roots in the IHL principle of responsible command, under which commanders have a duty to ensure that their subordinates respect IHL. This principle is stipulated in various regulations;

Hague Regulations, Article 1(1) of the 1899 Hague Regulations and Article 1(1) of the 1907 Hague Regulations lay down as a condition which an armed force must fulfil in order to be accorded the rights of belligerents “to be commanded by a person responsible for his subordinates”.

Hague Convention (X); Article 19 of the 1907 Hague Convention (X) provides: “The commanders-in-chief of the belligerent fleets must see that the above articles are properly carried out; they will have also to see to cases not covered thereby, in accordance with the instructions of their respective Governments and in conformity with the general principles of the present Convention.”

Geneva Convention (1929); Article 26 of the 1929 Geneva Convention provides: *The Commanders-in-Chief of belligerent armies shall arrange the details for carrying out the preceding articles as well as for cases not provided for in accordance with the instructions of their respective Governments and in conformity with the general principles of the present Convention.*

Additional Protocol I; Article 86(2) of the 1977 Additional Protocol I provides: *The fact that a breach of the Conventions or this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.*

Article 87 of the 1977 Additional Protocol I provides:

*1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and,*

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<sup>150</sup> Nicholas Tsagourias, Alasdair Morrison, *International Humanitarian Law: Case, Material, and Commentary*, Ch 12 Command Responsibility. Cambridge University Press, London. 2018, p 337-367

where necessary, to suppress and report to competent authorities breaches of the Conventions and of this Protocol.

...

3. *The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.*<sup>151</sup>

## 2. Individual Responsibility

In this principle, it simply stated; Individuals are criminally responsible for war crimes they commit.<sup>152</sup> Individual criminal responsibility for war crimes committed in international armed conflicts was the basis for prosecutions under the Charters of the International Military Tribunals at Nuremberg and at Tokyo, as it is under the Statute of the International Criminal Tribunal for the former Yugoslavia and the Statute of the International Criminal Court.<sup>153</sup> Geneva Convention I, Article 49 stated:

*The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.*

*Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons*

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<sup>151</sup> Practice Relating to Rule 153. Command Responsibility for Failure to Prevent, Punish or Report War Crimes, [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule153](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule153), June 12, 2020, 13.05 pm

<sup>152</sup> Rule 151. Individual Responsibility on [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule151](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule151), June 12, 2020, 13.14 pm

<sup>153</sup> IMT Charter (Nuremberg) Art.6; IMT Charter (Tokyo) Art. 5; ICTY Statute, Art.2–3; ICC Statute, Art.5, 25

*over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a prima facie case.*

*Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.*<sup>154</sup>

The Hague Regulations specify that no penalty can be inflicted on persons for acts for which they are not responsible.<sup>155</sup> The Fourth Geneva Convention provides that “no protected person may be punished for an offence he or she has not personally committed”.<sup>156</sup> The requirement of individual criminal responsibility is recognized as a fundamental rule of criminal procedure in Additional Protocols I and II.<sup>157</sup>

Not only regulates the criminal responsibility, the regulations also covers Individual Civil Liability, which the offender may be charge on what losses they’ve made. Article 75 of the 1998 ICC Statute, entitled “Reparations to victims”, provides:

*1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of*

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<sup>154</sup> Geneva Convention I, Art. 49. Corresponding provisions are contained in Art. 50 of the 1949 Geneva Convention II, Art. 129 of the 1949 Geneva Convention III and Art. 146 of the 1949 Geneva Convention IV. The grave breaches to which the obligations of paragraphs 1 and 2 apply are defined in Article 50 of the 1949 Geneva Convention I, Art. 51 of the 1949 Geneva Convention II, Art. 130 of the 1949 Geneva Convention III and Art. 147 of the 1949 Geneva Convention IV. Other relates Article 28 of the 1954 Hague Convention for the Protection of Cultural Property requires States “to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit ... a breach of the present Convention”.

Art. 2(2) of the 1973 Convention on Crimes against Internationally Protected Persons provides: “Each State Party shall make these crimes punishable by appropriate penalties which take into account their grave nature.”

Art. 4 of the 1977 OAU Convention against Mercenarism, entitled “Scope of criminal responsibility”, states: “A mercenary is responsible both for the crime of mercenarism and all related offences, without prejudice to any other offences for which he may be prosecuted.”

<sup>155</sup> Hague Regulations, Art.50

<sup>156</sup> Geneva Convention (IV) Art. 33

<sup>157</sup> Additional Protocol I, Art.75(4)(b); Additional Protocol II, Art 6(2)(b)



*any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.*

*2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.*<sup>158</sup>

Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79. The Trust Fund referred to was established for the benefit of victims of crimes within the Court's jurisdiction and will be financed, inter alia, by money or other property collected through fines or forfeiture which the Court might order to be transferred to the fund.

## **2.2 Types of Armed Conflict**

The law of war has changed in the use of the term, so that term of laws of war turned into a laws of armed conflict.<sup>159</sup> And regarding this one, Edward Kossoy said:<sup>160</sup>

*The term of armed conflict tends to replace at least in all relevant legal formulation, the older notion of war. On purely legal consideration the replacement for war by armed conflict seems more justified and logical.*

Armed conflict is a term to describe the origin of the conflict between the countries, the term armed conflict extended through the development of international law. Differences in armed conflict has historically drawn between international and internal conflict or non-international armed

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<sup>158</sup> ICC Statute, Art. 75(2) gives the Court the power to “make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation

<sup>159</sup> Hans Peter Gasser, *International Humanitarian Law*, Henry Dunant Institute, 1993, p.3

<sup>160</sup> Arlina Permanasari, *Op.cit.*, p.7

conflict, based on the difference between the inter-state relations, which is the right focus for international law and intra-state case that traditionally fall within domestic jurisdiction of the state and thus the principally immune to the rules of international law. In the field of humanitarian law can be seen in the gradual application of the rule to the internal armed conflict or non-international.<sup>161</sup>

During its development, the term armed conflict back to change, becoming international humanitarian law. International humanitarian law set two types of armed conflict, namely international armed conflict and non-international armed conflicts. From the broadly speaking, the difference in international armed conflict with non-international armed conflict under international humanitarian law lies in the nature and the number of countries that are parties to the armed conflict.<sup>162</sup> In the settlement of an international dispute is basically already known some methods of resolving disputes peacefully.<sup>163</sup>

In international humanitarian law known and set in it regarding the two types of armed conflict, namely international armed conflicts and non-international armed conflict. The author will explain more detail on the definition of each type of armed conflict;

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<sup>161</sup> Haryo Mataram, *Refleksi dan Kompleksitas Hukum Humaniter*, Pusat Studi Hukum Humaniter dan HAM, FH Usakti, Jakarta, 2012, p.3

<sup>162</sup> Ambarwati, Denny Ramdhany, Rina Rusman, *Hukum Humaniter Internasional: Dalam Studi Hubungan Internasional*, Ctk. Ketiga, Rajawali Pers, Jakarta, 2012, p. 53.

<sup>163</sup> Huala Adolf, *Op.cit.*, p. 26

### 2.2.1 International Armed Conflict (IAC)

Draper stated that International armed conflict as any situation in the which a difference between two states leads to the intervention of armed forces within the extended meaning conferred upon he later term by art.4 of prisoner of war conventions.<sup>164</sup>

From the opinion expressed by Draper regarding international armed conflict, it is understood that armed conflict can be said to be an international armed conflict if it involves two armed forces of different countries.<sup>165</sup> According to Article 1 Paragraph (3) and Article 1 Paragraph (4) of Protocol I to note that the international armed conflict are grouped into two, namely: the armed conflict between states; the armed conflict between the peoples against colonial domination, alien occupation and racist regimes (CAR Conflict) which is commonly called the war of national liberation.<sup>166</sup>

In international armed conflict, both sides have the same legal status, because both of them is the state or country.<sup>167</sup> International armed conflict that has been expressed in the same provisions of Article 2 of the Geneva Conventions in 1949 as armed conflict involving two or more countries.<sup>168</sup>

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<sup>164</sup> *Ibid.*

<sup>165</sup> *Ibid.*

<sup>166</sup> Additional Protocol I, Article 1.3-1.4

<sup>167</sup> Arlina Permanasari, *Op.cit.*,p. 139.

<sup>168</sup> Ambarwati, Denny Ramdhany , Rina Rusman, *Op.cit.*, p. 56

### 2.2.2 Non International Armed Conflict (NIAC)

The historical record has been drawn distinction between international armed conflicts with non-international armed conflict. The difference is based on the difference between the inter-state relations, which became the focus of international relations and affairs of intra-state relations which traditionally includes the jurisdiction of the countries, so that in theory are not affected by the rules of international law. But in recent decades, this difference fades. Seen rules in the realm of international law entered into force gradually to non-international armed conflict.<sup>169</sup> Normative framework governing non-international armed conflict has grown considerably, both as a result of the application of Additional Protocol II of 1977, and as a result of the emergence and crystallization of international customary law in this area. In addition, with the development of international criminal law and the advent of the International Criminal Court (ICC), the prospect of enforcement violations in non-international armed conflict have improved.

Non-international armed conflict, according to Additional Protocol II of 1997 is armed conflict occurring in the territory of a State and it is between the armed forces of the country with rebel armed forces or other organized armed groups under responsible command, carry out such control over a part of its territory to allow the group to conduct continuously military operation and unity and it's also applying the rules of international

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<sup>169</sup> Malcolm N. Shaw, *Hukum Internasional*, Leicester; England, 2008, p. 1197

humanitarian law contained in Additional Protocol II 1977,<sup>170</sup> can be said as a battle or a war involving countries that are against non-state armed group.<sup>171</sup> Non-International armed conflicts are characterized by fighting between the armed forces of a country with resistance from a group of people or rebel forces. However, conflict in an area of the country between the two ethnic groups can also be classified as a non-international armed conflict as long as the conflict meets the requirements such as the intensity of the conflict, the old or the duration of the conflict and people's participation in the conflict.<sup>172</sup>

## **2.3 The Overview of Private Military and Security Company and Several Case related**

### **2.3.1 Privatization of War**

At present the military and security issues are no longer become the monopoly of state entities, the military and security now entered, cultivated and developed by civilians. This condition cannot be separated from the liberalization in the military and security fields which in turn opens the gap for civilians to get involved in it by utilizing various business potentials with the aim of gaining economic benefits.

The phenomenon of private military and security services in an armed conflict is currently an issue that develops along with the increasingly widespread conflict in various parts of the world. The existence of these

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<sup>170</sup> *Ibid.*,p. 60

<sup>171</sup> *Ibid.*,p. 53

<sup>172</sup> Arlina, *Apa Arti Konflik Bersenjata Non Internasional*".  
<http://arlina100.wordpress.com/2009/02/03/apa-arti-konflik-bersenjata-non-internasional/>,  
accessed on Saturday 9 March 2019, 23.20.

services cannot be separated from the swift current of liberalization that permeates the military sector.<sup>173</sup> After the post of cold-war, both demand for and supply of private military and security services grew. States, international organization, NGOs, global corporations, and wealthy individual use those service. The number of private security providers burgeoned during 1990s with well over two hundred such companies making the news between 1995 and 2004. Private firms trained militaries more than 42 countries during the 1990s. By the early twenty-first century several hundred companies globally operated in over 100 countries on six continents.<sup>174</sup>

Not only provides and deploy soldier in battlefield, PMSCs today also provide more kind of services including some that have been considered core military capabilities in the modern era. Instead, PMSC offer three broad categories of military support; operational support, military advice and training, and logistical support.<sup>175</sup> Also, change in the nature of armed conflict have led task less central to the core of modern militaries (such as operating complex weapon system, policing, ranging from site security, crime prevention, and intelligence) to be subcontracted to PMSCs.<sup>176</sup> Furthermore, state are not the only legal entity that hire security providers. Increasingly non-state actor (such as NGOs, multinational corporations, and

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<sup>173</sup> Angga Nurdin Rahmat, *Keamanan Global Transformasi Isu Keamanan Pasca Perang Dingin*. CV Alfabeta; Bandung. 2015. p.146

<sup>174</sup> P.W Singer, *Corporate Warriors; the Rise of the Privatized Military Industry*. Cornel University Press. 2003. p.2

<sup>175</sup> Deborah Avant, *Private Security*, Part 3 Chapter 28 on the Book of *Security Studies an Introduction*, Edited by Paul D. Williams. Routledge Taylor & Francis Group; New York. 2<sup>nd</sup> Edition. 2013. p.428

<sup>176</sup> *Ibid.* p.426-428

others) are financing security services to accomplish their goals. Its proven, in 2003 to 2007, a consortium of PMSC could bring years of peacekeeping experience and NATO-level professionalism to protect vulnerable population in place like the Democratic Republic of Congo (DRC) or Darfur, Sudan; they could also train gendarmes in policing and human rights so as to build more professional local force.<sup>177</sup>

In sum, the need for security<sup>178</sup>, business opportunities, and market demand,<sup>179</sup> makes this business of services flourish. The use of private military and security services also shown the capacities of state, organizations, and institution to secure their interest and their peoples.

### 2.3.2 Definition of Private Military and Security Company

In studying the Private Military and Security Companies, it necessary to define what is the definition of PMSC. This condition is related to the ambiguity of those terminologies which have two terms; Military and Security.<sup>180</sup> At least in some references related to PMSC are divided into two service providers, namely Private Military Company (PMC), and Private Security Company (PSC). Therefore, in this case, we need to provide clear boundaries regarding the two companies that refer to the security service provider, some of which;

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<sup>177</sup> *Ibid.*

<sup>178</sup> One of the basic need of human being was safety and security; *the theory of social need; Maslow's Hierarchy* brought by Abraham Maslow, <https://study.com/academy/lesson/what-are-social-needs-in-maslows-hierarchy-definition-examples-quiz.html> last accessed on January 26, 2020.

<sup>179</sup> Deborah Avant, *Private Security*, p.428

<sup>180</sup> Angga Nurdin Rahmat, *Keamanan Global Op.cit*, p.147

1. PMC is defined as private companies specializing in military skills, which include combat operations, strategic planning, intelligence gathering, operational support, training, procurement, and maintenance of weapons and equipment.<sup>181</sup> From this definition, it can be seen that clients who use their services usually require a special ability in the military for field operations. So it is very reasonable if the tariffs and prices of their services are expensive enough, that the clients are usually the government, but it cannot be denied that their clients can also come from rebel groups, militias, or armed factions involved in armed conflict.
2. Veronika Shinta Saraswati defines PMC as a "registered civil company and specializes in providing commercial contracting services for domestic and foreign entities to protect industrial personnel and assets in the applicable domestic law"<sup>182</sup>
3. P.W Singer defines PMC as a business activity that provides professional services that are intrinsically related to this has become a weapon tool.<sup>183</sup> Singer sees that as a business, PMC, in this case has become an activity in which economic motives are then the basis for the operation of the PMC.
4. PMC is an institution in the form of a company with the aim of establishing it is to provide military and security services, including relevant security information, training, logistical support, efforts to fulfill

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<sup>181</sup> Foreign Affairs Committee of the House of Commons, *Private Military Companies; Option for Regulation*. London: Stationary Office. 2002. p.8

<sup>182</sup> Veronika Shinta Saraswati, *Imperium Perang Militer Swasta*. Resist Book; Yogyakarta. 2009. p.96

<sup>183</sup> P.W Singer, *The Military Industry and Iraq; What Have We Learned and Where to Next, Policy Paper*. Geneva Center for Democratic Control of Armed Forces (DCAF). 2004, p.1



needs, etc, with legality in the form of employment contracts between companies and clients within a certain period.<sup>184</sup>

5. PSC is defined as companies that specialize in providing security and protection services for Personnel and property that includes humanitarian and industrial assets.<sup>185</sup> This can be interpreted that the services provided do not have to use weapons, the nature of their operations is more defensive than offensive and clients who become consumers of their services are not restricted because they include governments, international organizations, non-governmental organizations (NGOs) or companies.

6. PSC is defined as a security service provider that operates abroad for companies, governments and other bodies including the United Nations and some NGOs.<sup>186</sup>

The fundamental difference between the two service providers in the scope of service provision as well as the parties who become their clients. PSC provides security services at a minimum level with or without the use of weapons instruments, while PMC in providing services makes weapons instruments and military tactics capabilities offered. PSC can develop or provide services such as those owned by PMC under certain conditions or client requests. Likewise, the PMC where the services it offers can include

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<sup>184</sup> Nill Roseman. *Code of Conduct: Tool for Self-Regulation for Private Military Company*. Occasional Paper No.15 Geneva Center for Democratic Control of Armed Forces (DCAF). 2008, p.10

<sup>185</sup> M Caparini dan F. Schreier., *Privatizing Security: Law, Practice and Governance of Private Military Security Companies, dalam Perusahaan Militer dan Keamanan Swasta dan Gender*, Sabrina Schulz dan Christina Yeung dalam *Gender and Security Sector*, Megan Bastick dan Kristin Valasek, Translation edition, IDSS Press: Jakarta. 2008, p.2

<sup>186</sup> Foreign Affair Committee of the House of Commons, *Loc.cit*

the services offered by the PSC. This makes the difference between PMC and PSC very thin and difficult to distinguish from one another. Both types of security service provider companies must also be distinguished from mercenaries, where mercenaries refer to individuals or employees of the company while the PMC and PSC are an institution in the form of a company.

Therefore in this discussion, PMSC terminology will be used which will include two types of companies that provide security services privately. In some literature, the PMC and the PSC are not distinguished concerning changes in service provision of each of these criteria can be easily exchanged. This condition cannot be separated from the operationalization of the two types of companies involved in various conflicts as well as in the post-conflict process as part of the contracts entered into with their clients. This also strengthens the view of the author that; what will be emphasized in this analysis is the services they offer as providers of military and security services and the significance and implications of global security.

### **2.3.3 History and Development of Privatization Military and Security Services**

The military and security service industry have been practiced for centuries.<sup>187</sup> The emergence of the PMSC is inseparable from a series of

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<sup>187</sup> The use of mercenary services for war purposes has long been known to the world community, has existed since ancient times. See. E David, O. Tandon, HLM. Joenniemi in Yves Sandoz, Christophe Swinarksi & Bruno Zimmerman (eds), *Commentary on Additional Protocol*, ICRC, Martinus Nijhoff Publisher, Geneva, 1987, p.577, footnote 28, as quoted in Arlina Permanasari, Aji Wibowo and friends, *Pengantar Hukum Humaniter*, International Committee of The Red Cross, Jakarta, 1999, p.99

security evolution, from before the emergence of the term sovereignty as a modern feature of territorial borders to the aftermath, from those without any high-tech involvement to sophisticated technology, from management that seemed closed to open, from a collection of people who paid to become war soldiers or mercenaries until military operations training involves sophisticated technology. Even though those who provide these services are individuals or groups known as mercenaries/ hired soldiers/ military personnel, this is believed to be the basis for the current operation of PSMC. The various kingdoms of ancient China, Greece, and Rome had employed large numbers of mercenaries and mercenaries being half of the armies that William the Conqueror had in the 17th century. As long before the 14th century, the city-state in Italy using hired troops known as *condottiens*<sup>188</sup> to protect their city-states from enemy attacks, this is preliminary evidence that hiring mercenaries can provide benefits related to cost-effectiveness compared to using regular troops.<sup>189</sup>

Another example of this is Britain which also used mercenaries (military services) during the American war of independence. This was done to prevent its citizens from being used as soldiers. By the end of the 18th-century, foreign troops had made up half of the army owned by Prussia, two-

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<sup>188</sup> *Condottiens* is the name of a company engaged in the military and recruits people to be mercenaries who are not native citizens of Italy. in the 15th century, these soldiers were severely criticized by the people for their inhumane and often robbing actions. The condottiere then disappeared after the consolidation of the Italian state and foreign invasion after 1949. See Radolph Starn in the *Encyclopedia Americana* Vol 26, p.141-142

<sup>189</sup> David Shearer, *Outsourcing War*, Foreign Policy No.12. 1998, p.69

thirds of the French and British armies.<sup>190</sup> The idea of mercantilism<sup>191</sup> has also encouraged the development of the use of mercenaries, where in the 1800s the East Indian Company (EIC) owned by the British colonialism in various places, and this also happened with Vereenigcle Oosticdische Compagnie (VOC) who did the colonization in the Dutch East Indies/Indonesia) currently for economic interests.<sup>192</sup>

After the French Revolution (1789), the industry expanded to large companies such as the English East Company, The Dutch East India Company, and The Companhia de Mocambique played a crucial role in the global trade system, international relations (between nations) to take military roles outside the structure government. They exercise all control over trade with key commodities such as nutmeg, pepper, tea, opium, and gold. In the trading process, it is necessary to have a safe and conducive condition, therefore these companies hire many mercenaries.<sup>193</sup>

Looking back further, the use of military and security services has been around since the first war, Egyptian Pharaoh Ramses II employed the

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<sup>190</sup> *Ibid.*, p.70

<sup>191</sup> Belief in the benefits of profitable trading; commercialism. Accessed on January 29, 2020 at 14: 32 PM from <https://www.lexico.com/en/definition/mercantilism>. There is a thick relationship between the politics of militarism and the economy. During the 17th and 18th centuries, European companies carried out overseas exploration. His main motivation was lucrative trade in spices, silk, precious metals and other goods from the Dutch East Indies. Europeans have long focused their attention on these products. However, for several centuries they had no direct control over the trade routes in the East. During early modern times, private trade in Europe discovered a new form of collective capitalism which was manifested in the establishment of joint-stock trading companies. A charter establishing constitutions and corporate governance as well as granting trade monopolies on certain goods and geographical areas of trade. The idea of using those services was for securing trade routes, and strengthening monopolies. See also, *Thomas Jager & Gerhard Kummel, Eds: Private Military and Security Companies: Chances, Problem, Pitfalls, and Prospect*. Wiesbaden, VS Verlag fur Sozialwissenschaften, 2007, p.9-10

<sup>192</sup> Christopher Kinsey, *Corporate Soldier and International Security*, Routledge; London and New York. 2006, p.39

<sup>193</sup> Thomas Jager & Gerhard Kummel, eds: *Private military.., Loc.cit*, p.23

Numians to fight in the Kadesh war, 1294 BC.<sup>194</sup> The Carthaginian people were so dependent on mercenaries that the First Punic War against Rome was also known as the Wage War.<sup>195</sup> Around the year 700 BC were the years of development of Hellenistic teachings originating from Greece. In this teaching, the military is known as *the Hoplites*. Hoplites are the spearhead in every Greek war and will turn into a pool of unemployment in peacetime. The aristocrats who owned capital from the military group made this condition a business opportunity. The commanders sell Hoplier services to those who need them. The war between the Greek countries called The Peloponnesian War (war between Greece and Persia) many uses the services of mercenaries. For example, the war that took place at Thermopylae in 480 BC between the Persian Empire and the Greek Spartans.<sup>196</sup>

Then, in 334 BC, Alexander the Great also used mercenaries. The mercenaries used came from areas that were successfully controlled. When Alexander gained control of Macedonian territory, he formed a mercenary army called *the Phalangites*. Besides, in other areas of his population, Alexander also formed a mercenary army, such as the famous *Thesally* cavalry tough in battle. Alexander also hires mercenaries from Greece.<sup>197</sup>

At that time, they also had mercenary warfare versus mercenaries. The Punic War between the Roman Forces and the Chartage Forces in the south

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<sup>194</sup> T. Chrishtian Miller, *Blood Money: membuang jutaan Dollar, Menewaskan Ribuan Jiwa, & Perusahaan Rakus di Irak*. Jakarta: Ufuk Press, 2007, p.228

<sup>195</sup> *Ibid.*

<sup>196</sup> *Battle of Thermopylae in 480 BC, which documented in 300 Spartans Film*, Historical ancient battle movie inspired by Frank Miller's original graphic novel **300**. At that time, the Persians led by Xerxes used the services of mercenaries from Greece.

<sup>197</sup> Arrian. *Anabasis of Alexander*, book 1, chapter 14, section 4. The Persian cavalry were about 20,000 in number, and their infantry, consisting of Grecian mercenaries, fell a little short of the same number, translated by E. J. Chinnock. Also see on Book 1 chapter 16 p.45–50

of Sicily<sup>198</sup>. In that war, Chartage's troops relied on sea power as the main force. Meanwhile, the land force consisted of mercenaries from Iberia (now Spain) and Numidia in North Africa. Chartage also uses the services of mercenaries from the Balaeric Islands. During the Punic War I, Chartage's sea power was destroyed by the Romans. After that, Chartage focused on land strength. On the other hand, Rome also prepared a mercenary army consisting of *Hoplites*- who came from Greece. Therefore, the Punic War II became a battle of mercenaries versus mercenaries.

The international system has experienced significant changes since the end of the Cold War. These changes include how the state protects security. Previously, the government relied on national military forces to protect borders and vital interests. During this period most of great state carried out trimming and reorganization their armed forces which reduced millions of troops and then moved to the private sector.<sup>199</sup> Private military and security services began to grow and develop services that were no longer just for war but also related to intelligence data gathering, military/militia training, strategic planning and guarding state assets that

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<sup>198</sup> Chris Scarre, *The Wars with Carthage, The Penguin Historical Atlas of Ancient Rome* (London: Penguin Books, 1995), p.24–25, as quoted in [https://en.wikipedia.org/wiki/Punic\\_Wars](https://en.wikipedia.org/wiki/Punic_Wars), Read also, M. Boatwright, *The Romans: From Village to Empire: A History of Rome from Earliest Times to the End of the Western Empire*. et al. 2nd edition. 2011

<sup>199</sup> Keyle M Ballard, *The Privatization of Military Affair: A Historical Look into the Evolution of the Private Military Industry*, in the Book of Thomas Jager & Gerhard Kummel, Eds: *Private Military and Security Companies: Chances, Problem, Pitfalls, and Prospect*. Wiesbaden, VS Verlag fur Sozialwissenschaften, 2007, p.44

used their services.<sup>200</sup> And in the mid-1970s came the PMSC which was considered a transformation of the role of mercenaries.<sup>201</sup>

### **2.3.4 The Involvement of PMSCs in Several Conflicts**

#### **a. Invasion of Iraq**

A conflict means the harvest of money, and it is what thousands of mercenaries come to come to the hottest region in the world in the early 21st century, Iraq's battlefield. Long before America invaded Iraq, the preparations for the massive invasion did not only depend on combat weapons but prepared what had to be done after Iraq was overpowered.<sup>202</sup> Controlling territory in a big war will surely leave the infrastructure completely destroyed and it will take a long time to rebuild up again to overcome post-war damage and rebuilt again all vital facility. The facilities to be built include the airport, oil wells, and industry, and security systems, legal and political systems.

A formal company engaged in the repair of oil refineries, reconstruction of highway systems, bridges, schools, hospitals, and so on. However, in disguise is actually a mercenary company that also provides high-risk security services. The three most trusted companies of the American government are, Halliburton, DynCorp, and Blackwater. In terms of income, the triad got a very large income.

The value of the Halliburton contract in a year can reach 12.5 billion US dollars with a number of formal tasks including securing oil wells,

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<sup>200</sup> Angga Nurdin Rohmat, *Keamanan Global, Op.cit.*, p.152

<sup>201</sup> Christopher Kinsey, *Corporate Soldier, Ibid*, p.51

<sup>202</sup> *Ke Irak Menantang Maut*, in *Angkasa Magazine*, Collection Edition, April 2006.

reconstructing oil refineries, as well as supporting the US military who is currently serving in Iraq and Kuwait.<sup>203</sup> DynCorp which has sent 1,000 personnel to handle security, technology, Iraqi military advisors, and support the peace process in Iraq, was paid 226,855 billion US dollars a year. While Blackwater does not have as much income as Halliburton and DynCorp, the dollar value it receives remains large. because in 2003, Blackwater won its first high profile contract, namely, guarding a civil official, L. Paul Bremer in Iraq, with a fee of 21 million US dollars for 11 months. And since June 2004, Blackwater has been paid 320 million US dollars from the main payment of 1 billion US dollars, from the State Department's five-year budget for the Worldwide Personal Protective Service, which protects American officials and several other foreign officials.<sup>204</sup>

Specifically, Blackwater only carry out VIP escorts, train Iraqi anti-terror forces, as well as tasks that tend to face armed resistance. That is why victims who fall in crossfire generally start from Blackwater personnel. Not only America mobilizing PMSCs Britain also allows two PMSC services, Control Risk and Armour Group to be present in Iraq. Although the role of the two British companies is not as vital as the role of the triad of Americans.

Professional PMSCs personnel from both the American and British companies sent to Iraq generally are former trained soldiers from various countries. Those who came to Iraq without army uniforms but carried combat rifles were from well-known elite units in the world including the

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<sup>203</sup> Kuntjoro Hadi, *Ensiklopedia Tentara Bayaran*, Pustaka Radja; Yogyakarta, 2011, p.133

<sup>204</sup> Mircea Windham, *Blackwater*, Pustaka Solomon; Yogyakarta. 2010, p.44-45



US Navy Seal, Special Forces, Special Air Service, SAS, war veterans in Chechnya, Colombia.<sup>205</sup> Those personnel took a large fee in a short time of at least 1500 dollars per day.<sup>206</sup> Their task is not to deliberately look for Iraqi guerrillas and fight frontally, but to carry out a special task of protecting American and allied facilities and protecting westerners who are working on the project. Project work itself comes mainly from paid soldiers, especially personnel who master aerospace technology, computers, communications, oil, and others. Usually, if a project facility or church is ambushed by Iraqi guerrillas, the PMSC personnel encounter it. While fighting, they contacted allied forces to help attack the guerrillas, because the guerrillas often attacked desperately and did not hesitate to use suicide bombings, many personnel had been killed. The guerrillas prefer to ambush that personnel, given the number of those who sometimes only a few, and lightly armed.

Within a month, sometimes around 5 to 6 personnel were killed in an ambush by Iraqi guerrillas. If they are unlucky, some of the personnel have even been captured, taken hostage, tortured and then killed. Mercenaries are vulnerable toward violence as well as regular soldiers.

Workers from Germany, France and Russia who were not PMSCs personnel eventually chose to return home instead of facing the violence of Iraqi guerrillas. While those who choose to fight are asking for insurance

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<sup>205</sup> *Ensiklopedia Tentara Bayaran, Op.cit*, p.135. Even though they don't wear uniforms but under their clothes or vests, their identity is always tucked away. This identity is important, because at any time they are killed, identity and the company from which they were sent can be known.

<sup>206</sup> *Ibid.*, besides looking for is the combat adventure that comes to Iraq with the risk of losing your life, their biggest motivation is money-oriented

coverage up 250 to 500 thousand US dollars per person.<sup>207</sup> In anticipation of the increasingly violent ambush, the PMSCs personnel were equipped with heavy weapons and served in large numbers of teams. The number of PMSCs personnel in Iraq is the second-largest compared to the regular army coalition. The difference is those personnel get a bigger salary than regular soldiers, but has the same risk, betting lives on the always murky Iraqi battlefield.<sup>208</sup>

The chaos situation in Iraq doesn't make the PMSC personnel their gall shrinkable. Critics toward the violence that they've done and threatening security aren't bother by them. Plenty of money they got is the guarantee to survive, even the life may be passed away at a certain time. The chronicle stringency inside the war which involved PMSC personnel of DynCorp, Halliburton and Blackwater in Iraq were described below,<sup>209</sup>

- a. On January 14, 2004, two personnel of Halliburton are killed, and one injury, as a result of an attack by Iraqi militia to the convoy of the vehicles of Halliburton's personnel near the residential of Saddam Husein in Tikrit.
- b. March 31, 2004, Iraqi Militia in Fallujah attack a convoy enclosed of four army personnel from Blackwater which has sending equipment and food supply to the caterer and consumption division of ESS. The four personnel was, Scott Helvenston, Jerry Zovko, Wesley Batalona, and Micheal Teague, who was attacked and killed by grenade and rifle. Their corpse was hung at the bridge across Euphrat River. This incident was shared by many agencies and has been informed to the international society, and made US Military take over the Fallujah. The first attack to

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<sup>207</sup> Ibid., p.136

<sup>208</sup> Mohammad Ghazy Jannaby, *the Legal Regime of Private Military and Security Company*. Springer International Publisher; Switzerland. 2016, p.38-39

<sup>209</sup> Kuntjoro Hadi, *Ensiklopedia Tentara Bayaran. Op.cit.*, p.137

the guerrilla of the Fallujah was failed, and continue seven months later. That fight was won by the triad PMSCs personnel.

- c. On April 09, 2004, six personnel are shoot dead by the Iraqi guerrilla in the Anaconda Camps, International airport of Baghdad. At those incident, two persons was missing (probably abducted).
- d. On the convoys of ten of the PMSC vehicle from Trikit to Baghdad at May 13, 2004, two personnel of DynCorp, Jesse Gentry and Henry A. Doll was killed in attack from the Iraqi guerrilla.
- e. December 24, 2006, a workers of Blackwater are shooting and killing security that works for the vice president of Iraq.
- f. January 23, 2007, five members of personnel Blackwater are killed when Helicopter Hughes H-6 is shooting down by the guerrillas. The incident happened in Haifa Baghdad.
- g. September 16, 2007. An incident of the massacre by killing 28 civilians of Iraq by the personnel of Blackwater in Al Nisour Square Field in Baghdad.
- h. January 23, 2009, a personnel from DynCorp, Luis Draco, has serious injury in an attack done by Iraqi guerrilla. Due to that accident Draco died in hospital.
- i. March 5, 2009, a young personnel of DynCorp, Justin Pope, Shoot died by a sniper at Kirkuk.

#### **b. Involvement of PMSCs in Latin America and Colombia in Narcotic Eradication Effort**

*“(In) Columbia, the seventh largest supplier of oil to the US a phony drug war has become a bloody large scale anti-guerrilla campaign (and) war crimes lawsuit are pending against US barbarity Rachel Guevera.<sup>210</sup>*

In a distance-time of three years from 1994 to 1997, five fighter’s helicopters and 3 police planes in Colombia are shooting down by the

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<sup>210</sup> Dan Butt, *How Corporations Hurt us all; saving our rights, democracy, institutions, and our future*. Trafford Publishing; Victoria. 2003, p.43.

belligerent. Quite a lot of victims. 44 peoples died and 72 peoples got injury. From flaw victim, three of them was a DynCorp personnel. But government state a hoax that they just a civilians. DynCorp has come to Colombia with jargon; “Prays and Spray”. Perhaps the pray be the only power of the PMSC to survive when they sweep the cocaine field that guarded by the belligerents, even not all can safely live.<sup>211</sup>

Long before the US became involved in Colombia through the Plan of Colombia,<sup>212</sup> which increasingly fueled the narcotics war, the situation in Colombia was already chaotic. For more than 30 years, the largest coca country in the world has been torn apart by civil war between the government and the Marxist guerrillas, Revolutionary Armed Forces of Colombia or Fuerzas Armadas Revolucionaras de Colombia (FARC).

The reason for America coming to Colombia is the smooth delivery of oil through long pipes and empties into the Caribbean Sea where American tankers anchored. If these pipes have been sabotaged by the rebels, the needs of the oil will certainly be disrupted, and the Government does not want it happen, then inevitably US helps the Colombian government to clean up the rebels, as well as burning down coca fields which are controlled by narcotics cartels and protected by rebels.<sup>213</sup> To

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<sup>211</sup> Kuntjoro Hadi, *Ensiklopedia Tentara Bayaran*, *Op.cit.* p.119

<sup>212</sup> Plan Colombia is an American aid to Colombia requested by Colombian president Andres Prastana. This assistance includes US military assistance to end armed conflict in Colombia and creating anti-cocaine strategies in the country. The plan aimed to recover a country that was in the grips of drug mafias, leftist guerrillas and rightwing militias, and whose institutions malfunctioned and economy faltered, see <https://www.theguardian.com/world/2016/feb/03/plan-colombia-cocaine-narcotics-farc-peace-deal>, last accessed on January 07, 2020 1;04 AM

<sup>213</sup> Ken Silverstein and Daniel Burton-Rose, *Private Warriors*, New York; Verso, 2000. p.187

handle the oil business, fight against the rebels, and eradicate the Koka trade, US not only deploys DEA (American anti-Narcotic agency) with billions of dollars in cash but also mobilizes DynCorp who are tasked with training Colombian troops. The challenges faced in this assignment in Colombia are indeed severe. In fact, 15 thousand FARC guerrillas with sophisticated weapons control almost all villages in the interior of Colombia. So beating narcotics means fighting against strong rebels.

DynCorp's arrival in Colombia began in 1997 with a high total contract value of 600 million dollars per year and this contract has lasted long enough so that DynCorp mercenaries are increasingly trusted in Colombia.<sup>214</sup> DynCorp was estimated to employ 50 to 80 retired American troops in Colombia. One third to one half of them are trained pilot, while the rest are mechanics. They were placed in San Jose del Guaviare.

Increasingly, the task of DynCorp personnel who originally only trained Colombian troops has continued to be a combat army against FARC guerrillas.<sup>215</sup> With their level of assignments rising, DynCorp's personnel are also spoiled and made envy the regular army and Colombian anti-narcotics police. Despite being in the military barracks, the DynCorp army got luxurious amenities as if they were living in a five-star hotel. Their rooms are equipped with television and satellite communication. They can drink alcohol as much as possible, smoke wherever they like, and many things.<sup>216</sup> The military equipment brought by DynCorp was not half-

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<sup>214</sup> *Tentara bayaran di Kolombia* in *Angkasa Magazine*, Collection Edition April 2006

<sup>215</sup> Kuntjoro Hadi, *Ensiklopedia Tentara Bayaran. Op.cit.*,p.120

<sup>216</sup> *Ibid.* p.122

hearted. All include Black Hawk combat helicopters, Ayres Turbo Thruses, UH-IH Iroquois Heli, Bell 212 Huey, T-65 Thrush, and a number of OV-10 Bronco aircraft.<sup>217</sup> This combat facility came to Colombia openly and was known to the public, in contrast to the arrival of DynCorp's personnel who were kept secret.

The warplanes operating in Colombia are on average piloted, manned by DynCorp personnel themselves, and often involved in the battle. A Bell helicopter full of DynCorp personnel was shot down by FARC guerrillas. The helicopters who managed to escape were surrounded by guerrillas but three combat helicopters belonging to DynCorp came to evacuate immediately after a fierce firefight. Specifically for the Bronco OV-10 aircraft, DynCorp personnel use it to disperse chemical liquids into the cocaine fields. This operation is similar to scattering napalm bombs (yellow rain from the air) during the Vietnam War. The operation to spread cocaine destruction by aircraft is not easy, because the aircraft must fly low in the middle of the cocaine field and this is vulnerable to FARC guerrilla attacks. For such operations, cocaine field should be sterile from the rebels. So there is always a combat task for DynCorp to secure air operations by cleaning up the rebels on land. DynCorp personnel are always at the forefront to fight with FARC guerrillas in the fields of Colombian Cocaine.

Officially, the Colombian government claims appreciate DynCorp services, but personally they are not too happy with the arrival of DynCorp. Sometimes this PMSC personnel fails to comply with basic norms even as

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<sup>217</sup> Pierre-Arnaud Chouvy, *Opium: Uncovering the Politic of the Poppy*. Harvard University Press; Harvard. 2010, p.115

for securing the aircraft at limit potential damage in the event of guerrilla attacks.<sup>218</sup> As a result, Colombian government spending is increasingly swollen.<sup>219</sup> The pressure from America on Colombia has negated the negative side of DynCorp personnel which remain free to vent their fantasy of war in the fields of cocaine in Colombia.

#### **2.4 The Regulation Applied to Private Military and Security Company Personnel**

The regulations applied to PMSC are not clearly stated. However, the provisions that resemble mercenaries, or PMSC, are provisions governing the recruitment of foreigners in the armed forces of parties involved in the dispute, has already been regulated in the Hague Convention in 1907.<sup>220</sup> Furthermore, in the eyes of the public and the media, the use of the term Mercenaries is more known than PMSC. The rules regarding Mercenaries, have been mentioned in Additional Protocol I 1977 Art 47 which reads;

- 1. A mercenary shall not have the right to be a combatant or a prisoner of war.*
- 2. 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*

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<sup>218</sup> US Mercenaries in Colombia, accessed on <http://colombiajournal.org/colombia19.htm>

<sup>219</sup> Daniel Mejía, *Plan Colombia: An Analysis of Effectiveness and Costs. Improving Global Drug Policy: Comparative Perspectives and UNGASS 2016*. A summary executive. Foreign Policy. Center for 21st Century Security and Intelligence-Latin America Initiative. Brookings. In its findings; Colombia has paid a high price to fight the “war on drugs,” with costs amounting to approximately 1.1 percent of its GDP per year from 2000 to 2008. The estimated value of Colombia’s drug-related economy shrank from US\$7.5 billion in 2008 to US\$4.5 billion in 2013.

<sup>220</sup> Pietro Verri, *Dictionary of the International Law of Armed Conflict*, ICRC, Geneva, 1992, p.71 as been quoted in Arlina Permanasari, Aji Wibowo, dkk, *Pengantar Hukum Humaniter*, International Committee of The Red Cross, Jakarta, 1999, p. 99. See also Art.4-6, and 17 Convention V.

*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; and*

*(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.*

Classifying PMSC personnel as Mercenaries is not easy. There needs to review again related to PMSC as Mercenaries. PMSC and Mercenaries are also in a different era. *Before PMSC is regulated in international conventions, an explanation of mercenaries is first discussed in two international conventions specifically aimed at eliminating them through the criminalization of mercenary activities. Those conventions were; The Organization of African Unity (OAU) Convention for The Elimination of Mercenaries in Africa, and the UN General Assembly (UNGA) on the Convention against the Recruitment, Use, Financing and Training of Mercenaries.* The problem of mercenaries first appeared in the UN session in 1961 in connection with the separation of the Katangese from Kongo.<sup>221</sup> Then in 1964 the government controlled by the Kongo community recruited mercenaries in order to confront the rebels. In 1967 when the mercenaries were instructed to no longer carry out their attacks. They refused and fought against the government, shows the difficulty of organizing and controlling instructions to mercenaries poses a serious threat of mercenaries when it

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<sup>221</sup> Security Council Resolution No. 161A & 164 issued in 1961, and UNGA Resolution No. 1599 year of 1961, were contains of withdrawal of all mercenaries from Africa, See Arlina Permanasari, *Op.cit.*,p. 96



involved in an armed conflict which could possibly result in many casualties.

The motivation for money is also one of the causes of the prohibition of mercenaries which makes them always look for profits from a war, resulting in a war not being the last resort for conflict resolution. The need for money legitimates them to always keep the battle going on which makes more suffer toward the parties. It also violates the principle that prohibits violence can cause excessive suffering. The Security Council and the organization of the African state (OAU) Organization of Africa Unions, through its resolution asked other countries to prevent the acceptance of mercenaries in their territory. For instance, Security Council Resolution No. 405 (16 April 1977) which condemned the recruitment of mercenaries, then UN General Assembly Resolution No. 33/24 in 8 December 1978 stated that the practice of using mercenaries in opposing national liberation movements was considered a criminal offense and the mercenaries concerned would be considered as an ordinary criminal, not as a combatant.<sup>222</sup> Even in the same year, the OAU council of ministers ratified an agreement called the Convention for the elimination of mercenaries in Africa.<sup>223</sup> This shows that the use of mercenaries is completely prohibited in the present. Although including new actors, in principle and simply all those involved in the war, both directly and indirectly, are fully submissive

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<sup>222</sup> *Ibid.* See more on UN addressing and responding the problem of mercenaries and the issue of Luanda's agreement, See Haryo Mataram, *Op.cit*, p. 171-190

<sup>223</sup> UN General Assembly (UNGA) on the Convention against the Recruitment, Use, Financing and Training of Mercenaries, came into force on April 22, 1985

and shall be based on IHL. In its development, the regulation regarding PMSC was initiated in the Montreux Document which discussed the status of PMSC according to the 1949 Geneva Convention.

Montreux Document: On Pertinent International Legal Obligations and Good Practices for States Relating to Private Military and Security Companies During Armed Conflict was an intergovernmental document intended to promote respect for international humanitarian law and human rights law whenever private military and security companies are present in armed conflicts. It is not legally binding as such but, rather, contains a compilation of relevant international legal obligations and good practices.<sup>224</sup>

Regarding the regulation of actions for PMSC personnel has been regulated clearly in the Montreux Document: at the first part of Articles 22-26. The international agreement stipulates the obligations of PMSC personnel who are carrying out their duties in conflict areas, includes;

*22. PMSCs are obliged to comply with international humanitarian law or human rights law imposed upon them by applicable national law, as well as other applicable national law such as criminal law, tax law, immigration law, labour law, and specific regulations on private military or security services.*

*23. The personnel of PMSCs are obliged to respect the relevant national law, in particular the national criminal law, of the State in which they operate, and, as far as applicable, the law of the States of their nationality.*

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<sup>224</sup> non-legal document neither creates nor alters legal obligations, but merely articulates existing requirements pertinent to private security operations, It is stated; “*That this document is not a legally binding instrument and does not affect existing obligations of States under customary international law or under international agreements to which they are parties, in particular their obligations under the Charter of the United Nations (especially its articles 2(4) and 51)*”; The Montreux Document; On Pertinent International Legal Obligations and Good Practices for States Relating to Private Military and Security Companies During Armed Conflict. p.9

24. *The status of the personnel of PMSCs is determined by international humanitarian law, on a case-by-case basis, in particular according to the nature and circumstances of the functions in which they are involved.*

25. *If they are civilians under international humanitarian law, the personnel of PMSCs may not be the object of attack, unless and for such time as they directly participate in hostilities.*

26. *The personnel of PMSCs:*

*a) are obliged, regardless of their status, to comply with applicable international Humanitarian law;*

*b) are protected as civilians under international humanitarian law, unless they are incorporated into the regular armed forces of a State or are members of organized armed forces, groups or units under a command responsible to the State; or otherwise lose their protection as determined by international humanitarian law;*

*c) Are entitled to prisoner-of-war status in international armed conflict if they are persons accompanying the armed forces meeting the requirements of article 4A(4) of the Third Geneva Convention.<sup>225</sup>*

The rules in the Montreaux Document clarify that PMSC personnel are required to comply with international humanitarian law and all national laws that apply in the country where the PMSC personnel carries out duties ranging from criminal law to special regulations on private military and security services;<sup>226</sup> Also giving an explanation of the status of PMSC personnel determined by international humanitarian law based on their nature and function;<sup>227</sup> The right of PMSC personnel as civilians must be protected and not subject to attack if they do not participate in conflict;<sup>228</sup> As well as the obligation to comply with all international humanitarian

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<sup>225</sup> The Montreaux Document: On Pertinent International Legal Obligations and Good Practices for States Relating to Private Military and Security Companies During Armed Conflict, Art. 22-26

<sup>226</sup> *Ibid.*, Art 22 & 23

<sup>227</sup> *Ibid.*, Art 24

<sup>228</sup> *Ibid.*, Art 25

law;<sup>229</sup> protected as civilians;<sup>230</sup> are entitled to the status of prisoners of war if they are accompanying armed forces that meet the requirements of Article 4A (4) the third part of the Geneva convention;<sup>231</sup> and comply with and exercise governmental authority, are subject to prosecution if they make a mistake that violates national or international law.<sup>232</sup>

Not only regulated in the Montreaux Document, the actions of the personnel or the obligations of PMCs and their personnel are also regulated in the International Code of Conduct for Private Security Service Providers.

The International Code of Conduct for Private Security Service Providers (ICoC) is a set of standards for security companies to respect human rights and humanitarian law. It was a multi-stakeholder initiative<sup>233</sup> developed as a complement to the Montreaux Document<sup>234</sup> The total companies signed after that raising up to 708 companies. Several key clients, including the UK and US governments, have announced that they will require contractors to abide by the Code.

The Code includes provisions specific to the conduct of personnel, management and governance of private security companies, rules on the use of force, detention, prohibition of torture and inhuman and degrading

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<sup>229</sup> *Ibid.*, Art 26.a

<sup>230</sup> *Ibid.*, Art 26.b

<sup>231</sup> *Ibid.*, Art 26.c

<sup>232</sup> *Ibid.*, Art 26.d&e

<sup>233</sup> The initiative was launched by private sector stakeholders in 2009 with the assistance collaboration the Government of Switzerland United Kingdom, the United States, other stakeholders and relevant experts.

<sup>234</sup> [https://www.business-humanrights.org/en/conflict-peace/special-initiatives/initiatives-on-private-military-security-companies/international-code-of-conduct-for-private-security-service-providers-icoc-a-process-aimed-at#:~:text=The%20International%20Code%20of%20Conduct,complement%20to%20the%20Montreaux%20Document.](https://www.business-humanrights.org/en/conflict-peace/special-initiatives/initiatives-on-private-military-security-companies/international-code-of-conduct-for-private-security-service-providers-icoc-a-process-aimed-at#:~:text=The%20International%20Code%20of%20Conduct,complement%20to%20the%20Montreaux%20Document., accessed on June 11, 2020, 16.56pm), accessed on June 11, 2020, 16.56pm

treatment, prohibition of sexual exploitation, abuse and gender-based violence, human trafficking, forced labour, child labour, discrimination, selection and vetting of personnel and subcontractors, incorporating the Code's provisions in company policies, training of personnel, health and safety, and grievance mechanisms, among other topics.<sup>235</sup>

Unlike the Montreaux Document which focuses on regulating rights and obligations for the Tenant Country, the PMSC Country of origin, PMSC Personnel, and the community or the International State, the International Code of Conduct for Private Security Service Providers are more focused on how to apply codes of conduct for security service providers. In article 7, the agreement explains the purpose of the code of conduct, namely:

*“7. Those establishing this code recognize that this code acts as a founding instrument for a broader initiative to create better governance, complicity, and accountability. Recognizing that further effort is necessary to implement effectively the principles of this code, signatory company accordingly commit to work with states, other signatory companies, clients and other relevant stakeholders after initial endorsement of this code to, within 18 months:*

- a) Establish objective and measurable standard for providing security services based upon this code, with the objective of realizing common and internationally recognized operational and business practices standards, and;*
- b) Establish external independent mechanism for effective governance and oversight, which will include certification of signatory companies compliance with the code's principles and the standards derived from the code, beginning with adequate policies and procedures, auditing and monitoring of their work in the field, including reporting, and execution of mechanism to address alleged violations of the code's principles or the standards derived from the code.*

*And thereafter to consider the development of additional principles and standards for related services, such as training of external forces, the provision of maritime security services and the*

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<sup>235</sup> The International Code of Conduct for Private Security Service Providers, November 09, 2010, could be download at [https://www.icoca.ch/sites/all/themes/icoca/assets/icoc\\_english3.pdf](https://www.icoca.ch/sites/all/themes/icoca/assets/icoc_english3.pdf)

*participation in operations related to detainees and other protected persons.*"<sup>236</sup>

The second part of the Montreux document article 43 above explains that the arrangements regarding the use of force and firearms by PSMC personnel, mentioned;

*"43. To have in place appropriate rules on the use of force and firearms by PMSCs and their personnel, such as :*

- a). Using force and firearms only when necessary in self-defence or defence of third persons;*
- b). immediately reporting to and cooperation with competent authorities in the case of use force and firearms.*"<sup>237</sup>

In the article, it is explained that the use of force and firearms by PMSC personnel only as a means of self-protection, and in its use required for cooperative action of the personnel to immediately report the use of weapons and violent actions to the authorities. Not only regulated in the Montreux Document, but also the use of force by PMSCs personnel also regulated in the International Code of Conduct for Private Security Providers in articles 30-32, which stated;

*"30. Signatory Companies will require their personnel to take all reasonable steps to avoid the use of force. If force is used, it shall be in a manner consistent with applicable law. In no case shall the use of force exceed what is strictly necessary, and should be proportionate to the threat and appropriate to the situation.*

*31. Signatory companies will require their personnel not use firearms against persons except in self-defence or defence others against the imminent threat of death or serious injury, or to prevent the perpetration of particularly serious crime involving grave to life.*

*32. To the extent personnel are formally authorized to assist the exercise of a state's law enforcement authority, signatory companies will require that their use of force or weapons will comply with all national and international obligations applicable to regular law enforcement officials of state and, as a minimum, with the standards*

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<sup>236</sup> International Code of Conduct For Private Security Service Providers, 2010. Art. 7

<sup>237</sup> The Montreaux Document, Second part Art.43

*expressed in the United Nations Basic Principles on The Use of Force and Firearms by Law Enforcement Officials (1990).”<sup>238</sup>*

## **2.5 The Use of PMSCs according to Islamic Perspective**

### **A. The Basis Islamic Law of War**

The main source of IHL were International Customary Law and International treaties. At least there are two source of international treaties were The Hague Convention in 1899 and 1907s, and The Geneva Convention and its protocols. Every country is openly given the opportunity to be involved in signing and ratifying this agreement<sup>239</sup> so that this convention becomes a written reference in the tradition of international law. While the law of war in Islam is known as *fiqhul siyar*.<sup>240</sup> As a derivative of Islamic law, the main sources of *fiqh al-siyar* are the Qur'an, Hadist (Sunnah), Ijma 'and Qiyas. In Islamic teachings law comes from God as the creator. The duty and function of Islamic jurists are to draw conclusions from God's law from divine sources through the mechanism of ijtiihad. That is the point of a fundamental difference between the source of IHL and *fiqh al siyar*, if the IHL is made by the country that proposes it, while the Law of War in Islam comes from the creator. Indeed, in the insights of Islamic Law of war, Islamic teachings regulate acts of war and hostility, which are primarily aimed at minimizing casualties and to alleviate suffering during

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<sup>238</sup> International Code of Conduct For Private Security Service Providers, 2010. Art. 30-32

<sup>239</sup> For example nowadays, there are 194 countries are parties to fourth Geneva Conventions, 173 states parties to the additional protocol I and 167 parties to additional protocol 2

<sup>240</sup> ICRC, *Islam dan Urusan Kemanusiaan; Konflik, Perdamaian, dan Filantropi*, Serambi Ilmu Semesta, Jakarta. 2015. p.19,33

the conflict. Islamic jurists have described what is now called Islamic international humanitarian law, which in classical literature is called *Al Siyar*. This branch of jurisprudence includes not only the discussion of international humanitarian law but also regulates relations between Islamic states and other countries during peace or war.<sup>241</sup> In Islamic teachings, *Fiqh al -siyar* is also known as *fiqh jihad* (Law of Jihad) or *fiqh qital* (Law of war).<sup>242</sup> In the international world a similar discourse can also be seen from the term *Jus ad Bellum* which is the rule of law governing the rights and the reasons for fighting and the legitimacy of using weapons during the war and the term *Jus In Bello* is a legal instrument that regulates various aspects when the war has revolved such as regulating human rights, protection of non-combatant members of warring parties and members who are no longer involved in hostilities (*Horse de combat*), children, and women, ordinary people and protection of prisoners of war. In its development, Islamic Fiqh tends to focus more on the war in term of *Jus in Bello* rather than *Jus ad bellum*.<sup>243</sup>

From a historical point of view, the development of *fiqh al Siyar* in the Islamic tradition is not new since its birth in Mecca in the 6th century. The Islamic world has interacted with other great civilizations such as the Roman emperors and the Persian emperors.<sup>244</sup> Within 100 years Islam had

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<sup>241</sup> Zafar Ishaq Anshari, "Forewords" in Al Syaibani, *Muslim International Law Kitab Al-Siyar al-saghir* . 1998, p. x-xiii.

<sup>242</sup> ICRC, *Islam dan Urusan Kemanusiaan, Op.cit.*, p.33

<sup>243</sup> *Ibid*, p.33-34

<sup>244</sup> *Ibid.*,



reached Austria, Spain and Iran.<sup>245</sup> This expansion has been carried out through a peaceful process and military operations. Related to various events of the war when the expansion of Islam to several regions, experts formulated a kind of military code of ethics to be a guide for members of the troops in their military operations. A classic works such as the book *Al Siyar al-saghir*, a concise book on the law of war, written by Muhammad Al Syaibani (749-804)<sup>246</sup> explains that the Prophet Muhammad pbuh had formulated the procedures for carrying out the war; civil protection rules outside of war protection against prisoners of war; prohibition of warfare activities during the holy month; the treatment of infidels; property acquisition; peace reconciliation; ceasefire; rebel treatment; and use of booty.<sup>247</sup> These topics are also found in many parts of the classic book of Islamic law. The hadith quote below illustrates a little about the way of war.

*Fight you in the way of Allah and fight those who do not believe in Allah. But never violate trust or betrayal or mutilate anyone or kill minorities or women. This is God's request and the behavior of the apostle for your guidance.*<sup>248</sup>

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<sup>245</sup> Film 99 Cahaya di Langit Eropa, as adopted from the Book (Novel) with the same title; 99 Cahaya di Langit Eropa, written by Hanum Salsabilla Rais and Ranga Almahendra. p.177- contains a Historical Record in the form of traces of travel & experience, which describes the period of Islamic civilization in Europe at that time started from an area on the Siberian peninsula, which known as Spain. Starting from the Cordoba region, Islam began to enter Spain (formerly Andalusia) in 93 H (711 AD) via the North African line under the leadership of Tariq bin Ziyad who led the Islamic army to open Andalusia. Islam in Europe had achieved its glory during the Umayyad Dynasty.

<sup>246</sup> Zafar Ishaq Anshari, "Forewords" in Al Syaibani, *Op.cit*, Islamic teaching requires warfare based on holy intention or sacred motivation, defending the religion of God, where the rules of the game are directly regulated in Quran and Hadist.

<sup>247</sup> *Ibid.*,

<sup>248</sup> Imam Syaukani, *Nailul Authar; Ansar al-Sunnah an-Nabawiyyah*, Vol.7, 246, as quoted by Muhammad Munir, "Suicide Attack and Islamic Law, *Interntaional Review of the Red Cross*, 90". 2008, p.83

International humanitarian law recognizes that Islam is a civilization that provides an important source for the development of international humanitarian law.

Regarding the position of humans in the Islamic point of view, especially the Qur'an as the main and first source of Islamic law, Qur'an highly respects the position of humans in any condition both in war and handling after the war is over, which indeed often leaves a long lasting negative impact. The Islamic law respect towards humans is evidenced by the Qur'an's concern for human existence. In the Qur'an, 2 specific surah are found, which are called human's surah, namely Surah *Al-Insan* (76) and Surah *An-Nas* (114), each consisting of 31 verses of 240 words and 1504 letters for surah *Al-Insan* and 6 verses with 20 words of 99 letters for the second surah, *An-Nas*. This surah in the Qur'an basically implies the figure and identity of human being as a servant of God who should really be humanized by themselves. Other Islamic view for the human position can be traced through a number of verses scattered in several other surah especially in surah *Al-Isra* (17);7, *Al-Insan* (76);2, and *At-Tin* (95);4, which upholds the overall degree and dignity of humanity. While on the other hand, the verses of the Qur'an also reveal the bad character of humans with self-centered greed and lust even join to armed conflict deliberately killing each other, can be seen Surah *Al Alaq* (96);67 and especially Surah *Al Baqarah* (2);30.

Related to the protection of humanity in various hadiths, the Prophet pbuh explained the importance of a human life. The legal experts codify it

in five important points, or known as *Maqashid shar'i*<sup>249</sup> or *Maqashid khamsah*, which aims to protect five important things from humanity, namely guarding toward religion, guardians to life, mind, descent, and property.

Islam only introduces values and great principles in war. As for the procedure of warfare or method of war in detail is taken from ijtiḥad by interpreting Qur'an and Sunnah. The concept of war in the Qur'an is contained in the term *Qital*. The word of *qital* in various forms of derivation written 170 times included in 33 Surahs in the Qur'an. Not all *qital* terminology in the Qur'an means war, there is also a meaning of killing,<sup>250</sup> and some are colored curse or torture.<sup>251</sup> The first verse that speaks of war in Islam is surah Al Hajj (22); 39. This verse states that permits warfare for believers because they have been persecuted.

أُذِنَ لِلَّذِينَ يُقَاتَلُونَ بِأَنَّهُمْ ظَلِمُوا، وَإِنَّ اللَّهَ عَلَىٰ نَصْرِهِمْ لَقَدِيرٌ -

22:39

Meaning; "Permission [to fight] has been given to those who are being fought, because they were wronged. And indeed, Allah is competent to give them victory."<sup>252</sup>

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<sup>249</sup> *Maqashid Shar'i* or "sharia goals" is an idea in Islamic law that sharia is revealed by Allah to achieve certain goals. According to the bearers of this idea, these goals can be found or extracted from the main sources of Islamic law (i.e. the Quran and Sunnah) and must always be maintained when deciding legal matters together with other classic ideas namely *Mashlahah* (social benefit/common interest). See, Adis Duderija, ed. *Contemporary Muslim Reformist Thought and Maqāsid cum Maṣlaḥa Approaches to Islamic Law: An Introduction. Maqasid al-Shari'a and Contemporary Reformist Muslim Thought: An Examination*. Springer. 2014. p.2-6

<sup>250</sup> QS. At-Takwir (81);9

<sup>251</sup> QS. Al Buruj (85);4

<sup>252</sup> Translation by Sahih International, taken from quran.com, accessed on June 11, 2020. QS. Al Hajj (22);39

In interpreting this verse, Quraish Shihab in his book *Tafsir Al Mishbah*, classify into 4 groups which included verses 38 through 41. According to the Quraish Shihab, permission to fight for the believers came as God's protection as an effort of self-defense.<sup>253</sup> With the issuance of permits and command to fight as a means of self-defense because they have been persecuted, Allah intends to win his religion and give everyone the right to freedom of religion and worship without threats from anyone. The model and interpretation of jihad and war Quraish Shihab were different compare to the interpretation by Sayyid Quthb. In his Book of commentary of Qur'an Fii Dzilalil Qur'an, Sayyid Quthb explained that *qital* does not only mean defensive to defend religion but also offensive to realize the Islamic Shari'a in life and spread Islam,<sup>254</sup> because Islam as a religion is the Proclamation of Human Independence on earth from the worship of fellow human beings, including their passions and desires, as well as efforts against tyranny.<sup>255</sup> Thus, it is need a form of *Harakah* or movement as a means of fight.<sup>256</sup>

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<sup>253</sup> Zunly Nadia, *Konsep Jihad dan Perang dalam Tafsir Al Mishbah Karya Muhammad Quraish Shihab*, as noted in the book of *Islam dan Urusan Kemanusiaan; Konflik, Perdamaian, dan Filantropi*, Serambi Ilmu Semesta, Jakarta. 2015. p.178-179

<sup>254</sup> *Ibid.*, p.183

<sup>255</sup> Of course, this difference is influenced by the environment where interpreter grows, Quraish Shihab with his Indonesian background, starting from the condition of a pluralistic Indonesian society, the development of Islamic spread in a peaceful with the tolerance government and his track not only known as academician, but also have a role in government. Whereas Sayyid Quthb came from Egyptian background, was under pressure from a ruling regime at that time, suffered physical torture in prison until he had to die on the gallows because of his activities were considered against the ruling regime, hence the character of the movement and style side both the language and the content of their interpretations were felt different, especially as Quthb were written when he was in prison.

<sup>256</sup> Sayyid Quthb, *Fii Dzilalil Qur'an*, Vol. 9, Beirut, Cairo. 1981, p.144-149

The continuation of the verse reads;<sup>257</sup>

الَّذِينَ أُخْرِجُوا مِنْ دِيَارِهِمْ بِغَيْرِ حَقٍّ إِلَّا أَنْ يَقُولُوا رَبُّنَا اللَّهُ وَلَوْلَا  
دَفَعُ اللَّهُ النَّاسَ بَعْضَهُمْ بِبَعْضٍ لَهَدَّيْتُمْ صَوَامِعُ وَبِيْعُ وَصَلَوَاتُ وَمَسَاجِدُ  
يُذَكَّرُ فِيهَا اسْمُ اللَّهِ كَثِيرًا وَلَيَنْصُرَنَّ اللَّهُ مَنْ يَنْصُرُهُ إِنَّ اللَّهَ لَقَوِيٌّ عَزِيزٌ -

22:40

Meaning; “[They are] those who have been evicted from their homes without right - only because they say, "Our Lord is Allah." And were it not that Allah checks the people, some by means of others, there would have been demolished monasteries, churches, synagogues, and mosques in which the name of Allah is much mentioned. And Allah will surely support those who support Him. Indeed, Allah is Powerful and Exalted in Might.”

Despite differing opinions, scholars and commentators argue that the two verses above are the beginning of the justification of war and the use of force in Islam.<sup>258</sup> These verses include as *Madaniyah*.<sup>259</sup> The first verse which gives permission to fight in Islam explains *Casus Belli* (the incident that triggered the war) as a defense against attack. They also mention Muslims who were driven out of their homes unjustly because of their faith in Allah.<sup>260</sup> Thus, *Casus Belli* in Islam as conveyed by John Kelsay is a

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<sup>257</sup> QS. Al-Hajj (22);40-41

<sup>258</sup> Qur'anic justification for war was exist in many text, can be seen in the following verses; (2); 190-194, 216-217, (4); 75-76, (8);38-39, 61, (9);5, 29, (22);39-40, (60);8-9. See Ibnu Katsir, *Tafsir Al Qur'an al-Azim*, Beirut, Dar al-Fikr, 1980-1/1401 Vol. 3 p.226; al Qurthubi, *al-Jami' li Ahkam al-Qur'an*, Cairo, Dar al-Sha'b nd. Vol. 12, p.68; al-Qaradhawi, *Fiqh al-Jihad; Dirasah Muqaranah li-Ahkamih wa Falfasatih fi Daw' al-Qur'an wa al-Sunnah*, Cairo; Maktabah Wahbah, 2009, Vol.1 p.229-231, see also, Bernard K. Freamon, *Martyrdom, Suicide, and the Islamic Law of War: A Short Legal History*, 27 Fordham Int'l L.J. 299. 2003, p.314, Available access at: <https://ir.lawnet.fordham.edu/ilj/vol27/iss1/11>, last accessed on June 11, 2020, 18; 36 pm.

<sup>259</sup> The divine verses came after the Hijrah, or when the Prophet was in Medina

<sup>260</sup> Ibnu Katsir, *Tafsir*, Vol.3 p.226; al Qurthubi, *al-Jami'*, Vol. 12, p.69; at-Thabari, Muhammad Ibn Jarir, *Jami al-Bayan 'an Ta'wil Ay al-Qur'an*, Beirut, Dar al-Fikr, 1984-5/1405, Vol.17 p.174, as quoted by Ahmed al- Dawoody, *Hukum Perang Islam*. KPG in collaboration with ICRC, Gramedia; Jakarta, 2011, p.89-90

defense of human rights,<sup>261</sup> in other words the verses support the guarantee and protection of religious freedom in general because monasteries, churches, synagogues and mosques are presented as justification of defensive warfare.<sup>262</sup> A few years after the Muslims left Mecca, the persecution of the oppressed whose weak in social status and unable to leave Mecca (*Mustadh'afin*) was declared *Casus Belli*.<sup>263</sup>

## **B. The Use of PMSC According to Islamic Perspective.**

In the Islamic law perspective, there is no text and argumentation that directly regulates the use of PMSC in a war or armed conflict. As explained above, Islam only regulates, the justification of war, values, principles and ethics in a broad context. At least, the Qur'an has explained about the ethics of war which can be concluded in several points includes:

1. Must keep an appointment/do not breaks promises;
2. Do not kill people who do not fight/civilians (children, women, oldster, residents of houses of worship, and so on);
3. Don't overdo it/ do no transgress;
4. Do not chop/mutilate;
5. Do not tear down or burn buildings;
6. Do not cut down trees and damage plants;
7. Do not kill the surrender;
8. Treat prisoners well

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<sup>261</sup> John Kelsay, *Islam and War; A Study in Comparative Ethics*. Louisville, KY: Westminster, Jon Knox, 1993, p.54, see also az-Zayd Ibn 'Abd al-Karim. *Muqaddimah fi al-Qanun al-Dawli al-Insani fi al-Islam*. N.p: Committee International Geneve, ICRC, 2004, p.12

<sup>262</sup> Ibnu Katsir, *Tafsir*, Vol.3 p.226; al Qurthubi, *al-Jami'*, Vol. 12, p.69; at-Thabari, *Jami al-Bayan*, Vol.17 p.174, as quoted by Ahmed al- Dawoody, *Hukum Perang Islam. Op.cit*, p. 89

<sup>263</sup> QS. (4); 75-76, See Ahmed al- Dawoody, *Hukum Perang Islam. Op.cit*, p. 90

9. Accept peace offer.<sup>264</sup>

Based on view on the existing legal rules, the use of military and security services included as muamalah relationship or business. There was a ruled that listed in *Qawaid Fiqhiyah*,<sup>265</sup> reads;

الأصلُ في الشُّرُوطِ في المُعَامَلَاتِ الحِلُّ وَالإِبَاحَةُ إِلَّا بِدَلِيلٍ

Meaning; *the law of origin in muamalah is lawful and permissible unless there is an argument (which prohibits it).*<sup>266</sup>

Certainly, the use of PMSC is permissible with the aim of self-protection/defensive allowed as long as they don't use their skills to attack because Islamic reasons exist, is for peace, and creating security. The text of Qur'an also mentions to disperse by means and prepare for the battle;

فَأَمَّا تَثَقَفْتَهُمْ فِي الحَرْبِ فَشَرِّدْ بِهِم مِّنْ خَلْفَهُمْ لَعَلَّهُمْ يَدَّكِرُونَ -  
8:57

وَأَعِدُّوا لَهُمْ مَا اسْتَطَعْتُمْ مِّنْ قُوَّةٍ وَمِنْ رِّبَاطِ الخَيْلِ تُرْهِبُونَ بِهِ عَدُوَّ  
اللَّهِ وَعَدُوَّكُمْ وَآخَرِينَ مِّنْ دُونِهِمْ لَا تَعْلَمُونَهُمُ اللّهُ يَعْلَمُهُمْ ۗ وَمَا تُنْفِقُوا مِنْ  
شَيْءٍ فِي سَبِيلِ اللّهِ يُوفَّ إِلَيْكُمْ وَأَنْتُمْ لَا تُظْلَمُونَ - 8:60

Meaning: “So if you, [O Muhammad], gain dominance over them in war, disperse by [means of] them those behind them that perhaps they will be reminded. [QS (8); 57],<sup>267</sup> And prepare against them whatever you are able of power and of steeds of war by which you may terrify the enemy of Allah and your enemy and others besides them whom you do not know [but] whom Allah knows. And whatever you spend in the cause of Allah will be fully repaid to you, and you will not be wronged”. [QS (8); 60]<sup>268</sup>

<sup>264</sup> A. Lalu Zaenuri. *Qitâl dalam Perspektif Islam*, (2010), JDIS Vol. 1, No.1.

<sup>265</sup> General principle of Islamic Law

<sup>266</sup> Faturrhaman Azhari, *Qawaid Fiqhiyyah Muamalah*, LPKU; Banjarmasin. 2015, p. 76,

<sup>267</sup> QS. Al-Anfal (8); 57

<sup>268</sup> QS. Al Anfal (8); 60

By existence of these verse, it become the basis for use PMSC services if needed to strengthen the security system, and as strategy to disperse the enemy using their technology, and data intelligence that they provide as long as not to violate the ethics of war that brought by Islam.

The presence of Islam in the early days did not recognize the use of PMSCs and its personnel due to methods of warfare used are traditional, followed by the rapidly growing number of Muslims after the Hijrah period. But history records, in the days of the Prophet life already existed and identified mercenaries or people who were paid to engage in battlefield. This mercenary practice has been going on for a long time for economic purposes. Historians note, in one of the *Ghazwah* (the war that followed the prophet), In 627 AD, a "fellowship" (*al-ahzab*), consisting of the Meccans and mercenaries from the Bedouin and Abissinia tribes, attacked the Medina people. But the Muslims of Medina regained their victory after Muhammad ordered his troops to dig trenches around Medina based on a proposal from Salman al-Farisi as a strategy to defend the territories.<sup>269</sup> The war was known as the Ahzab / Khandaq (Trench) war.<sup>270</sup>

In other history of Islamic civilization, the practice of mercenaries also found in the spread and development of Islam in Spain during the Abbasid

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<sup>269</sup> Philip K. Hitti, *History of The Arabs "Rujukan Induk Paling Otoritatif tentang Sejarah Peradaban Islam"*, Serambi; Jakarta. 2018 Translation Ed from the original same titled published by Macmillan Publisher Ltd. London, 1937, p. 146.

<sup>270</sup> Syaikh Shafiyyurahman Al-Mubarakfuri, *Ar Rahiq Al Makhtum, Sirah Nabawiyah; Sejarah Hidup Nabi Muhammad*. Jakarta; Ummul Qura, Aqwam. 2011, translated from the origin book titled *Ar-Rahiq Al-Makhtum Bahtsun fis Siratin Nabawiyati 'ala Shahibiha Afdhalush Sholati was Sallam*, p.545



dynasty (755-912 AD).<sup>271</sup> Islam in Spain is not subject to the central government but is led by an *Amir*.<sup>272</sup> The first *Amir* was Abdurrahman I who entered Spain in 138 H / 755 AD and was given the title Al-Dakhil (who entered Spain). He succeeded in establishing the dynasty of the Umayyads in Spain. Spanish rulers of this period were Abd al-Rahman al-Dakhil, Hisham I, Hakam I, Abd al-Rahman al-Ausath, Muhammad ibn Abd al-Rahman, Munzir ibn Muhammad, and Abdullah ibn Muhammad.<sup>273</sup> During this period, Spanish Muslims began to gain advances in both the political and civilization fields. Abd al-Rahman al-Dakhil founded the Cordova mosque and schools in major cities of Spain. Hisham is known as a reformer in the military field. He initiated mercenaries in Spain. Whereas Abd al-Rahman al-Ausath was known as a loving ruler. Philosophical thought also began in his period. The presence of mercenaries is used to maintain the stability of the country due to fanatical Christian movements seeking martyrdom.<sup>274</sup>

The fact of the use of mercenaries is also found in the Fatimid dynasty in Egypt.<sup>275</sup> Mercenaries are used as a way to perpetuate the power. This legion is also used as a tool to stamp out various rebellions. Two large

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<sup>271</sup> Badri Yatim, *Sejarah Peradaban Islam*, PT: Gravindo Persada : Jakarta, 2003, p.95

<sup>272</sup> Leader/Governor

<sup>273</sup> Mar'atus Nur Sholehah, Nurul Dezna Putri, and friends. *Sejarah Peradaban Islam di Spanyol (Andalusia) dan Pengaruhnya Terhadap Renaisans di Eropa*, STAIN Jurai Siwo Metro; Lampung, 2009

<sup>274</sup> Mercenaries were prepared for resistance in Islamic religious conflicts with Christians, See Mar'atus Nur Sholehah, Nurul Dezna Putri, and friends. *Sejarah Peradaban Islam di Spanyol*. *Op.cit*,

<sup>275</sup> Muhammad Subarkah, *Tentara Bayaran dalam Sejarah Peradaban Islam*, 29 Mar 2020, on <https://republika.co.id/berita/q7wn6c385/tentara-bayaran-dalam-sejarah-peradaban-islam>, last accessed on June 11, 2020 at 15:41 pm

groups of mercenaries belonging to the Fatimid Caliphate, originating from the black regiment or Zawila, were recruited by buying from the slave market, which had sprung up a lot in Africa, especially at the center near Lake Chad; and also a division whose members came from Sakalaba-Europe or often called the Slav Nation. Both the Slavs and the Zawila have long been known as warring nations. This Fatimid power then utilized its combat capabilities to conquer various territories, such as Sicily (948 AD), Egypt (969 AD), and Sijilmasat and Fez in 978 AD. They invaded the place with the support of a large force of mercenaries, reaching 50 thousand to 100 thousand people. These mercenaries were also used to build a new city, which was named Cairo (now the capital of modern Egypt). The purpose of establishing this capital was to accommodate the administration of the government while making it a center for military headquarters and the establishment of the Al Azhar Mosque was intended as a center for preaching the Fatimid Caliphate. The peak achievement of this paid legion is when they succeeded in conquering the center of the Abbasiyah Dynasty, the city of Baghdad in 1058 AD. One of the spoils of war obtained as a sign of surrender from the rulers of Baghdad at that time was a robe from the Prophet Muhammad pbuh.

In other point of view, the classical Islamic legal literature found the basic principle of distinction, where Islam distinguishes enemies into two categories namely *Al Muqatilah/ Ahl al-Qital/ Al Muharibah* (combatants/soldiers) and *ghair al-muqatilah/ ghair al-Muharibah* (non-

combatants).<sup>276</sup> The term *Muqatilah* is derived from the verb, *Yuqatil* which means fight or to fight. While the term *Muharibah* comes from the verb *Yuharib* which is to fight in a war. It should be added here that the use of the term *Muqatilah* to distinguish combatants from non-combatants comes from the time of the Prophet.<sup>277</sup>

Some of the hadiths attributed to the prophet forbid targeting 5 non-combatant enemy categories as targets of attacks, namely women, children, elderly people, religion man, and *al-asif* or hired persons.<sup>278</sup> In the context of the use of private military and security companies, of course, the most similar thing is the existence of the subject *Al-asif* which is one of the non-combatants who are protected from the target of attack. The term of *Asif* (plural; *usafa*) means a paid person or employee.<sup>279</sup> In general, this refers to people who are paid to do certain jobs in the context of war. This term refers to anyone who works for the enemy or is paid by the enemy to do service on the battlefield, for example as mentioned by Asy-Syaukani to take care of goods and livestock but not engage in battle.<sup>280</sup>

The prohibition on targeting this category of attack is based on the traditions of the Prophet, some of which relate to the killing of a woman in

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<sup>276</sup> As-Samarqandi, *Tuhfah al-Fuqaha*, Vol.3 p.295, 301, As quoted by as quoted by Ahmed al- Dawoody, *Hukum Perang Islam*. KPG in collaboration with ICRC, Gramedia; Jakarta, 2011, p. 169

<sup>277</sup> *Ibid.*,

<sup>278</sup> *Ibid.*, regard to the Immunity of Non-Combatants in Classical Islamic Law

<sup>279</sup> *Ibid.*, p. 176

<sup>280</sup> Al-Shawkani, Muhammad Ibn Ali Ibn Muhammad. *as-Sayl al Jarrar al-Mutadaffiq 'ala Hada'iq al Azhar*, Vol. 4, Ed. Mahmud Ibrahim Zayid. Dar al-Kutub al-Ilmiyah; Beirut. 1984/1405. p 532 as quoted by Ahmed al- Dawoody, *Hukum Perang Islam*. KPG in collaboration with ICRC, Gramedia; Jakarta, 2011, p. 177

the battle of Hunain. In that incident, the prophet sent someone to meet Khalid bin Walid with an explicit command not to kill the woman, child or the person employed.<sup>281</sup> Thus, because the prophet forbade attacking people employed to serve enemy soldiers on the battlefield even if their presence affected the course of the battle, it was clear that targeting non-combatants were strictly prohibited.<sup>282</sup>

Furthermore, legal experts expand non-combatant immunity by including *al-harif al masyghul bi hirfatih* (craftsmen who are busy with their work)<sup>283</sup>. Umar bin Khattab issued a special written instruction prohibiting targeting farmers to Zaid bin Wahb, which reads; "Don't steal booty, don't betray, don't kill children, fear Allah, and don't kill farmers unless they fight against you."<sup>284</sup> Thus at least there is an equivalent presence of PMSC in warfare according to Islamic Law, where they include people who are paid, protection from war targets. Basically, the position of Islam clearly states that there is no justification for wars directed deliberately against non-combatants in jihad.

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<sup>281</sup> See The Hadist No. 2841 & 2841 in Ibn Majah, Sunan Ibni Majah, Vol.2, p.947.

<sup>282</sup> Ahmed al- Dawoody, *Hukum Perang Islam, Op.cit.* p.177

<sup>283</sup> *Ibid.*,

<sup>284</sup> *Ibid.*, p.180

**CHAPTER III**  
**THE LEGAL STATUS OF PMSCs PERSONNEL INVOLVED IN AN**  
**ARMED CONFLICT BASED ON INTERNATIONAL HUMANITARIAN**  
**LAW**

**3.1 The Legal Status of Private Military and Security Company Personnel involved in Armed Conflict Based on International Humanitarian Law**

In the history of human political life, the most notable events are war and peace. Major events that become the main themes in the political literature and international relations revolve around these two kinds of interactions. The expression that peace to be merely a respite between wars shows, the situation of war and peace, continues to alternate in human interaction.<sup>285</sup> In simple terms, the term of war with armed conflict is often considered the same. The Black's Law Dictionary explained that war is hostility by using the armed forces that occur between nations, states or rulers, or citizens in a nation or state.<sup>286</sup>

In the past, the armed conflict only occurred when two countries/nations at loggerheads. In Modern age, the armed conflict has develop ranging from the method and instrument used, until the emergence of new actor in that war. The emergence of the new actor provide a military and security service known as the Private Military and Security Company (PMSC) to carry out missions that are synonymous with conflict or other violence.

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<sup>285</sup> Ambarwati, Denny., *Hukum Humaniter Internasional dalam studi Hubungan Internasional. Op.cit*, p.2.

<sup>286</sup> Henry Campbell Black, *Black's Law Dictionary*, Sixth edition, West publishing Co, St Paul; US, p.1093

This practice has been demonstrated by countries classified as a super power state, which are often involved in armed conflicts, such as the United States, Britain, France, Russia, and Israel.<sup>287</sup> Not only contracted to carry out missions in warfare, but sometimes they are also tasked with protecting VIPs, protecting economic assets, military facilities, training the armed forces and sending logistics to dangerous places.<sup>288</sup>

As it is proven in the involvement of private military and security companies such as Blackwater, DynCorp, California Microwave Inc., Kellogg, Brown & Root, Military Professional Resources, Titan Corporation, Military Professional Resources Incorporated<sup>289</sup> which are not limited to providing members in the field, military experts or information, but also provides goods (products) such as fighter planes, humvees (combat vehicles), and other means of transportation that are useful in assisting the movement of regular troops, for example the United States which appears to be very dependent on the role of private military companies in their involvement in conflicts armed, especially armed conflicts in Afghanistan and Iraq.<sup>290</sup>

### **3.1.1 The Fact on involvement of PMSCs Personnel in Armed Conflict**

Based on the Congressional Budget Office (CBO) report entitled "Contractors Support of U.S. Operations in Iraq "on August 15, 2008, shows

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<sup>287</sup> Muhammad Zulifan, *Bisnis Militer Amerika Serikat di Timur Tengah*, 10 Maret 2008, as quoted by Agis Ardiansyah, *Jurnal Hukum Arena*, *Status Hukum Anggota PMC Yang Terlibat Dalam Konflik Bersenjata Berdasarkan Hukum Humaniter Internasional*, *Jurnal Hukum Arena*, FH UB, 2008

<sup>288</sup> *Ibid.*,

<sup>289</sup> Dario Azzellini and Boris Kanzleiter (ed), *La Empresa Guerra Bisnis Perang dan Kapitalisme Global*, translated by Onni Wiranda, 2005, p.27-43

<sup>290</sup> *Ibid.*, p.205

the great dependence of the United States on the role of the Private Military and Security Company in Iraq.<sup>291</sup> During the period 2003 to 2007, there were at least 160,000 PMSCs personnel working for the United States in the armed conflict in Iraq. The composition of PMSCs personnel consists of 40% Iraqi citizens and only 20% of United States citizens, while the rest are citizens of third countries. For the amount of costs, at least until early 2008, the United States Government has spent 85 billion dollars on the use of PMSCs services in Iraq. Work contracts carried out by PMSCs personnel in Iraq include logistical support, construction, petroleum products and food.<sup>292</sup> Work contract for the Army's Logistics Civil Augmentation Program (LOGCAP), a program that aims to regulate the use of civilian contractors to support the mission of the United States Department of Defense during warfare and other military operations and to increase combat support and military equipment is one of the largest, amounting to 22 billion dollars.<sup>293</sup>

The information from several sources shows an increase in the number of PMSCs personnel during the 5 years in the armed conflict in Iraq since the start of the invasion by the United States. In the 2006 census there were at least 100,000 PMSCs personnel in Iraq, nearly close to the total number of US troops in Iraq and ten times greater than during the 1991 Gulf War.

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<sup>291</sup> David Isenberg, *Dogs of War : More contractors in Iraq*, 22 August 2008, on [http://www.spacedaily.com/reports/Dogs\\_of\\_War\\_More\\_contractors\\_in\\_Iraq\\_999.html](http://www.spacedaily.com/reports/Dogs_of_War_More_contractors_in_Iraq_999.html), Accessed December 22, 2019.

<sup>292</sup> Congressional Budget Office (CBO) of the Congress of the United States, report entitled "*Contractors Support of U.S. Operations in Iraq "on August 15, 2008, Op.cit.*"

<sup>293</sup> Congressional Research Service Report for Congress, *Defense Contracting in Iraq : Issues and Options for Congress*, Order Code RL 33834, 15 August 2008.

In addition, US troops, at that time amount of 140,000 PMSCs personnel include DynCorp employees of 1,500 who are tasked with providing training to Iraqi police and Blackwater amount of 1,000 personnel, the majority of which operate in security services.<sup>294</sup> Then in early 2007 an increase in the number of PMSCs personnel numbered around 120,000. The fastest and most significant increase was in July 2007, where the number of PMSCs personnel in Iraq theatre<sup>295</sup> reached 180,000.<sup>296</sup> The activities of PMSCs personnel in Iraq have begun to be known to the public, including cooking food for soldiers, repairing infrastructure, translating documents, intelligence analysis, guarding prisoners, protecting military convoys to sending water in the Green Zone which is quite high risk.<sup>297</sup>

U.S. Data The Labor Department said that there was an increase in the death toll for PMSCs personnel by 17% in 2007. Of the total US military death toll, a quarter of them were PMSCs personnel. During 2007, when President Bush sent an additional 30,000 troops, at least 353 PMSCs personnel were killed, a significant increase considering that in 2006 there were 301 casualties among PMSCs personnel. If all of the data is added up, by the end of 2007 at least 1,123 PMSCs personnel have been killed in Iraq

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<sup>294</sup> Renae Merle, *Census Counts 100.000 Contractors in Iraq*, 5 Desember 2006 taken from <http://www.globalpolicy.org/security/issues/iraq/contract/2006/1205census.htm>. Accessed on December 5, 2019.

<sup>295</sup> Based on the 2008 Congressional Budget Office report, the number of PMSCs in *Iraq theatre* which included Iraq, Turkey, Jordan, Kuwait, Saudi Arabia, Oman, United Arab Emirates, Bahrain, and Qatar totalled 190.200 personnel, while those specifically in Iraq were 160,000 operate with a rolling system.

<sup>296</sup> Christian Miller, *Contractors Outnumber Troops in Iraq*, 4 Juli 2007, as quoted from <http://articles.latimes.com/2007/jul/04/nation/na-private4>, accessed on December 21, 2019.

<sup>297</sup> Michelle Roberts, *Nearly 800 Iraq Contractors Killed*, Associated Press, 23 Februari 2007, dikutip dari <http://www.truthout.org/article/ap-nearly-800-iraq-contractors-killed>, last accessed on December 20, 2019.



since the start of the American invasion in 2003.<sup>298</sup> T. Scott Allen, legal counsel from Houston representing wounded former Brown and Root Kellogg employees. various events that almost claimed their lives while serving in Iraq, said that the main cause of the many PMSCs personnel killed in Iraq was because the majority of them were assigned to the front line and not infrequently also placed in the middle of the battlefield despite not doing combat functions. Even the most famous case regarding the act of personnel were in the Iraq case, but the involvement of PMSCs personnel, were occurred in many place such Egypt,<sup>299</sup> Lebanon, Afghanistan,<sup>300</sup> Libya, Somalia<sup>301</sup> and even in Nicaragua and Colombia.<sup>302</sup>

### **3.1.2 The Legal standing of PMSCs Personnel in International Humanitarian Law**

In the written source of international humanitarian law, namely Geneva Law and Den Haag Law, the term private military company is not found. The closest term to a private military and security company is "contractors" as stated in the 1949 Geneva Convention I concerning the Improvement of the Injured and Sickling Members of the Armed Forces in the Battle Ground Article 13 (4) which states that:

*“Persons who accompany the armed forces without actually being members thereof, such as civil members of military aircraft crews, war*

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<sup>298</sup> David Ivanovich, *Contractor deaths up 17 percent across Iraq in 2007 As Surge took effect, spike in killings subsided*, 9 Februari 2008, <http://www.chron.com/disp/story.mpl/front/5528613.html>, accessed on December 23, 2019.

<sup>299</sup> Ardy Yulinanto, Sucipto, and friends. *Tanggung Jawab Negara Penyewa Personil Private Military Company Dalam Konflik Bersenjata Di Mesir*. Student Journal, FH UB. 2014.

<sup>300</sup> Kuntjoro Hadi, *Ensiklopedia Tentara Bayaran*, *Op.cit*, p. 88-110

<sup>301</sup> *Ibid*, p. 100-101, UNAMSIL, The Peacekeeper Security hiring Vinnel Corporation by United Nations Peacekeeping Operations

<sup>302</sup> *Ibid*, p. 118- 125, DynCorp vs Belligerence in Cocaine Farm Colombia

*correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany.”*

Under these provisions, people accompanying the armed forces without actually being members of the armed forces, such as civilian members of military airplanes, war reporters, supply suppliers, members of the work force or services responsible for the welfare of the force war, on the condition they get the endorsement from the armed forces that they accompany. They are also entitled to prisoner of war status if captured by the enemy.

The Montreux Document states that what is meant by a private military or Security Company is a private business entity that provides security or military services or depends on how they describe themselves, including armed escort, protection of people or objects, convoys, buildings, maintenance and operation of weapons systems, guarding prisoners, advising and training local forces and security personnel.<sup>303</sup>

Peter Warren Singer divides PMSCs into three business sector categories, namely:<sup>304</sup> Military Provider Firms, Military Consultant Firms and Military Support Firms. Herbert Wulf, an expert identifies six types of private actors in the security sector more broadly including (a) private security companies, which provide personal security services to citizens,

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<sup>303</sup> Montreux Document On Pertinent International Legal Obligations And Good Practices For States Related To Operations Of Private Military And Security Companies During Armed Conflict 2008.

<sup>304</sup> Peter W. Singer, *Humanitarian Principles, Private Military Agents : some implications of the privatised military industry for the humanitarian community*, from Victoria Wheeler and Adele Harmer (eds), *resetting the rules of engagement : trends and issues in military-humanitarian relations*, HPG Report 22, forthcoming February 2006.

companies and governments, (b) defense producers, who are involved in research, development, production and financing military equipment, (c) service providers, which involve themselves in the management of supplies, military services, (d) private military companies, which provide military services to military partners, humanitarian organizations and UN agencies, (e) non -statutory armed forces, such as rebels, warlords, criminal organizations, (f) mercenaries, which are combat forces that are generally hired by non-state actors.<sup>305</sup>

Determining the legal status of PMSC personnel based on each activity, function, task and case relating to the presence of PMSC in armed conflict, in accordance with the provisions contained in Montreux Document Number 24, namely:

*“The status of the personnel of PMSCs is determined by international humanitarian law, on a case by case basis, in particular according to the nature and circumstances of the functions in which they are involved.”*

By term of “on a case by case basis”, made their personnel status was casuistic depending on their role in the battlefield. At least there are several possibilities regarding the status of PMSCs which will be explained as follows;

#### **A. PMSCs Personnel as Civilians**

Based on Article 50 of Additional Protocol I 1977, the legal definition for a civilian is someone who is not included in the categories of Article 4A

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<sup>305</sup> Sam Perlo-Freeman and Elisabeth Skons, *The Private Military Services Industry*, SIPRI Insights on Peace and Security, No. 2008/1 September 2008.

(1), (2), (3) and (6) Geneva III Convention 1949 and Article 43 of Additional Protocol I 1977. Even in the Protocol it is stated that if there is doubt in determining whether a person is a civilian or not, then that person should be considered a civilian. In other words, civilians are people who are not included in the category of combatants. This rule also applies to PMSCs personnel, who carry out activities, functions and tasks that are not included in the categories of Article 4A (1), (2), (3) and (6) Geneva III Convention 1949 and Article 43 of Additional Protocol I 1977 is a civilian. As civilians, PMSCs personnel are not allowed to take part in hostilities and are entitled to protection from targets of military attacks. In the Montreux Document, number 26 (b), which states that PMSCs personnel are basically civilians under international humanitarian law unless they are members of a unit of the armed forces of a country, organization or armed group under the command responsible to a country, then they will lose their protection based on the provisions of international humanitarian law. They have various duties and functions. Based on data from CBO, PMSCs personnel in Iraq perform tasks in the fields of logistics support, construction, engineering and technical support, linguist services, economic development, humanitarian assistance, and security. While the products produced by them include food, fuel, vehicles, and communications equipment.<sup>306</sup> In general the tasks and functions , produced by PMSC personnel whose do not directly participate in battles, but in general the services offered by PMSC where categorize as civilians, especially in Iraq was cover 6 fields, viz:<sup>307</sup>

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<sup>306</sup> Congressional Budget Office of the Congress of the United States, 2008, *Op cit*

<sup>307</sup> *Ibid*

1. Transportation including moving people, supplies dan equipment;
2. Engineering and construction includes repair, build the headquarter, bridges, roadways, railways, and communication system;
3. Maintenance include technical support includes providing technical supports to improve and maximizing the equipment;
4. Base operations includes provide the food and other housekeeping services in the headquarters;
5. Medical support counted the use of civilian surgeons, nurses, attendants; and
6. Security.

PMSCs personnel in charge of construction are those who carry out the activities of the Iraq reconstruction program after the armed conflict, they consist of building architects, building construction officers and their aides. Their tasks include rebuilding public facility buildings such as hospitals, schools, houses of worship, bridges that have been cut off, courthouses and government buildings that have been damaged by armed conflict. They are entirely civilians as long as they are not part of the armed forces and the activities they carry out are only for the benefit of civil society and are not directly involved in combat.

PMSCs personnel who carry out construction tasks such as building buildings, bridges, highways, railroads and communication systems that are not for the military interests of US troops or only for carrying out the Iraqi reconstruction program are fully civilians. Likewise with medical staff such

as surgeons, nurses and their assistants/attendants who come from PMSCs and in charge of providing medical care to civilians, they should be treated as civilian medical officers. Specifically for civilian medical units, Additional Protocol I 1977 stipulates that medical officers must be respected and protected at all times and not be subject to military attacks (Article 12 (1)). Although civilian medical personnel are permitted to carry small arms (revolvers) as self-defences (defensive) as stipulated in Article 13 (2) of the Protocol,<sup>308</sup> this will not change their status to combatants provided that the weapons they carry are not used to attack (offensive). This provision applies to PMSCs personnel who serve as civilian medical officers on the condition that they are part of one of the parties to the dispute, obtain recognition and endorsement from the disputing party.

PMSCs personnel carrying out tasks aimed at providing protection to civilians can be categorized as carrying out the Civil Defense function, which is a humanitarian task aimed at protecting civilians from the effects of fighting, trying to restore it immediately to its original state and doing things deemed necessary for survival civilian population (Article 61 (a) Additional Protocol I 1977.

PMSCs personnel who carry out civil defense tasks are classified as civilians because they are part of the population or civilian objects under their protection which are not the target of military attacks as stated in

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<sup>308</sup> Additional Protocol I 1977, Art 13 Par.2 (a), That the personnel of the unit are equipped with light individual weapons for their own defence or for that of the wounded and sick in their charge, shall not be considered as act of harmful to the enemy

Article 52 (2) of Additional Protocol I 1977. In The Montreux Document Art 25 is also stated as follows:

*“If they are civilians under international humanitarian law, the personnel of PMSCs may not be the object of attack, unless and for such time as they directly participate in hostilities.”*<sup>309</sup>

The stipulation of the article stated that every attack must be aimed only at military objects where the nature, location is used with the aim of supporting military action.<sup>310</sup> So civil objects such as schools, houses, hospitals, places of worship are objects that are protected from the target of military attacks. If there is an attack on the civilian building then the action is a form of violation of the provisions of international humanitarian law and every PMSCs personnel who serves as a security officer has the right to provide protection for himself and the civilians in it. In accordance with their duties (civil defense), the use of weapons by PMSCs personnel is a form of self-defense and to protect objects and civilians from military attacks (defensive), these actions are not considered as participating directly in combat, therefore PMSCs personnel accompanying do not include targets of military action. Some PMSCs in their internal code of ethics even allow each of their personnel serving as security guards to use their weapons if they are first attacked by Iraqi guerrillas.<sup>311</sup>

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<sup>309</sup> The Montreux Document Art 25, Part One, Section E on the PMSCs and their personnel

<sup>310</sup> Marco Sassoli, *Legitimate Targets of Attacks Under International Humanitarian Law*, Background Paper prepared for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law, Cambridge January 27-29 2003, Program on Humanitarian Policy and Conflict Research Harvard University.

<sup>311</sup> Hadi Kuntjoro, *Ensiklopedi Tentara ...*, *Op.cit*, p.136

In determining of which areas PMSC personnel enter, it can also see the work of *Hansip* (Civil Defences) in Indonesian law. The concept of civil defense which attach to the security services as part of PMSCs personnel has possibility to turn into doubled standard. If we look at the construction of thinking in the International Humanitarian Law, one of the new provisions contained in protocol I is the existence of a new organization introduced in the sphere of humanitarian law. The organization is called civil defense<sup>312</sup>. Law No. 20/1982 jo. Presidential Decree No.55 of 1972 reads the function of Hansip/ Hankamrata in Indonesia can be tasked with carrying out social works such as managing traffic, maintaining village security, securing areas affected by natural disasters, as well as non-social work such as participating in assisting ABRI/TNI (Indonesian army forces) in dispelling the enemies.<sup>313</sup> This dual task implies that the status of Hansip can also be double status, it could be a status as a civilians when he is doing his social work, but he can also assume as a combatant while helping ABRI to defeat the enemy. Unless they aren't actively and took a direct participation is hostility, their status was not change to them who accompanying the armed forces, and still enjoy the civilian's right. By the enactment of the new regulation on existence of Law No. 34 year of 2004, on the Fundamentals of National Defense and Security, this dual function

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<sup>312</sup> The Term of civil defence in protocol 1 of 1977, has a different meaning from the term Civil Defense as used in Indonesia, especially in Law No. 20/1982 jo. Presidential Decree No.55 of 1972 concerning the perfection of the Civil Defense Organization and the Organization for the Resistance of the People and People's Security in the Context of Controlling the Implementation of the Hankamrata System and Presidential Decree No.56 of 1972 concerning the Submission of Civil Defense Organization Development from the Ministry of Defense and Security of the Ministry of Home Affairs.

<sup>313</sup> Arlina Permanasari, Aji Wibowo, Pengantar Hukum Humaniter, *Op.cit*, p. 207



will no longer exist in Indonesia.<sup>314</sup> The system were renew with Hankamrata concept<sup>315</sup> which more seen to be general and bias. In sum, the basic status of PMSCs personnel are fallen to the civilian status unless they were actively and directly participating in the battlefield. The commentary Additional Protocol I define, direct participation as acts of war which by their nature or purpose are likely to cause actual harm to personnel and equipment of the enemy armed forces.<sup>316</sup>

Although the PMSCs personnel status is mostly civilians in practice, but in practice and development, there are variations in which they are not felt in civilian status, but also as civilians accompany the armed forces with non-combatant status. CBO data shows that there are a number of PMSCs personnel functions place them to accompany the United States armed forces, including guarding and caring for the equipment that will be used in combat (communication equipment, ammunition, weapons, tanks, helicopters, etc.); personnel in the field of military equipment maintenance, supplying military logistics requirements, being a janitor; to deliver goods; headquarters cooks, military headquarters reconstruction officers, and military medical personnel.<sup>317</sup> civilians who are seconded by the

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<sup>314</sup> Haryo Mataram, *Bunga Rampai Hukum Humaniter (Hukum Perang)*, Bumi Nusantara Jaya, Jakarta, 1988, p.190

<sup>315</sup> Law No. 34 of 2004 stipulated Hankamrata (Pertahanan Keamanan Rakyat Semesta), or known as Universal Defense, which involves all citizens, territories and other national resources, and is prepared in advance by the government and is carried out in a total, integrated, directed, and sustainable manner to uphold national sovereignty, maintain the territorial integrity of the Unitary State of the Republic of Indonesia and protect the safety of all nations from every threat.

<sup>316</sup> <https://www.icrc.org/en/doc/assets/files/other/2004-05-expert-paper-dp>, accessed on May 12, 2020, related to the principle of distinction underpinning many rules of IHL that only fighters may be directly targeted. This is a necessary compromise that IHL provides for in order to protect civilians in armed conflict. Without the principle of distinction, they would be no limitation on the methods of warfare.

<sup>317</sup> Congressional Budget Office of the Congress of the United States, 2008, *Op cit*

government to assist the task of the soldiers both on the battlefield and at military base camps. The role of these civilians is not only limited to matters of an administrative nature, but also of a technical nature and concerning the welfare of members of the military. These civilians are commonly known as civilians accompanying the armed forces. Even though they are part of the armed forces, they are not combatants but recognize with non-combatants status, i.e member who accompany the armed forces but do not carry out combat duties or are not directly involved in armed conflict, because that they are not included in the object of military attack. Specifically for PMSCs personnel serving as supply suppliers, military headquarters cooks and military medical officers, the Geneva Convention 1949 I explicitly regulates their legal status and their protection, as stated in Article 13 (4) which states that:

*“Persons who accompany the armed forces without actually being members thereof, such as civil members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany.”*

Article 24 of the 1949 Geneva Convention I specifically regulates military medical officers (members of the military health service). Those who become medical officers in a unit of the armed forces must be respected and protected from actions that can interfere with their duties and safety. They will continue to be treated as non-combatants while carrying out their functions to provide medical assistance to members of the armed forces and not to engage in combat activities. This provision in addition to emphasizing their legal status in armed conflict also regulates the protection of those

accompanying the armed forces without actually being a member of the armed forces such as civilian members of military airplanes, war journalists, supply contractors, members work units or services responsible for the welfare of the armed forces on the condition that they have been endorsed by the armed forces they accompany. In addition to the 1949 Geneva Convention, Article 3 Hague Regulation 1907 also regulates the protection of those who are combatants and non-combatants.<sup>318</sup> The term of non-combatants in this provision doesn't mean civilians, but rather part of the armed forces who did not take part in combat (such as doctors and clergy or religion man). Although they did not fight, if they were captured by the enemy, they also gained status as prisoners of war.<sup>319</sup>

For PMSCs personnel in charge of the construction of the headquarters, their existence has not been explicitly regulated in the provisions of humanitarian law. If based on the understanding of non-combatants, they are the parties accompanying the armed forces because their duties are related to military interests but they are not members of the armed forces that they belong to and do not participate in combat directly (do not carry out combat functions). Not only limited to the construction sector, all PMSC personnel can be classified as non-combatants if they carry

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<sup>318</sup> Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907. In Rauglation Art. 3. Stated; *"The armed forces of the belligerent parties may consist of combatants and non-combatants. In the case of capture by the enemy, both have a right to be treated as prisoners of war."*

<sup>319</sup> Frist Kalshoven, *Constraint on the Waging of War*, ICRC, Second Edition 1987, p.28 as quoted by as quoted by Arlina Permanasari, Aji Wibowo, and friends, *Pengantar Hukum Humaniter*, *Op.cit.*, p. 79

out tasks related to military interests but do not participate actively in armed conflict and obtain legalization from the armed forces that they accompany.

At the core most of PMSC personnel status was civilian, due to its task are not function for fight in an armed conflict, not integrated in the country's armed forces and as well as doesn't have right to combat and participate in hostilities, makes them out of the status of combatant, and for the who accompanying the armed forced, include and known as civilian accompanying the armed forces.

#### **B. PMSCs Personnel as Unlawful Combatant**

As previously explained on parties involved in the conflict agreed as combatants with some cumulative requirements. In other words, other than legitimate fighters, there is no party invited directly to the conflict,<sup>320</sup> if this provision is violated then his actions include violating international humanitarian law.

PMSCs personnel is not lawful combatants based on the requirements of international humanitarian law, Therefore they are not entitled to actively participate in armed conflict. Active in the means that they intentionally served or were involved in armed conflict with the aim of killing enemy. If they violate them then they will lose their rights as protected persons, as stipulated in the Montreux Document Art. 25, stated:

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<sup>320</sup> IHL recognized the concept of Unlawful Combatant proposed by Starke which divided combatant into two groups; lawful and unlawful. See J.G. Starke, *Introduction to International Law*, 10<sup>th</sup> Edition, Butterworth, 1989. p.547, as quoted by Arlina Permanasari, Aji Wibowo, and friends, *Pengantar Hukum Humaniter, Op.cit.*, p. 106

*“If they are civilians under international humanitarian law, the personnel of PMSCs may not be the object of attack, unless and for such time as they directly participate in hostilities.”*

Therefore, PMSCs personnel who are directly involved in armed conflict have an aggressive nature and can be categorized as mercenaries. Article 47 Additional protocol I describe and regulates mercenaries pervades;

*1. A mercenary shall not have the right to be a combatant or a prisoner of war.*

*2. 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; and*

*(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.*

People classified as mercenaries under Article 47 paragraph (2) of Additional Protocol I of 1977, stated that a mercenary participates directly in an armed conflict, which means a person can be said to belong to that group if recruited and assigned to fight, destroy and or kill the enemy. The characteristics of mercenaries such as those contained in the provisions of Article 43 & 47 of Additional Protocol I 1977 and UN Mercenaries 1989 show the aggressive nature of a person. They are recruited both from abroad and within the country only to fight with the motivation of reward for a

number of materials or compensation so that there is no term loyalty to the state that there is only loyalty to the material, to whoever has paid them, this feature shows how dangerous the activities carried out by a soldier payment because they will only give loyalty to those who pay more. For this reason, international humanitarian law prohibits the use of mercenaries in armed conflict.

There are indeed similarities between mercenaries and PMSCs personnel regarding their involvement in armed conflict. Their presence in armed conflict is due to the motivation of economic gain, not the ideology of nationalism as ideally possessed by combatants. Even, Jose del Prado says, “these individuals cannot be considered as civilians, given that they often carry and use weapons, interrogate prisoners, load bombs, drive military trucks and fulfill other essential military functions. Those who are armed can easily switch from a passive/defensive to an active/offensive role and can commit human rights violations and even destabilize governments. They cannot be considered soldiers or supporting militias under international humanitarian law either, since they are not part of the army or in the chain of command, and often belong to a large number of different nationalities.”<sup>321</sup>

With the identical form of mercenaries related to activities carried out in armed conflict, PMSCs personnel can be classified as unlawful

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<sup>321</sup> Jose Luis Gomez del Prado, *The Privatization of War : Mercenaries, Private Military and Security Companies (PMSC)* Published on: 5 March 2013, at [www.Globalresearch.ca](http://www.Globalresearch.ca). for Global Research, available accessed also in <https://www.business-humanrights.org/en/the-privatization-of-war-mercenaries-private-military-and-security-companies-pmsc>.

combatants. Unlawful combatant means that the status of a person/group of people who carry out combatant functions, which is directly involved in armed conflict, is realized by participating in fighting to kill enemy combatants, in their unlawful status accordance to Art 47. Sefriani argued that it necessary carefulness to determine and conclude that PMSC was include personnel as same as mercenaries.<sup>322</sup> Due to the cumulative requirement fulfilment of mercenaries status stated in Art 47 Additional Protocol I. The criteria of actively and directly participate in hostilities occurring debates and interpretation.<sup>323</sup> By the development era of technology, term of direct and actively taking part to the hostilities cannot be measure simply. The commentator explained that PMSCs contractors would be considered to have participated directly in hostilities when carrying out defense efforts that resulted in wounding the enemy. The point is that humanitarian law does not distinguish whether the efforts made are attacks or self-defense efforts all included in the criteria of direct participation.<sup>324</sup>

### **3.2 The Right and Obligations of the PMSCs Personnel during the Armed Conflict**

Even the statutes are slightly depending on their actions in hostilities, the general concept of the right of parties of an armed conflict and its

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<sup>322</sup> Sefriani, *Status Hukum Kontraktor PMSC dalam Hukum Humaniter Internasional*, Jurnal Hukum Yustisia, Vol.5 No.1 January- April 2016, p.99

<sup>323</sup> *Ibid.*,

<sup>324</sup> The Moutrex Document Commentary, p.37, as quoted from *An Interpretative Guidance on the Notion of Direct Participation in Hostilities under IHL* has recently been published by the ICRC, see: <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/direct-participation-ihl-article-020609>.

obligations, whether combatants or civilians was regulated under IHL. Each PMSC personnel is a human who has the rights and legal obligations, both on a national and international scale. Violations committed by/toward PMSC must be given legal sanctions, to uphold human rights and provide security to the international community, especially for countries that are at war. The perspective of PMSC personnel can be considered as a civilian or other non-combatant status does not eliminate the possibility to hold them accountable in International Law. Jurisprudence provided in the ICTR in 2001 states that individual criminal responsibility does not depend on its status in a conflict,<sup>325</sup> whether civilians or combatants can commit and be prosecuted for war crimes and also serious violations of the Geneva Conventions.

At general, IHL regulated that Civilians do not have the right to direct participate in an armed conflict. They are not given the same authority as combatants, the legal consequences that can occur to PMSC personnel as civilians include; As from the time PMSC personnel began his participation in hostilities, he lost his immunity rights to military attacks and became a worthy target according to law until when he was no longer involved in hostilities; If the PMSC personnel is captured by the enemy when he commits such participation, he will not get his rights as a prisoner of war<sup>326</sup>, because it is clear that he is not a combatant.<sup>327</sup> The PMSC personnel can be

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<sup>325</sup> ICTR in Prosecutor v. Jean-Paul Akayesu, Case No. ICTR-96-4-I, Court Dec. (Appeal Chamber), June 01<sup>st</sup>, 2001, para. 444.

<sup>326</sup> Gillard, Emanuela-Chiara, *Business Goes to War: Private Military/Security Companies and International Humanitarian Law*, (International Review of the Red Cross. Vol. 88, No. 836, September 2006), p. 590

<sup>327</sup> Michael N. Schmitt, *Humanitarian Law and Direct Participation in Hostilities by*



punished by the National Law of the country that arrested and detained him or who has jurisdiction over him and for his actions which are considered as violations of IHL.

Moreover, the Montreux document also highlighted the right of Protection of PMSC personnel from attack. Statement 25 explains that if PMSC personnel qualify as civilians (which they do in most cases) they may not be attacked. However, international humanitarian law provides that civilians lose their protection against attack if and for such time as they directly participate in hostilities. Direct participation in hostilities is a rather complex term. Simply put, it means participation in combat operations or activities aimed at weakening the enemy's military capacity and specifically meant to support one party to the conflict against the other. Guarding military bases against attacks from the enemy party, gathering tactical military intelligence, operating weapons systems in a combat operation are examples of direct participation in hostilities in which PMSC personnel may be involved.

Statement 26a recalls that whatever their status, the personnel of PMSCs must always comply with international humanitarian law. Indeed, humanitarian law must be respected not only by all parties to the conflict, but by all individuals acting in relation to a conflict – whether or not they are acting on behalf of a government.

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*Private Contractors or Civilian Employees*, (Chicago Journal of International Law. Vol. 5, Januari 2005) p.519 as quoted by Gerald Diandra et.al, *Peran dan Status PMSC dalam Konflik Bersenjata di tinjau dari Hukum Humaniter Internasional*, Diponegoro Law Journal. Volume 6, Nomor 1, Tahun 2017

Statement 26b mentions the circumstances, referred to above, in which PMSC personnel do not qualify as civilians. The last part of the sentence (“or otherwise lose their protection as determined by international humanitarian law”) refers, in particular, to the situation where a PMSCs employee is part of the armed wing of a party to a non-international armed conflict and, in effect, qualifies as a “rebel soldier”. In this case, he or she can be attacked under humanitarian law.

Statement 26c explains that even if they are civilians, PMSC personnel are entitled to prisoner-of-war status when, in an international armed conflict, they are hired to work as “civilians accompanying the armed forces”. The armed forces should provide such civilians with identity cards identifying them as such.

Statement 26d recalls that PMSC employees acting as State agents are directly bound to respect human rights, since these are binding on States. Statement 26e is a corollary to statement 26a and recalls that PMSC personnel are subject to prosecution if they commit certain crimes, especially war crimes. More to be clear, the International Code of Conduct give the ethical code and technical means of conduct. The code reinforces and articulates the obligations of private security providers particularly with regard to international humanitarian law and human rights law. The ICoC also sets the foundation for developing an institutional framework to provide meaningful and independent oversight of and accountability to the ICoC. ICoC for Private Security Providers in articles 30-32, even gave the limitation on the use of forces which stated;

*“30. Signatory Companies will require their personnel to take all reasonable steps to avoid the use of force. If force is used, it shall be in a manner consistent with applicable law. In no case shall the use of force exceed what is strictly necessary, and should be proportionate to the threat and appropriate to the situation.*

*31. Signatory companies will require their personnel not use firearms against persons except in self-defence or defence others against the imminent threat of death or serious injury, or to prevent the perpetration of particularly serious crime involving grave to life.*

*32. To the extent personnel are formally authorized to assist the exercise of a state’s law enforcement authority, signatory companies will require that their use of force or weapons will comply with all national and international obligations applicable to regular law enforcement officials of state and, as a minimum, with the standards expressed in the United Nations Basic Principles on The Use of Force and Firearms by Law Enforcement Officials (1990).”<sup>328</sup>*



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<sup>328</sup> International Code of Conduct For Private Security Service Providers, 2010. Art. 30-32

## CHAPTER IV

### CLOSURE

#### A. Conclusion

Based on the elaboration and findings of the research, it can be conclude as follow;

1. Private military and security companies' personnel does not operate in a legal vacuum. Due to the existing rules are applicable to them, depending on their actual activities and their relationship with the contracting states. In the situations of armed conflict certain well-established rules and principles in the form of International Humanitarian Law apply to the activities of PMSC and its personnel. With the basis of Distinction Principle, and concern to Art 13 Conv I, II, III, Art 41 related to Protected person, Art 4A Conv III on Prisoner of War, and Montreux Document, it can be conclude that that PMSCs status can possibly felt into civilians or Unlawful combatant depend on case by case basis mention at Montreux Document, which related to their function and role in the battlefield. Although in the Mountrex document stated the existing Civilians accompanying armed forces, it is included as the Civilians group with role to accompanying the armed forces. At the core, IHL and Montreux Document try to emphasize and give clear solutions standard. It was stated that all the status of the personnel was civilians, except for those who have an aggressive nature and carry out combat functions that are directly involved in an armed conflict marked with fight/kill enemy, are fall into Unlawful combatant status.

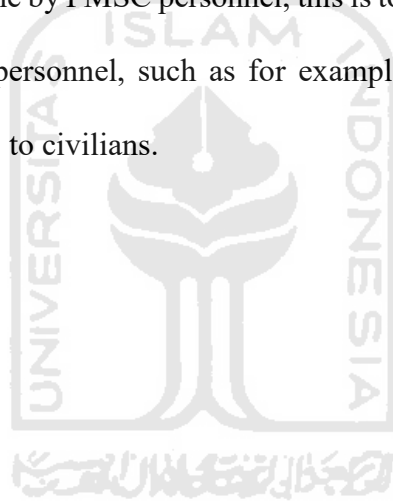
2. Every legal status owned by PMSC Personnel rise different right and obligations in accordance with the provisions of International humanitarian law. As civilians PMSC personnel are entitled to protection from attack or not to be targeted by military attacks. Furthermore, if they are member of the accompanying armed forces, they are also entitled to the status of prisoners of war if caught by the enemy. However, if the PMSC personnel take action that causes him to be directly involved in hostilities, then they will lose their rights and will be categorized as Unlawful Combatant. Their legal obligation was generally obey and ruled to the basis of humanitarian law as whole.

#### **B. Recommendations**

This research is still need the initiatives of an international convention, which would clarify the legal status in clear way, and maintaining the obligation of states to regulate PMSCs and its personnel within their jurisdiction. By making the documents as legal bind as customary international law, it might be clarified that the whole regulation in order to answer the challenge the new paradigm of warfare. The UN Security Council should immediately establish a supervisory body related to the security service provider or PMSC. So that the possibility of cases of violations of international humanitarian law committed by PMSC and its personnel can be minimized. Although many experts could determine the status of these new actor in battle, the fact in armed conflict does not always comply with the regulation. Thus it is necessary to establish an international

monitoring mechanism and attempts to strengthen the regulation of their activities on both international and domestic level.

The making of new rules or laws for PMSC personnel was apparently not yet effective, there were still many violations caused by PMSC personnel. The responsibility of the State as the main offender for PMSC personnel is considered not to be serious in responding to problems that can be caused by PMSC personnel. In making employment contracts for PMSC personnel leasing, it is better for PMSC stakeholders to also limit the work done by PMSC personnel, this is to avoid the extra authority given to PMSC personnel, such as for example using weapons (use of force) or violence to civilians.



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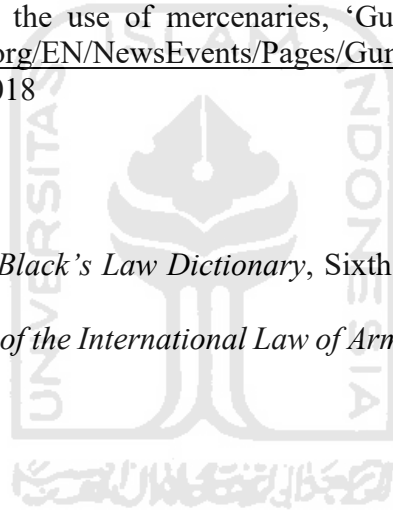
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## APPENDIX

### THE MONTREUX DOCUMENT

On pertinent international legal obligations and good practices for States  
related to operations of private military and security companies during  
armed conflict

Montreux, 17 September 2008

#### Contents

#### PREFACE

#### PART ONE

#### Pertinent International Legal Obligations relating to Private Military and Security Companies

##### Introduction

- A. Contracting States
- B. Territorial States
- C. Home States
- D. All other States
- E. PMSCs and their personnel
- F. Superior responsibility

#### PART TWO

#### Good Practices relating to Private Military and Security Companies

##### Introduction

- A. **Good practices for Contracting States**
  - I. Determination of services
  - II. Procedure for the selection and contracting of PMSCs
  - III. Criteria for the selection of PMSCs
  - IV. Terms of contract with PMSCs
  - V. Monitoring compliance and ensuring accountability
- B. **Good practices for Territorial States**
  - I. Determination of services
  - II. Authorization to provide military and security services
  - III. Procedure with regard to authorizations
  - IV. Criteria for granting an authorization
  - V. Terms of authorization
  - VI. Rules on the provision of services by PMSCs and their personnel
  - VII. Monitoring compliance and ensuring accountability
- C. **Good practices for Home States**
  - I. Determination of services
  - II. Establishment of an authorization system
  - III. Procedure with regard to authorizations
  - IV. Criteria for granting an authorization
  - V. Terms of authorization granted to PMSCs
  - VI. Monitoring compliance and ensuring accountability

## Preface

This document is the product of an initiative launched cooperatively by the Government of Switzerland and the International Committee of the Red Cross. It was developed with the participation of governmental experts from Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the United Kingdom of Great Britain and Northern Ireland, Ukraine, and the United States of America in meetings convened in January and November 2006, November 2007, and April and September 2008. Representatives of civil society and of the private military and security industry were consulted.

The following understandings guided the development of this document:

4. That certain well-established rules of international law apply to States in their relations with private military and security companies (PMSCs) and their operation during armed conflict, in particular under international humanitarian law and human rights law;
5. That this document recalls existing legal obligations of States and PMSCs and their personnel (Part One), and provides States with good practices to promote compliance with international humanitarian law and human rights law during armed conflict (Part Two);
6. That this document is not a legally binding instrument and does not affect existing obligations of States under customary international law or under international agreements to which they are parties, in particular their obligations under the Charter of the United Nations (especially its articles 2(4) and 51);
7. That this document should therefore not be interpreted as limiting, prejudicing or enhancing in any manner existing obligations under international law, or as creating or developing new obligations under international law;
8. That existing obligations and good practices may also be instructive for post-conflict situations and for other, comparable situations; however, that international humanitarian law is applicable only during armed conflict;
9. That cooperation, information sharing and assistance between States, commensurate with each State's capacities, is desirable in order to achieve full respect for international humanitarian law and human rights law; as is cooperative implementation with the private military and security industry and other relevant actors;
10. That this document should not be construed as endorsing the use of PMSCs in any particular circumstance but seeks to recall legal obligations and to recommend good practices if the decision has been made to contract PMSCs;
11. That while this document is addressed to States, the good practices may be of value for other entities such as international organizations, NGOs and companies that contract PMSCs, as well as for PMSCs themselves;
12. That for the purposes of this document:
  - a) "PMSCs" are private business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security

services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel.

- b) Personnel of a PMSC” are persons employed by, through direct hire or under a contract with, a PMSC, including its employees and managers.
- c) Contracting States” are States that directly contract for the services of PMSCs, including, as appropriate, where such a PMSC subcontracts with another PMSC.
- d) Territorial States” are States on whose territory PMSCs operate.
- e) Home States” are States of nationality of a PMSC, i.e. where a PMSC is registered or incorporated; if the State where the PMSC is incorporated is not the one where it has its principal place of management, then the State where the PMSC has its principal place of management is the “Home State”.

The participating States commend this document to the attention of other States, international organizations, NGOs, the private military and security industry and other relevant actors, which are invited to adopt those good practices that they consider appropriate for their operations. The participating States invite other States and international organizations to communicate their support for this document to the Federal Department of Foreign Affairs of Switzerland. The participating States also declare their readiness to review and, if necessary, to revise this document in order to take into account new developments.

## **Part One**

### **Pertinent international legal obligations relating to private military and security companies**

#### **Introduction**

The following statements aim to recall certain existing international legal obligations of States regarding private military and security companies. The statements are drawn from various international humanitarian and human rights agreements and customary international law. This document, and the statements herein, do not create legal obligations. Each State is responsible for complying with the obligations it has undertaken pursuant to international agreements to which it is a party, subject to any reservations, understandings and declarations made, and to customary international law.

#### **A. Contracting States**

1. Contracting States retain their obligations under international law, even if they contract PMSCs to perform certain activities. If they are occupying powers, they have an obligation to take all measures in their power to restore, and ensure, as

far as possible, public order and safety, i.e. exercise vigilance in preventing violations of international humanitarian law and human rights law.

2. Contracting States have an obligation not to contract PMSCs to carry out activities that international humanitarian law explicitly assigns to a State agent or authority, such as exercising the power of the responsible officer over prisoner-of-war camps or places of internment of civilians in accordance with the Geneva Conventions.
3. Contracting States have an obligation, within their power, to ensure respect for international humanitarian law by PMSCs they contract, in particular to:
  - a) ensure that PMSCs that they contract and their personnel are aware of their obligations and trained accordingly;
  - b) not encourage or assist in, and take appropriate measures to prevent, any violations of international humanitarian law by personnel of PMSCs;
  - c) take measures to suppress violations of international humanitarian law committed by the personnel of PMSCs through appropriate means, such as military regulations, administrative orders and other regulatory measures as well as administrative, disciplinary or judicial sanctions, as appropriate.
4. Contracting States are responsible to implement their obligations under international human rights law, including by adopting such legislative and other measures as may be necessary to give effect to these obligations. To this end they have the obligation, in specific circumstances, to take appropriate measures to prevent, investigate and provide effective remedies for relevant misconduct of PMSCs and their personnel.
5. Contracting States have an obligation to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, grave breaches of the Geneva Conventions and, where applicable, Additional Protocol I, and have an obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and bring such persons, regardless of their nationality, before their own courts. They may also, if they prefer, and in accordance with the provisions of their own legislation, hand such persons over for trial to another State concerned, provided such State has made out a *prima facie* case, or to an international criminal tribunal.
6. Contracting States also have an obligation to investigate and, as required by international law, or otherwise as appropriate, prosecute, extradite or surrender persons suspected of having committed other crimes under international law, such as torture or hostage taking, in accordance with their obligations under international law. Such prosecutions are to be carried out in accordance with international law providing for fair trial, mindful that sanctions be commensurate with the gravity of the crime.
7. Although entering into contractual relations does not in itself engage the responsibility of Contracting States, the latter are responsible for violations of international humanitarian law, human rights law, or other rules of international law committed by PMSCs or their personnel where such violations are attributable to the Contracting State, consistent with customary international law, in particular if they are:
  - a) incorporated by the State into their regular armed forces in accordance with its domestic legislation;

- b) members of organized armed forces, groups or units under a command responsible to the State;
  - c) empowered to exercise elements of governmental authority if they are acting in that capacity (i.e. are formally authorized by law or regulation to carry out functions normally conducted by organs of the State); or
  - d) in fact acting on the instructions of the State (i.e. the State has specifically instructed the private actor's conduct) or under its direction or control (i.e. actual exercise of effective control by the State over a private actor's conduct).
8. Contracting States have an obligation to provide reparations for violations of international humanitarian law and human rights law caused by wrongful conduct of the personnel of PMSCs when such conduct is attributable to the Contracting States in accordance with the customary international law of State responsibility.

## **B. Territorial States**

9. Territorial States have an obligation, within their power, to ensure respect for international humanitarian law by PMSCs operating on their territory, in particular to:
- a) disseminate, as widely as possible, the text of the Geneva Conventions and other relevant norms of international humanitarian law among PMSCs and their personnel;
  - b) not encourage or assist in, and take appropriate measures to prevent, any violations of international humanitarian law by personnel of PMSCs;
  - c) take measures to suppress violations of international humanitarian law committed by the personnel of PMSCs through appropriate means such as military regulations, administrative orders and other regulatory measures as well as administrative, disciplinary or judicial sanctions, as appropriate.
10. Territorial States are responsible to implement their obligations under international human rights law, including by adopting such legislative and other measures as may be necessary to give effect to these obligations. To this end they have the obligation, in specific circumstances, to take appropriate measures to prevent, investigate and provide effective remedies for relevant misconduct of PMSCs and their personnel.
11. Territorial States have an obligation to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, grave breaches of the Geneva Conventions and, where applicable, Additional Protocol I, and have an obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and bring such persons, regardless of their nationality, before their own courts. They may also, if they prefer, and in accordance with the provisions of their own legislation, hand such persons over for trial to another State concerned, provided such State has made out a *prima facie* case, or to an international criminal tribunal.
12. Territorial States also have an obligation to investigate and, as required by international law, or otherwise as appropriate, prosecute, extradite or surrender

persons suspected of having committed other crimes under international law, such as torture or hostage taking, in accordance with their obligations under international law. Such prosecutions are to be carried out in accordance with international law providing for fair trial, mindful that sanctions be commensurate with the gravity of the crime.

13. In situations of occupation, the obligations of Territorial States are limited to areas in which they are able to exercise effective control.

### **C. Home States**

14. Home States have an obligation, within their power, to ensure respect for international humanitarian law by PMSCs of their nationality, in particular to: disseminate, as widely as possible, the text of the Geneva Conventions and other relevant norms of international humanitarian law among PMSCs and their personnel; not encourage or assist in, and take appropriate measures to prevent, any violations of international humanitarian law by personnel of PMSCs; take measures to suppress violations of international humanitarian law committed by the personnel of PMSCs through appropriate means such as administrative or other regulatory measures as well as administrative, disciplinary or judicial sanctions, as appropriate.
15. Home States are responsible to implement their obligations under international human rights law, including by adopting such legislative and other measures as may be necessary to give effect to these obligations. To this end they have the obligation, in specific circumstances, to take appropriate measures to prevent, investigate and provide effective remedies for relevant misconduct of PMSCs and their personnel.
16. Home States have an obligation to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, grave breaches of the Geneva Conventions and, where applicable, Additional Protocol I, and have an obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and bring such persons, regardless of their nationality, before their own courts. They may also, if they prefer, and in accordance with the provisions of their own legislation, hand such persons over for trial to another State concerned, provided such State has made out a *prima facie* case, or to an international criminal tribunal.
17. Home States also have an obligation to investigate and, as required by international law, or otherwise as appropriate, prosecute, extradite or surrender persons suspected of having committed other crimes under international law, such as torture or hostage taking, in accordance with their obligations under international law. Such prosecutions are to be carried out in accordance with international law providing for fair trial, mindful that sanctions be commensurate with the gravity of the crime.

### **D. All other States**

18. All other States have an obligation, within their power, to ensure respect for international humanitarian law. They have an obligation to refrain from encouraging or assisting in violations of international humanitarian law by any party to an armed conflict.
19. All other States are responsible to implement their obligations under international human rights law, including by adopting such legislative and other measures as may be necessary to give effect to these obligations.
20. All other States have an obligation to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, grave breaches of the Geneva Conventions and, where applicable, Additional Protocol I, and have an obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and bring such persons, regardless of their nationality, before their own courts. They may also, if they prefer, and in accordance with the provisions of their own legislation, hand such persons over for trial to another State concerned, provided such State has made out a *prima facie* case, or to an international criminal tribunal.
21. All other States also have an obligation to investigate and, as required by international law, or otherwise as appropriate, prosecute, extradite or surrender persons suspected of having committed other crimes under international law, such as torture or hostage taking, in accordance with their obligations under international law. Such prosecutions are to be carried out in accordance with international law providing for fair trial, mindful that sanctions be commensurate with the gravity of the crime.

#### **E. PMSCs and their personnel**

22. PMSCs are obliged to comply with international humanitarian law or human rights law imposed upon them by applicable national law, as well as other applicable national law such as criminal law, tax law, immigration law, labour law, and specific regulations on private military or security services.
23. The personnel of PMSCs are obliged to respect the relevant national law, in particular the national criminal law, of the State in which they operate, and, as far as applicable, the law of the States of their nationality.
24. The status of the personnel of PMSCs is determined by international humanitarian law, on a case-by-case basis, in particular according to the nature and circumstances of the functions in which they are involved.
25. If they are civilians under international humanitarian law, the personnel of PMSCs may not be the object of attack, unless and for such time as they directly participate in hostilities.
26. The personnel of PMSCs:
  - a) are obliged, regardless of their status, to comply with applicable international humanitarian law;
  - b) are protected as civilians under international humanitarian law, unless they are incorporated into the regular armed forces of a State or are members of organized armed forces, groups or units under a command responsible to the

- State; or otherwise lose their protection as determined by international humanitarian law;
- c) are entitled to prisoner-of-war status in international armed conflict if they are persons accompanying the armed forces meeting the requirements of article 4A(4) of the Third Geneva Convention;
  - d) to the extent they exercise governmental authority, have to comply with the State's obligations under international human rights law;
  - e) are subject to prosecution if they commit conduct recognized as crimes under applicable national or international law.

#### **F. Superior responsibility**

27. Superiors of PMSC personnel, such as:
- a) governmental officials, whether they are military commanders or civilian superiors, or
  - b) directors or managers of PMSCs, may be liable for crimes under international law committed by PMSC personnel under their effective authority and control, as a result of their failure to properly exercise control over them, in accordance with the rules of international law. Superior responsibility is not engaged solely by virtue of a contract.

## **Part Two**

### **Good practices relating to private military and security companies**

#### **Introduction**

This Part contains a description of good practices that aims to provide guidance and assistance to States in ensuring respect for international humanitarian law and human rights law and otherwise promoting responsible conduct in their relationships with PMSCs operating in areas of armed conflict. They may also provide useful guidance for States in their relationships with PMSCs operating outside of areas of armed conflict.

The good practices do not have legally binding effect and are not meant to be exhaustive. It is understood that a State may not have the capacity to implement all the good practices, and that no State has the legal obligation to implement any particular good practice, whether that State is a Contracting State, a Territorial State, or a Home State. States are invited to consider these good practices in defining their relationships with PMSCs, recognizing that a particular good practice may not be appropriate in all circumstances and emphasizing that this Part is not meant to imply that States should necessarily follow all these practices as a whole.

The good practices are intended, *inter alia*, to assist States to implement their obligations under international humanitarian law and human rights law. However, in considering regulation, States may also need to take into account obligations they have under other



branches of international law, including as members of international organizations such as the United Nations, and under international law relating to trade and government procurement. They may also need to take into account bilateral agreements between Contracting States and Territorial States. Moreover, States are encouraged to fully implement relevant provisions of international instruments to which they are Parties, including anti-corruption, anti-organized crime and firearms conventions. Furthermore, any of these good practices will need to be adapted in practice to the specific situation and the State's legal system and capacity.

### **A. Good practices for Contracting States**

States contemplating to contract PMSCs should evaluate whether their legislation, as well as procurement and contracting practices, are adequate for contracting PMSCs. This is particularly relevant where Contracting States use the services of a PMSC in a State where law enforcement or regulatory capacities are compromised.

In many instances, the good practices for Contracting States may also indicate good practices for other clients of PMSCs, such as international organizations, NGOs and companies.

In this sense, good practices for Contracting States include the following:

#### **I. Determination of services**

1. To determine which services may or may not be contracted out to PMSCs; in determining which services may not be contracted out, Contracting States take into account factors such as whether a particular service could cause PMSC personnel to become involved in direct participation in hostilities

#### **II. Procedure for the selection and contracting of PMSCs**

2. To assess the capacity of the PMSC to carry out its activities in conformity with relevant national law, international humanitarian law and international human rights law, taking into account the inherent risk associated with the services to be performed, for instance by:
  - a) acquiring information relating to the principal services the PMSC has provided in the past;
  - b) obtaining references from clients for whom the PMSC has previously provided similar services to those the Contracting State is seeking to acquire;
  - c) acquiring information relating to the PMSC's ownership structure and conducting background checks on the PMSC and its superior personnel, taking into account relations with subcontractors, subsidiary corporations and ventures.
3. To provide adequate resources and draw on relevant expertise for selecting and contracting PMSCs.

4. To ensure transparency and supervision in the selection and contracting of PMSCs. Relevant mechanisms may include:
  - a) public disclosure of PMSC contracting regulations, practices and processes;
  - b) public disclosure of general information about specific contracts, if necessary redacted to address national security, privacy and commercial confidentiality requirements;
  - c) publication of an overview of incident reports or complaints, and sanctions taken where misconduct has been proven; if necessary redacted to address national security, privacy and commercial confidentiality requirements;
  - d) oversight by parliamentary bodies, including through annual reports or notification of particular contracts to such bodies.

### **III. Criteria for the selection of PMSCs**

5. To adopt criteria that include quality indicators relevant to ensuring respect for relevant national law, international humanitarian law and human rights law, as set out in good practices 6 to 13. Contracting States should consider ensuring that lowest price not be the only criterion for the selection of PMSCs.
6. To take into account, within available means, the past conduct of the PMSC and its personnel, which includes ensuring that the PMSC has:
  - a) no reliably attested record of involvement in serious crime (including organized crime, violent crime, sexual offences, violations of international humanitarian law, bribery and corruption) and, insofar as the PMSC or its personnel had engaged in past unlawful conduct, has appropriately remedied such conduct, including by effectively cooperating with official authorities, taking disciplinary measures against those involved, and, where appropriate and consistent with findings of wrongdoing, providing individuals injured by their conduct with appropriate reparation;
  - b) conducted comprehensive inquiries within applicable law regarding the extent to which any of its personnel, particularly those who are required to carry weapons as part of their duties, have a reliably attested record of not having been involved in serious crime or have not been dishonourably discharged from armed or security forces;
  - c) not previously been rejected from a contract due to misconduct of the PMSC or its personnel.
7. To take into account the financial and economic capacity of the PMSC, including for liabilities that it may incur.
8. To take into account whether it and its personnel possess or are in the process of obtaining requisite registrations, licenses or authorizations.
9. To take into account whether it maintains accurate and up-to-date personnel and property records, in particular, with regard to weapons and ammunition, available for inspection on demand by the Contracting State and other appropriate authorities
10. To take into account that the PMSC's personnel are sufficiently trained, both prior to any deployment and on an ongoing basis, to respect relevant national law, international humanitarian law and human rights law; and to establish goals to

facilitate uniformity and standardization of training requirements. Training could include general and task- and context-specific topics, preparing personnel for performance under the specific contract and in the specific environment, such as:

- a) rules on the use of force and firearms;
- b) international humanitarian law and human rights law;
- c) religious, gender, and cultural issues, and respect for the local population;
- d) handling complaints by the civilian population, in particular by transmitting them to the appropriate authority;
- e) measures against bribery, corruption, and other crimes.

Contracting States consider continuously reassessing the level of training by, for example, requiring regular reporting on the part of PMSCs.

11. To take into account whether the PMSC:
  - a) acquires its equipment, in particular its weapons, lawfully;
  - b) uses equipment, in particular weapons, that is not prohibited by international law;
  - c) has complied with contractual provisions concerning return and/or disposal of weapons and ammunition.
12. To take into account the PMSC's internal organization and regulations, such as:
  - a) the existence and implementation of policies relating to international humanitarian law and human rights law, especially on the use of force and firearms, as well as policies against bribery, corruption, and other crimes;
  - b) the existence of monitoring and supervisory as well as internal accountability mechanisms, such as:
    - i. internal investigation and disciplinary arrangements in case of allegations of wrong-doing by its personnel;
    - ii. mechanisms enabling persons affected by the conduct of the personnel of the PMSC to lodge a complaint, including both third party complaint mechanisms and whistle-blower protection arrangements; and
    - iii. regular performance reporting, specific incident reporting, and reporting on demand to the Contracting State and under certain circumstances other appropriate authorities;
    - iv. requiring PMSC personnel and its subcontracted personnel to report any misconduct to the PMSC's management or a competent authority.
13. To consider the respect of the PMSC for the welfare of its personnel, as protected by labour law and other relevant national law. Relevant factors may include:
  - a) providing personnel a copy of any contract to which they are party in a language they understand;
  - b) providing personnel with adequate pay and remuneration arrangements commensurate to their responsibilities and working conditions;
  - c) adopting operational safety and health policies;
  - d) ensuring personnel unrestricted access to their own travel documents; and
  - e) preventing unlawful discrimination in employment.

#### **IV. Terms of contract with PMSCs**

14. To include contractual clauses and performance requirements that ensure respect for relevant national law, international humanitarian law and human rights law by

the contracted PMSC. Such clauses, reflecting and implementing the quality indicators referred to above as selection criteria, may include:

- a) past conduct (good practice 6);
- b) financial and economic capacity (good practice 7)
- c) possession of required registration, licenses or authorizations (good practice 8);
- d) personnel and property records (good practice 9);
- e) training (good practice 10);
- f) lawful acquisition and use of equipment, in particular weapons (good practice 11);
- g) internal organization and regulation and accountability (good practice 12);
- h) welfare of personnel (good practice 13);

Contractual clauses may also provide for the Contracting State's ability to terminate the contract for failure to comply with contractual provisions. They may also specify the weapons required for contract performance, that PMSCs obtain appropriate visas or other authorizations from the Territorial State, and that appropriate reparation be provided to those harmed by the misconduct of PMSCs and their personnel.

15. To require by contract that the conduct of any subcontracted PMSC is in conformity with relevant national law, international humanitarian law and international human rights law, including by:
  - a) establishing the criteria and qualifications for the selection and ongoing employment of subcontracted PMSCs and personnel;
  - b) requiring the PMSC to demonstrate that subcontractors comply with equivalent requirements as the PMSC initially contracted by the Contracting State;
  - c) ensuring that the PMSC is liable, as appropriate and within applicable law, for the conduct of its subcontractors.
16. To require, if consistent with force protection requirements and safety of the assigned mission, that the personnel of the PMSC be personally identifiable whenever they are carrying out activities in discharge of their responsibilities under a contract. Identification should:
  - a) be visible from a distance where mission and context allow, or consist of a non-transferable identification card that is shown upon demand;
  - b) allow for a clear distinction between a PMSC's personnel and the public authorities in the State where the PMSC operates.

The same should apply to all means of transport used by PMSCs.

17. To consider pricing and duration of a specific contract as a way to promote relevant international humanitarian law and human rights law. Relevant mechanisms may include:
  - a) securities or bonds for contractual performance;
  - b) financial rewards or penalties and incentives;
  - c) opportunities to compete for additional contracts.
18. To require, in consultation with the Territorial State, respect for relevant regulations and rules of conduct by PMSCs and their personnel, including rules on the use of force and firearms, such as:

- a) using force and firearms only when necessary in self-defence or defence of third persons;
- b) immediate reporting to and cooperation with competent authorities, including the appropriate contracting official, in the case of use of force and firearms.

#### **V. Monitoring compliance and ensuring accountability**

19. To provide for criminal jurisdiction in their national legislation over crimes under international law and their national law committed by PMSCs and their personnel and, in addition, to consider establishing:
  - a) corporate criminal responsibility for crimes committed by the PMSC, consistent with the Contracting State's national legal system;
  - b) criminal jurisdiction over serious crimes committed by PMSC personnel abroad
  
20. To provide for non-criminal accountability mechanisms for improper or unlawful conduct of PMSCs and their personnel, including:
  - a) contractual sanctions commensurate to the conduct, including :
    - i. immediate or graduated termination of the contract;
    - ii. financial penalties;
    - iii. removal from consideration for future contracts, possibly for a set time period;
    - iv. removal of individual wrongdoers from the performance of the contract;
  - b) referral of the matter to competent investigative authorities;
  - c) providing for civil liability, as appropriate.
  
21. To provide for, in addition to the measures in good practices 19 and 20, appropriate administrative and other monitoring mechanisms to ensure the proper execution of the contract and the accountability of contracted PMSCs and their personnel for their improper and unlawful conduct; in particular to:
  - a) ensure that those mechanisms are adequately resourced and have independent audit and investigation capacity;
  - b) provide Contracting State government personnel on site with the capacity and authority to oversee proper execution of the contract by the PMSC and the PMSC's subcontractors;
  - c) train relevant government personnel, such as military personnel, for foreseeable interactions with PMSC personnel;
  - d) collect information concerning PMSCs and personnel contracted and deployed, and on violations and investigations concerning their alleged improper and unlawful conduct;
  - e) establish control arrangements, allowing it to veto or remove particular PMSC personnel during contractual performance;
  - f) engage PMSCs, Territorial States, Home States, trade associations, civil society and other relevant actors to foster information sharing and develop such mechanisms.
  
22. When negotiating agreements with Territorial States which contain rules affecting the legal status of and jurisdiction over PMSCs and their personnel:
  - a) to consider the impact of the agreements on the compliance with national laws and regulations;

- b) to address the issue of jurisdiction and immunities to ascertain proper coverage and appropriate civil, criminal, and administrative remedies for misconduct, in order to ensure accountability of PMSCs and their personnel.
23. To cooperate with investigating or regulatory authorities of Territorial and Home States, as appropriate, in matters of common concern regarding PMSCs.

## **B. Good practices for Territorial States**

The following good practices aim to provide guidance to Territorial States for governing the supply of military and security services by PMSCs and their personnel on their territory. Territorial States should evaluate whether their domestic legal framework is adequate to ensure that the conduct of PMSCs and their personnel is in conformity with relevant national law, international humanitarian law and human rights law or whether it needs to establish further arrangements to regulate the activities of PMSCs.

Acknowledging the particular challenges faced by Territorial States in armed conflict, Territorial States may accept information provided by the Contracting State concerning the ability of a PMSC to carry out its activities in conformity with international humanitarian law, human rights law and relevant good practices

In this sense, good practices for Territorial States include the following:

### **I. Determination of services**

24. To determine which services may or may not be carried out on their territory by PMSCs or their personnel; in determining which services may not be carried out, Territorial States take into account factors such as whether a particular service could cause PMSC personnel to become involved in direct participation in hostilities.

### **II. Authorization to provide military and security services**

25. To require PMSCs to obtain an authorization to provide military and security services in their territory (“authorization”), including by requiring:
- a) PMSCs to obtain an operating license valid for a limited and renewable period (“corporate operating license”), or for specific services (“specific operating license”), taking into account the fulfilment of the quality criteria set out in good practices 31 to 38; and/or;
  - b) individuals to register or obtain a license in order to carry out military or security services for PMSCs.

### **III. Procedure with regard to authorizations**

26. To designate a central authority competent for granting authorizations.
27. To allocate adequate resources and trained personnel to handle authorizations properly and timely.
28. To assess, in determining whether to grant an authorization, the capacity of the PMSC to carry out its activities in conformity with relevant national law, international humanitarian law and international human rights law, taking into

account the inherent risk associated with the services to be performed, for instance by:

- a) acquiring information relating to the principal services the PMSC has provided in the past;
- b) obtaining references from clients for whom the PMSC has previously provided similar services or clients in the Territorial State;
- c) acquiring information relating to the PMSC's ownership structure and conduct background checks on the PMSC and its personnel, taking into account relations with subcontractors, subsidiary corporations and ventures, or obtain information from the Contracting State on these matters.

29. To ensure transparency with regard to authorizations. Relevant mechanisms may include:
  - a) public disclosure of authorization regulations and procedures;
  - b) public disclosure of general information on granted authorizations, including on the identity of authorized PMSCs and their number of personnel, if necessary redacted to address national security, privacy and commercial confidentiality requirements;
  - c) publication of an overview of incident reports or complaints, and sanctions taken where misconduct has been proven; if necessary redacted to address national security, privacy and commercial confidentiality requirements;
  - d) oversight by parliamentary bodies, including through annual reports or notification of particular contracts to such bodies;
  - e) publishing and adhering to fair and non-discriminatory fee schedules for authorizations.

#### **IV. Criteria for granting an authorization**

30. To ensure that PMSCs fulfil certain quality criteria relevant for the respect of relevant national law, international humanitarian law and human rights law by the PMSC and its personnel, including those set out below.
31. To require that the conduct of PMSCs and of any PMSC subcontracted is in conformity with relevant national law, international humanitarian law and international human rights law which includes ensuring that:
  - a) the PMSC notifies any subcontracting of military and security services to the authorization authority;
  - b) the PMSC can demonstrate that its subcontractors comply with equivalent requirements as the PMSC which initially obtained an authorization by the Territorial State;
  - c) the subcontractor is in possession of an authorization;
  - d) the PMSC initially granted authorization is liable, as appropriate and within applicable law, for the conduct of its subcontractors.
32. To take into account, within available means, the past conduct of the PMSC and its personnel, which includes ensuring that the PMSC has:
  - a) no reliably attested record of involvement in serious crime (including organized crime, violent crime, sexual offences, violations of international humanitarian law, bribery and corruption) and, insofar as the PMSC or its

personnel had engaged in past unlawful conduct, has appropriately dealt with such conduct, including by effectively cooperating with official authorities, taking disciplinary measures against those involved, and where appropriate and consistent with findings of wrongdoing, providing individuals injured by their conduct with appropriate reparation;

- b) conducted comprehensive inquiries within applicable law regarding the extent to which any of its personnel, particularly those who are required to carry weapons as part of their duties, have a reliably attested record of not having been involved in serious crime or have not been dishonourably discharged from armed or security forces;
  - c) not previously had an operating license revoked for misconduct of the PMSC or its personnel.
33. To take into account the financial and economic capacity of the PMSC, including for liabilities that it may incur.
34. To take into account whether the PMSC maintains accurate and up-to-date personnel and property records, in particular, with regard to weapons and ammunition, available for inspection on demand by the Territorial State and other authorities.
35. To take into account that the PMSC's personnel are sufficiently trained, both prior to any deployment and on an ongoing basis, to respect relevant national law, international humanitarian law and human rights law; and to establish goals to facilitate uniformity and standardization of training requirements. Training could include general and task- and context-specific topics, preparing personnel for performance under the specific contract and in the specific environment, such as:
- a) rules on the use of force and weapons;
  - b) international humanitarian law and human rights law;
  - c) religious, gender, and cultural issues, and respect for the local population;
  - d) complaints handling;
  - e) measures against bribery, corruption, and other crimes.

Territorial States consider continuously reassessing the level of training by, for example, requiring regular reporting on the part of PMSCs.

36. Not to grant an authorization to a PMSC whose weapons are acquired unlawfully or whose use is prohibited by international law.
37. To take into account the PMSC's internal organization and regulations, such as:
- a) the existence and implementation of policies relating to international humanitarian law and human rights law, especially on the use of force and firearms, as well as policies against bribery and corruption;
  - b) the existence of monitoring and supervisory measures as well as internal accountability mechanisms, such as
    - i. internal investigation and disciplinary arrangements in case of allegations of wrong-doing by its personnel;



- ii. mechanisms enabling persons affected by the conduct of the personnel of the PMSC to lodge a complaint, including both third party complaints mechanisms and whistle-blower protection arrangements;
  - iii. regular reporting on the performance of the assignment and/or specific incident reporting;
  - iv. requiring PMSC personnel and its subcontracted personnel to report any misconduct to the PMSC's management or a competent authority.
38. To consider the respect of the PMSC for the welfare of its personnel.
39. To take into account, in considering whether to grant a license or to register an individual, good practices 32 (past conduct) and 35 (training).

#### **V. Terms of authorization**

40. To include clauses to ensure that the conduct of the PMSC and its personnel is continuously in conformity with relevant national law, international humanitarian law and international human rights law. The authorization includes, where appropriate, clauses requiring the PMSC and its personnel to implement the quality criteria referred to above as criteria for granting general and/or specific operating licenses and relating to:
- a) past conduct (good practice 32);
  - b) financial and economic capacity (good practice 33);
  - c) personnel and property records (good practice 34);
  - d) training (good practice 35);
  - e) lawful acquisitions (good practice 36);
  - f) internal organization and regulation and accountability (good practice 37);
  - g) welfare of personnel (good practice 38);
41. To require the PMSC to post a bond that would be forfeited in case of misconduct or non-compliance with the authorization, provided that the PMSC has a fair opportunity to rebut allegations and address problems.
42. To determine, when granting a specific operating license, a maximum number of PMSC personnel and equipment understood to be necessary to provide the services.

#### **VI. Rules on the provision of services by PMSCs and their personnel**

43. To have in place appropriate rules on the use of force and firearms by PMSCs and their personnel, such as:
- a) using force and firearms only when necessary in self-defence or defence of third persons;
  - b) immediately reporting to and cooperation with competent authorities in the case of use of force and firearms.
44. To have in place appropriate rules on the possession of weapons by PMSCs and their personnel, such as:
- a) limiting the types and quantity of weapons and ammunition that a PMSC may import, possess or acquire;

- b) requiring the registration of weapons, including their serial number and calibre, and ammunition, with a competent authority;
  - c) requiring PMSC personnel to obtain an authorization to carry weapons that is shown upon demand;
  - d) limiting the number of employees allowed to carry weapons in a specific context or area;
  - e) requiring the storage of weapons and ammunition in a secure and safe facility when personnel are off duty;
  - f) requiring that PMSC personnel carry authorized weapons only while on duty
  - g) controlling the further possession and use of weapons and ammunition after an assignment is completed, including return to point of origin or other proper disposal of weapons and ammunition.
45. To require, if consistent with force protection requirements and safety of the assigned mission, that the personnel of the PMSC be personally identifiable whenever they are carrying out activities in discharge of their responsibilities under a contract. Identification should:
- a) be visible from a distance where mission and context allow, or consist of a non-transferable identification card that is shown upon demand;
  - b) allow for a clear distinction between a PMSC's personnel and the public authorities in the State where the PMSC operates.

The same should apply to all means of transportation used by PMSCs.

#### **VII. Monitoring compliance and ensuring accountability**

46. To monitor compliance with the terms of the authorization, in particular:
- a) establish or designate an adequately resourced monitoring authority;
  - b) ensure that the civilian population is informed about the rules of conduct by which PMSC have to abide and available complaint mechanisms;
  - c) requesting local authorities to report on misconduct by PMSCs or their personnel;
  - d) investigate reports of wrongdoing.
47. To provide a fair opportunity for PMSCs to respond to allegations that they have operated without or in violation of an authorization.
48. To impose administrative measures, if it is determined that a PMSC has operated without or in violation of an authorization; such measures may include:
- a) revocation or suspension of the authorization or putting the PMSC on notice of either of these steps in case remedial measures are not taken within a set period of time;
  - b) removing specific PMSC personnel under the penalty of revoking or suspending the authorization;
  - c) prohibition to re-apply for an authorization in the future or for a set period of time;
  - d) forfeiture of bonds or securities;
  - e) financial penalties.
49. To provide for criminal jurisdiction in their national legislation over crimes under international law and their national law committed by PMSCs and their personnel

and, in addition, to consider establishing corporate criminal responsibility for crimes committed by the PMSC, consistent with the Territorial State's national legal system.

50. To provide for non-criminal accountability mechanisms for improper and unlawful conduct of PMSC and its personnel, including:
  - a) providing for civil liability;
  - b) otherwise requiring PMSCs, or their clients, to provide reparation to those harmed by the misconduct of PMSCs and their personnel.
51. When negotiating agreements with Contracting States which contain rules affecting the legal status of and jurisdiction over PMSCs and their personnel:
  - a) to consider the impact of the agreements on the compliance with national laws and regulations;
  - b) to address the issue of jurisdiction and immunities to ascertain proper coverage and appropriate civil, criminal, and administrative remedies for misconduct, in order to ensure accountability of PMSCs and their personnel.
52. To cooperate with investigating and regulatory authorities of Contracting and Home States in matters of common concern regarding PMSCs

### **C. Good practices for Home States**

The following good practices aim to provide guidance to Home States for governing the supply of military and security services by PMSCs and their personnel abroad ("export"). It is recognized that other good practices for regulation – such as regulation of standards through trade associations and through international cooperation – will also provide guidance for regulating PMSCs, but have not been elaborated here.

In this understanding, Home States should evaluate whether their domestic legal framework, be it central or federal, is adequately conducive to respect for relevant international humanitarian law and human rights law by PMSCs and their personnel, or whether, given the size and nature of their national private military and security industry, additional measures should be adopted to encourage such respect and to regulate the activities of PMSCs. When considering the scope and nature of any licensing or regulatory regime, Home States should take particular notice of regulatory regimes by relevant Contracting and Territorial States, in order to minimize the potential for duplicative or overlapping regimes and to focus efforts on areas of specific concern for Home States.

In this sense, good practices for Home States include the following:

#### **I. Determination of services**

53. To determine which services of PMSCs may or may not be exported; in determining which services may not be exported, Home States take into account factors such as whether a particular service could cause PMSC personnel to become involved in direct participation in hostilities.

## **II. Establishment of an authorization system**

54. To consider establishing an authorization system for the provision of military and security services abroad through appropriate means, such as requiring an operating license valid for a limited and renewable period (“corporate operating license”), for specific services (“specific operating license”), or through other forms of authorization (“export authorization”). If such a system of authorization is established, the good practices 57 to 67 set out the procedure, quality criteria and terms that may be included in such a system.
55. To have in place appropriate rules on the accountability, export, and return of weapons and ammunition by PMSCs.
56. To harmonize their authorization system and decisions with those of other States and taking into account regional approaches relating to authorization systems.

## **III. Procedure with regard to authorizations**

57. To assess the capacity of the PMSC to carry out its activities in respect of relevant national law, international humanitarian law and international human rights law, taking into account the inherent risk associated with the services to be performed, for instance by:
  - a) acquiring information relating to the principal services the PMSC has provided in the past;
  - b) obtaining references from clients for whom the PMSC has previously provided similar services or clients in the Territorial State;
  - c) acquiring information relating to the PMSC’s ownership structure and conduct background checks on the PMSC and its personnel, taking into account relations with subcontractors, subsidiary corporations and ventures.
58. To allocate adequate resources and trained personnel to handle authorizations properly and timely.
59. To ensure transparency with regard to the authorization procedure. Relevant mechanisms may include
  - a) public disclosure of authorization regulations and procedures;
  - b) public disclosure of general information on specific authorizations, if necessary redacted to address national security, privacy and commercial confidentiality requirements;
  - c) oversight by parliamentary bodies, including through annual reports or notification of particular contracts to such bodies;
  - d) publishing and adhering to fair and non-discriminatory fee schedules.

## **IV. Criteria for granting an authorization**

60. To take into account the past conduct of the PMSC and its personnel, which include ensuring that the PMSC has:
  - a) no reliably attested record of involvement in serious crime (including organized crime, violent crime, sexual offences, violations of international humanitarian law, bribery and corruption) and, insofar as the PMSC or its

personnel had engaged in past unlawful conduct, has appropriately dealt with such conduct, including by effectively cooperating with official authorities, taking disciplinary measures against those involved, and where appropriate and consistent with findings of wrongdoing, providing individuals injured by their conduct with appropriate reparation;

- b) conducted comprehensive inquiries within applicable law regarding the extent to which its personnel, particularly those who are required to carry weapons as part of their duties, have a reliably attested record of not having been involved in serious crime or have not been dishonourably discharged from armed or security forces;
  - c) not previously had an authorization revoked for misconduct of the PMSC or its personnel.
61. To take into account the financial and economic capacity of the PMSC, including for liabilities that it may incur.
62. To take into account whether the PMSC maintains accurate and up-to-date personnel and property records, in particular, with regard to weapons and ammunition, available for inspection on demand by competent authorities.
63. To take into account that the PMSC's personnel are sufficiently trained, both prior to any deployment and on an ongoing basis, to respect relevant national law, international humanitarian law and human rights law; and to establish goals to facilitate uniformity and standardization of training requirements. Training could include general and task- and context-specific topics, preparing personnel for performance under the specific contract and in the specific environment, such as:
- a) rules on the use of force and firearms;
  - b) international humanitarian law and human rights law;
  - c) religious, gender, and cultural issues, and respect for the local population;
  - d) complaints handling;
  - e) measures against bribery, corruption and other crimes.

Home States consider continuously reassessing the level of training by, for example, requiring regular reporting on the part of PMSCs.

64. To take into account whether the PMSC's equipment, in particular its weapons, is acquired lawfully and its use is not prohibited by international law.
65. To take into account the PMSC's internal organization and regulations, such as:
- a) the existence and implementation of policies relating to international humanitarian law and human rights law;
  - b) the existence of monitoring and supervisory as well as internal accountability mechanisms, such as:
    - i. internal investigation and disciplinary arrangements in case of allegations of wrong-doing by its personnel
    - ii. mechanisms enabling persons affected by the conduct of the personnel of the PMSC to lodge a complaint, including both third party complaints mechanisms and whistle-blower protection arrangements.
66. To consider the respect of the PMSC for the welfare of its personnel as protected by labour law and other relevant national law.

## **V. Terms of authorization granted to PMSCs**

67. To include clauses to ensure that the conduct of the PMSC and its personnel respect relevant national law, international humanitarian law and international human rights law. Such clauses, reflecting and implementing the quality criteria referred to above as criteria for granting authorizations, may include:
- a) past conduct (good practice 60);
  - b) financial and economic capacity (good practice 61);
  - c) personnel and property records (good practice 62);
  - d) training (good practice 62);
  - e) lawful acquisitions (good practice 64);
  - f) internal organization and regulation and accountability (good practice 65);
  - g) welfare of personnel (good practice 66).

## **VI. Monitoring compliance and ensuring accountability**

68. To monitor compliance with the terms of the authorization, in particular by establishing close links between its authorities granting authorizations and its representatives abroad and/or with the authorities of the Contracting or Territorial State.
69. To impose sanctions for PMSCs operating without or in violation of an authorization, such as:
- a) revocation or suspension of the authorization or putting the PMSC on notice of either of these steps in case remedial measures are not taken within a set period of time;
  - b) prohibition to re-apply for an authorization in the future or for a set period of time;
  - c) civil and criminal fines and penalties.
70. To support Territorial States in their efforts to establish effective monitoring over PMSCs.
71. To provide for criminal jurisdiction in their national legislation over crimes under international law and their national law committed by PMSCs and their personnel and, in addition, consider establishing:
- a) corporate criminal responsibility for crimes committed by the PMSC, consistent with the Home State's national legal system;
  - b) criminal jurisdiction over serious crimes committed by PMSC personnel abroad.
72. To provide for non-criminal accountability mechanisms for improper and unlawful conduct of PMSCs and their personnel, including:
- a) providing for civil liability;
  - b) otherwise requiring PMSCs to provide reparation to those harmed by the misconduct of PMSCs and their personnel.
73. To cooperate with investigating or regulatory authorities of Contracting and Territorial States, as appropriate, in matters of common concern regarding PMSCs



**INTERNATIONAL CODE OF CONDUCT FOR PRIVATE SECURITY  
SERVICE PROVIDERS**

**9 November 2010**

**Contents**

	Paragr aphs	Page
A. PREAMBLE	1-8	
B. DEFINITIONS		
C. IMPLEMENTATION	9-12	
D. GENERAL PROVISIONS	13-15	
E. GENERAL COMMITMENTS	16-27	
F. SPECIFIC PRINCIPLES REGARDING THE CONDUCT OF PERSONNEL		
General Conduct	28	
Rules for the Use of Force	29	
Use of Force	30-32	
Detention	33	
Apprehending Persons	34	
Prohibition of Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment	35-37	
Sexual Exploitation and Abuse or Gender-Based Violence	38	
Human Trafficking	39	
Prohibition of Slavery and Forced Labour	40	
Prohibition on the Worst Forms of Child Labour	41	
Discrimination	42	
Identification and Registering	43	
G. SPECIFIC COMMITMENTS REGARDING MANAGEMENT AND GOVERNANCE		
	44	
Selection and Vetting of Personnel	45-49	
Selection and Vetting of Subcontractors	50-51	
Company Policies and Personnel Contracts	52-54	
Training of Personnel	55	
Management of Weapons	56-58	
Weapons Training	59	
Management of Materiel of War	60-62	
Incident Reporting	63	
Safe and Healthy Working Environment	64	
Harassment	65	
Grievance Procedures	66-68	
Meeting Liabilities	69	
H. REVIEW	70	



## A. PREAMBLE

1. Private Security Companies and other Private Security Service Providers (collectively “PSCs”) play an important role in protecting state and non-state clients engaged in relief, recovery, and reconstruction efforts, commercial business operations, diplomacy and military activity. In providing these services, the activities of PSCs can have potentially positive and negative consequences for their clients, the local population in the area of operation, the general security environment, the enjoyment of human rights and the rule of law.
2. The *Montreux Document On Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies During Armed Conflict* recognizes that well-established rules of international law apply to States in their relations with private security service providers and provides for good practices relating to PSCs. The “Respect, Protect, Remedy” framework developed by the Special Representative of the United Nations (UN) Secretary-General on Business and Human Rights, and welcomed by the UN Human Rights Council, entails acting with due diligence to avoid infringing the rights of others.
3. Building on these foundations, the Signatory Companies to this International Code of Conduct for Private Security Service Providers (the “Code”) endorse the principles of the Montreux Document and the aforementioned “Respect, Protect, Remedy” framework as they apply to PSCs. In so doing, the Signatory Companies commit to the responsible provision of Security Services so as to support the rule of law, respect the human rights of all persons, and protect the interests of their clients.
4. The Signatory Companies affirm that they have a responsibility to respect the human rights of, and fulfil humanitarian responsibilities towards, all those affected by their business activities, including Personnel, Clients, suppliers, shareholders, and the population of the area in which services are provided. The Signatory Companies also recognize the importance of respecting the various cultures encountered in their work, as well as the individuals they come into contact with as a result of those activities.
5. The purpose of this Code is to set forth a commonly-agreed set of principles for PSCs and to establish a foundation to translate those principles into related standards as well as governance and oversight mechanisms.
6. Signatory Companies commit to the following, as set forth in this Code:
  - a. to operate in accordance with this Code;
  - b. to operate in accordance with applicable laws and regulations, and in accordance with relevant corporate standards of business conduct;
  - c. to operate in a manner that recognizes and supports the rule of law; respects human rights, and protects the interests of their clients;
  - d. to take steps to establish and maintain an effective internal governance framework in order to deter, monitor, report, and effectively address adverse impacts on human rights;

- e. to provide a means for responding to and resolving allegations of activity that violates any applicable national or international law or this Code; and
  - f. to cooperate in good faith with national and international authorities exercising proper jurisdiction, in particular with regard to national and international investigations of violations of national and international criminal law, of violations of international humanitarian law, or of human rights abuses.
7. Those establishing this Code recognize that this Code acts as a founding instrument for a broader initiative to create better governance, compliance and accountability. Recognizing that further effort is necessary to implement effectively the principles of this Code, Signatory Companies accordingly commit to work with states, other Signatory Companies, Clients and other relevant stakeholders after initial endorsement of this Code to, within 18 months:
- a. Establish objective and measurable standards for providing Security Services based upon this Code, with the objective of realizing common and internationally-recognized operational and business practice standards; and
  - b. Establish external independent mechanisms for effective governance and oversight, which will include Certification of Signatory Companies' compliance with the Code's principles and the standards derived from the Code, beginning with adequate policies and procedures, Auditing and Monitoring of their work in the field, including Reporting, and execution of a mechanism to address alleged violations of the Code's principles or the standards derived from the Code;
- and thereafter to consider the development of additional principles and standards for related services, such as training of external forces, the provision of maritime security services and the participation in operations related to detainees and other protected persons.
8. Signature of this Code is the first step in a process towards full compliance. Signatory Companies need to: (1) establish and/or demonstrate internal processes to meet the requirements of the Code's principles and the standards derived from the Code; and (2) once the governance and oversight mechanism is established, become certified by and submit to ongoing independent Auditing and verification by that mechanism. Signatory Companies undertake to be transparent regarding their progress towards implementing the Code's principles and the standards derived from the Code. Companies will not claim they are certified under this Code until Certification has been granted by the governance and oversight mechanism as outlined below.

## **B. DEFINITIONS**

These definitions are only intended to apply exclusively in the context of this Code.

Auditing – a process through which independent auditors, accredited by the governance and oversight mechanism, conduct on-site audits, including in the field, on a periodic basis, gathering data to be reported to the governance and oversight mechanism which will in turn verify whether a Company is meeting requirements and if not, what remediation may be required.

Certification – a process through which the governance and oversight mechanism will certify that a Company's systems and policies meet the Code's principles and the standards derived from the Code and that a Company is undergoing Monitoring, Auditing, and verification, including in the field, by the governance and oversight mechanism. Certification is one element of a larger effort needed to ensure the credibility of any Implementation and oversight initiative.

Client – an entity that hires, has formerly hired, or intends to hire a PSC to perform Security Services on its behalf, including, as appropriate, where such a PSC subcontracts with another Company.

Company – any kind of business entity or form, such as a sole proprietorship, partnership, company (whether public or private), or corporation, and "Companies" shall be interpreted accordingly.

Competent Authority – any state or intergovernmental organization which has jurisdiction over the activities and/or persons in question and "Competent Authorities" shall be interpreted accordingly.

Complex Environments – any areas experiencing or recovering from unrest or instability, whether due to natural disasters or armed conflicts, where the rule of law has been substantially undermined, and in which the capacity of the state authority to handle the situation is diminished, limited, or non-existent.

Implementation – the introduction of policy, governance and oversight mechanisms and training of Personnel and/or subcontractors by Signatory Companies, necessary to demonstrate compliance with the Code's principles and the standards derived from this Code.

Monitoring – a process for gathering data on whether Company Personnel, or subcontractors, are operating in compliance with the Code's principles and standards derived from this Code.

Personnel – persons working for a PSC, whether as employees or under a contract, including its staff, managers and directors. For the avoidance of doubt, persons are considered to be personnel if they are connected to a PSC through an employment contract (fixed term, permanent or open-ended) or a contract of assignment (whether renewable or not), or if they are independent contractors,

or temporary workers and/or interns (whether paid or unpaid), regardless of the specific designation used by the Company concerned.

Private Security Companies and Private Security Service Providers (collectively “PSCs”) – any Company (as defined in this Code) whose business activities include the provision of Security Services either on its own behalf or on behalf of another, irrespective of how such Company describes itself.

Reporting – a process covered by necessary confidentiality and nondisclosure arrangements through which companies will submit to a governance and oversight mechanism a written assessment of their performance pursuant to a transparent set of criteria established by the mechanism.

Security Services – guarding and protection of persons and objects, such as convoys, facilities, designated sites, property or other places (whether armed or unarmed), or any other activity for which the Personnel of Companies are required to carry or operate a weapon in the performance of their duties.

Signatory Companies – are PSCs that have signed and agreed to operate in compliance with the Code’s principles and the standards derived from the Code and “Signatory Company” shall be interpreted accordingly

### **C. IMPLEMENTATION**

9. In recognition of the additional steps to be taken to support the Implementation of this Code – in particular the development of standards based on the Code (“standards”) and an independent governance and oversight mechanism (“the mechanism”) as outlined in the Preamble – Signatory Companies intend to, along with other interested stakeholders, convene regularly to review progress toward those steps.
10. Upon signature of the Code, Signatory Companies and other stakeholders will undertake to work with national standards bodies as appropriate to develop standards, with the intent that any national standards would eventually be harmonized in an international set of standards based on the Code.
11. Upon signature of the Code, Signatory Companies and other stakeholders will appoint a multi-stakeholder steering committee of 6-9 members who will function as a “temporary board”. This steering committee will be responsible for developing and documenting the initial arrangements for the independent governance and oversight mechanism, including by-laws or a charter which will outline mandate and governing policies for the mechanism. The Steering Committee will endeavour to complete a work plan for constituting the mechanism before the end of March 2011, and further to develop the bylaws/charter by the end of July 2011 and an operational plan before the end of November 2011.
12. After the independent governance and oversight mechanism has been constituted (by the adoption of bylaws/charter), the governance and oversight mechanism shall accept responsibility for maintenance and

administration of the Code, and shall determine whether and how it is appropriate for the mechanism and standards to be reflected in the text of the Code itself.

#### **D. GENERAL PROVISIONS**

13. This Code articulates principles applicable to the actions of Signatory Companies while performing Security Services in Complex Environments.
14. This Code complements and does not replace the control exercised by Competent Authorities, and does not limit or alter applicable international law or relevant national law. The Code itself creates no legal obligations and no legal liabilities on the Signatory Companies, beyond those which already exist under national or international law. Nothing in this Code shall be interpreted as limiting or prejudicing in any way existing or developing rules of international law.
15. This Code may be modified in accordance with procedures to be established by the governance and oversight mechanism.

#### **E. GENERAL COMMITMENTS**

16. Signatory Companies agree to operate in accordance with the principles contained in this Code. Signatory Companies will require that their Personnel, and all subcontractors or other parties carrying out Security Services under Signatory Company contracts, operate in accordance with the principles contained in this Code.
17. Signatory Companies will implement appropriate policies and oversight with the intent that the actions of their Personnel comply at all times with the principles contained herein.
18. Signatory Companies will make compliance with this Code an integral part of contractual agreements with Personnel and subcontractors or other parties carrying out Security Services under their contracts.
19. Signatory Companies will adhere to this Code, even when the Code is not included in a contractual agreement with a Client.
20. Signatory Companies will not knowingly enter into contracts where performance would directly and materially conflict with the principles of this Code, applicable national or international law, or applicable local, regional and international human rights law, and are not excused by any contractual obligation from complying with this Code. To the maximum extent possible, Signatory Companies will interpret and perform contracts in a manner that is consistent with this Code.
21. Signatory Companies will comply, and will require their Personnel to comply, with applicable law which may include international humanitarian law, and human rights law as imposed upon them by applicable national law, as well as all other applicable international and national law. Signatory Companies will exercise due diligence to ensure compliance with the law and with the principles contained in this Code, and will respect

the human rights of persons they come into contact with, including, the rights to freedom of expression, association, and peaceful assembly and against arbitrary or unlawful interference with privacy or deprivation of property.

22. Signatory Companies agree not to contract with, support or service any government, person, or entity in a manner that would be contrary to United Nations Security Council sanctions. Signatory Companies will not, and will require that their Personnel do not, participate in, encourage, or seek to benefit from any national or international crimes including but not limited to war crimes, crimes against humanity, genocide, torture, enforced disappearance, forced or compulsory labour, hostage-taking, sexual or gender-based violence, human trafficking, the trafficking of weapons or drugs, child labour or extrajudicial, summary or arbitrary executions.
23. Signatory Companies will not, and will require that their Personnel do not, invoke contractual obligations, superior orders or exceptional circumstances such as an armed conflict or an imminent armed conflict, a threat to national or international security, internal political instability, or any other public emergency, as a justification for engaging in any of the conduct identified in paragraph 22 of this Code.
24. Signatory Companies will report, and will require their Personnel to report, known or reasonable suspicion of the commission of any of the acts identified in paragraph 22 of this Code to the Client and one or more of the following: the Competent Authorities in the country where the act took place, the country of nationality of the victim, or the country of nationality of the perpetrator.
25. Signatory Companies will take reasonable steps to ensure that the goods and services they provide are not used to violate human rights law or international humanitarian law, and such goods and services are not derived from such violations.
26. Signatory Companies will not, and will require that their Personnel do not, consistent with applicable national and international law, promise, offer, or give to any public official, directly or indirectly, anything of value for the public official himself or herself or another person or entity, in order that the public official act or refrain from acting in the exercise of his or her official duties if such inducement is illegal. Signatory Companies will not, and will require their Personnel do not, solicit or accept, directly or indirectly, anything of value in exchange for not complying with national and international law and/or standards, or with the principles contained within this Code.
27. Signatory Companies are responsible for establishing a corporate culture that promotes awareness of and adherence by all Personnel to the principles of this Code. Signatory Companies will require their Personnel to comply with this Code, which will include providing sufficient training to ensure Personnel are capable of doing so.

## **F. SPECIFIC PRINCIPLES REGARDING THE CONDUCT OF PERSONNEL**

### **General Conduct**

28. Signatory Companies will, and will require their Personnel to, treat all persons humanely and with respect for their dignity and privacy and will report any breach of this Code.

### **Rules for the Use of Force**

29. Signatory Companies will adopt Rules for the Use of Force consistent with applicable law and the minimum requirements contained in the section on Use of Force in this Code and agree those rules with the Client.

### **Use of Force**

30. Signatory Companies will require their Personnel to take all reasonable steps to avoid the use of force. If force is used, it shall be in a manner consistent with applicable law. In no case shall the use of force exceed what is strictly necessary, and should be proportionate to the threat and appropriate to the situation.
31. Signatory Companies will require that their Personnel not use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury, or to prevent the perpetration of a particularly serious crime involving grave threat to life.
32. To the extent that Personnel are formally authorized to assist in the exercise of a state's law enforcement authority, Signatory Companies will require that their use of force or weapons will comply with all national and international obligations applicable to regular law enforcement officials of that state and, as a minimum, with the standards expressed in the United Nations Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990).

### **Detention**

33. Signatory Companies will only, and will require their Personnel 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. Signatory Companies will, and will require that their Personnel, treat all detained persons humanely and consistent with their status and protections under applicable human rights law or international humanitarian law, including in particular prohibitions on torture or other cruel, inhuman or degrading treatment or punishment.

### **Apprehending Persons**

34. Signatory Companies will, and will require their Personnel to, not take or hold any persons 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. Any such apprehension must be consistent with applicable national or international law and be reported to the Client without delay. Signatory Companies will, and will require that their Personnel to, treat all apprehended persons humanely and consistent with their status and protections under applicable human rights law or international humanitarian law, including in particular prohibitions on torture or other cruel, inhuman or degrading treatment or punishment.

#### **Prohibition of Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment**

35. Signatory Companies will not, and will require that their Personnel not, engage in torture or other cruel, inhuman or degrading treatment or punishment. For the avoidance of doubt, torture and other cruel, inhuman or degrading treatment or punishment, as referred to here, includes conduct by a private entity which would constitute torture or other cruel, inhuman or degrading treatment or punishment if committed by a public official.
36. Contractual obligations, superior orders or exceptional circumstances such as an armed conflict or an imminent armed conflict, a threat to national or international security, internal political instability, or any other public emergency, can never be a justification for engaging in torture or other cruel, inhuman or degrading treatment or punishment.
37. Signatory Companies will, and will require that their Personnel, report any acts of torture or other cruel, inhuman or degrading treatment or punishment, known to them, or of which they have reasonable suspicion. Such reports will be made to the Client and one or more of the following: the competent authorities in the country where the acts took place, the country of nationality of the victim, or the country of nationality of the perpetrator.

#### **Sexual Exploitation and Abuse or Gender-Based Violence**

38. Signatory Companies will not benefit from, nor allow their Personnel to engage in or benefit from, sexual exploitation (including, for these purposes, prostitution) and abuse or gender-based violence or crimes, either within the Company or externally, including rape, sexual harassment, or any other form of sexual abuse or violence. Signatory Companies will, and will require their Personnel to, remain vigilant for all instances of sexual or gender-based violence and, where discovered, report such instances to competent authorities



## **Human Trafficking**

39. Signatory Companies will not, and will require their Personnel not to, engage in trafficking in persons. Signatory Companies will, and will require their Personnel to, remain vigilant for all instances of trafficking in persons and, where discovered, report such instances to Competent Authorities. For the purposes of this Code, human trafficking is the recruitment, harbouring, transportation, provision, or obtaining of a person for (1) a commercial sex act induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years of age; or (2) labour or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, debt bondage, or slavery.

## **Prohibition of Slavery and Forced Labour**

40. Signatory Companies will not use slavery, forced or compulsory labour, or be complicit in any other entity's use of such labour.

## **Prohibition on the Worst Forms of Child Labour**

41. Signatory Companies will respect the rights of children (anyone under the age of 18) to be protected from the worst forms of child labour, including:
- a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in provision of armed services;
  - b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
  - c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs;
  - d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

Signatory Companies will, and will require their Personnel to, report any instances of the activities referenced above that they know of, or have reasonable suspicion of, to Competent Authorities.

## **Discrimination**

42. Signatory Companies will not, and will require that their Personnel do not, discriminate on grounds of race, colour, sex, religion, social origin, social status, indigenous status, disability, or sexual orientation when hiring

Personnel and will select Personnel on the basis of the inherent requirements of the contract.

### **Identification and Registering**

43. Signatory Companies, to the extent consistent with reasonable security requirements and the safety of civilians, their Personnel and Clients, will:
  - a) require all Personnel to be individually identifiable whenever they are carrying out activities in discharge of their contractual responsibilities;
  - b) ensure that their vehicles are registered and licensed with the relevant national authorities whenever they are carrying out activities in discharge of their contractual responsibilities; and
  - c) will ensure that all hazardous materials are registered and licensed with the relevant national authorities.

## **G. SPECIFIC COMMITMENTS REGARDING MANAGEMENT AND GOVERNANCE**

### **Incorporation of the Code into Company Policies**

44. Signatory Companies will incorporate this Code into Company policies and internal control and compliance systems and integrate it into all relevant elements of their operations.

### **Selection and Vetting of Personnel**

45. Signatory Companies will exercise due diligence in the selection of Personnel, including verifiable vetting and ongoing performance review of their Personnel. Signatory Companies will only hire individuals with the requisite qualifications as defined by the applicable contract, applicable national law and industry standards, and the principles contained in this Code.
46. Signatory Companies will not hire individuals under the age of 18 years to carry out Security Services.
47. Signatory Companies will assess and ensure the continued ability of Personnel to perform their duties in accordance with the principles of this Code and will regularly evaluate Personnel to ensure that they meet appropriate physical and mental fitness standards to perform their contracted duties.
48. Signatory Companies will establish and maintain internal policies and procedures to determine the suitability of applicants, or Personnel, to carry weapons as part of their duties. At a minimum, this will include checks that they have not:
  - a) been convicted of a crime that would indicate that the individual lacks the character and fitness to perform security services pursuant to the principles of this Code;
  - b) been dishonourably discharged;

- c) had other employment or engagement contracts terminated for documented violations of one or more of the principles contained in this Code; or
- d) had a history of other conduct that, according to an objectively reasonable standard, brings into question their fitness to carry a weapon.

For the purposes of this paragraph, disqualifying crimes may include, but are not limited to, battery, murder, arson, fraud, rape, sexual abuse, organized crime, bribery, corruption, perjury, torture, kidnapping, drug trafficking or trafficking in persons. This provision shall not override any law restricting whether a crime may be considered in evaluating an applicant. Nothing in this section would prohibit a Company from utilizing more stringent criteria.

- 49. Signatory Companies will require all applicants to authorize access to prior employment records and available Government records as a condition for employment or engagement. This includes records relating to posts held with the military, police or public or Private Security Providers. Moreover, Signatory Companies will, consistent with applicable national law, require all Personnel to agree to participate in internal investigations and disciplinary procedures as well as in any public investigations conducted by competent authorities, except where prohibited by law.

#### **Selection and Vetting of Subcontractors**

- 50. Signatory Companies will exercise due diligence in the selection, vetting and ongoing performance review of all subcontractors performing Security Services.
- 51. In accordance with principle 13 of this Code, Signatory Companies will require that their Personnel and all subcontractors and other parties carrying out Security Services under the contract, operate in accordance with the principles contained in this Code and the standards derived from the Code. If a Company contracts with an individual or any other group or entity to perform Security Services, and that individual or group is not able to fulfil the selection, vetting and training principles contained in this Code and the standards derived from the Code, the contracting Company will take reasonable and appropriate steps to ensure that all selection, vetting and training of subcontractor's Personnel is conducted in accordance with the principles contained in this Code and the standards derived from the Code.

#### **Company Policies and Personnel Contracts**

- 52. Signatory Companies will ensure that their policies on the nature and scope of services they provide, on hiring of Personnel and other relevant Personnel reference materials such as Personnel contracts include

appropriate incorporation of this Code and relevant and applicable labour laws. Contract terms and conditions will be clearly communicated and available in a written form to all Personnel in a format and language that is accessible to them.

53. Signatory Companies will keep employment and service records and reports on all past and present personnel for a period of 7 (seven) years. Signatory Companies will require all Personnel to authorize the access to, and retention of, employment records and available Government records, except where prohibited by law. Such records will be made available to any compliance mechanism established pursuant to this Code or Competent Authority on request, except where prohibited by law.
54. Signatory Companies will only hold passports, other travel documents, or other identification documents of their Personnel for the shortest period of time reasonable for administrative processing or other legitimate purposes. This paragraph does not prevent a Company from co-operating with law enforcement authorities in the event that a member of their Personnel is under investigation.

#### **Training of Personnel**

55. Signatory Companies will ensure that all Personnel performing Security Services receive initial and recurrent professional training and are also fully aware of this Code and all applicable international and relevant national laws, including those pertaining to international human rights, international humanitarian law, international criminal law and other relevant criminal law. Signatory Companies will maintain records adequate to demonstrate attendance and results from all professional training sessions, including from practical exercises.

#### **Management of Weapons**

56. Signatory Companies will acquire and maintain authorizations for the possession and use of any weapons and ammunition required by applicable law.
57. Signatory Companies will neither, and will require that their Personnel do not, possess nor use weapons or ammunition which are illegal under any applicable law. Signatory Companies will not, and will require that their Personnel not, engage in any illegal weapons transfers and will conduct any weapons transactions in accordance with applicable laws and UN Security Council requirements, including sanctions. Weapons and ammunition will not be altered in any way that contravenes applicable national or international law.
58. Signatory Company policies or procedures for management of weapons and ammunitions should include:
  - a) secure storage;
  - b) controls over their issue;
  - c) records regarding to whom and when weapons are issued;

- d) identification and accounting of all ammunition; and
- e) verifiable and proper disposal.

### **Weapons Training**

59. Signatory Companies will require that:
- a) Personnel who are to carry weapons will be granted authorization to do so only on completion or verification of appropriate training with regard to the type and model of weapon they will carry. Personnel will not operate with a weapon until they have successfully completed weapon-specific training.
  - b) Personnel carrying weapons must receive regular, verifiable and recurrent training specific to the weapons they carry and rules for the use of force.
  - c) Personnel carrying weapons must receive appropriate training in regard to rules on the use of force. This training may be based on a variety of relevant standards, but should be based at a minimum on the principles contained in this Code and the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (1990), and national laws or regulations in effect in the area duties will be performed.

### **Management of Materiel of War**

60. Signatory Companies will, and will require that their Personnel to, acquire and maintain all authorizations for the possession and use of any materiel of war, e.g. hazardous materials and munitions, as required by applicable law.
61. Signatory Companies will neither, and will require that their Personnel will neither, possess nor use any materiel of war, e.g. hazardous materials and munitions, which are illegal under any applicable law. Signatory Companies will not, and will require that their Personnel not engage in any illegal material transfers and will conduct any materiel of war transactions in accordance with applicable laws and UN Security Council requirements, including sanctions.
62. Signatory Company policies or procedures for management of materiel of war, e.g. hazardous materials and munitions, should include:
- a. secure storage; controls over their issue;
  - b. records regarding to whom and when materials are issued; and
  - c. proper disposal procedures.

### **Incident Reporting**

63. Signatory Companies will prepare an incident report documenting any incident involving its Personnel that involves the use of any weapon, which includes the firing of weapons under any circumstance (except authorized training), any escalation of force, damage to equipment or injury to persons, attacks, criminal acts, traffic accidents, incidents involving other

security forces, or such reporting as otherwise required by the Client, and will conduct an internal inquiry in order to determine the following:

- a) time and location of the incident;
- b) identity and nationality of any persons involved including their addresses and other contact details;
- c) injuries/damage sustained;
- d) circumstances leading up to the incident; and
- e) any measures taken by the Signatory Company in response to it.

Upon completion of the inquiry, the Signatory Company will produce in writing an incident report including the above information, copies of which will be provided to the Client and, to the extent required by law, to the Competent Authorities.

### **Safe and Healthy Working Environment**

64. Signatory Companies will strive to provide a safe and healthy working environment, recognizing the possible inherent dangers and limitations presented by the local environment. Signatory Companies will ensure that reasonable precautions are taken to protect relevant staff in high-risk or life-threatening operations. These will include:
  - a) assessing risks of injury to Personnel as well as the risks to the local population generated by the activities of Signatory Companies and/or Personnel;
  - b) providing hostile environment training;
  - c) providing adequate protective equipment, appropriate weapons and ammunition, and medical support; and
  - d) adopting policies which support a safe and healthy working environment within the Company, such as policies which address psychological health, deter work-place violence, misconduct, alcohol and drug abuse, sexual harassment and other improper behaviour.

### **Harassment**

65. Signatory Companies will not tolerate harassment and abuse of co-workers by their Personnel.

### **Grievance Procedures**

66. Signatory Companies will establish grievance procedures to address claims alleging failure by the Company to respect the principles contained in this Code brought by Personnel or by third parties.
67. Signatory Companies will establish procedures for their Personnel and for third parties to report allegations of improper and/or illegal conduct to designated Personnel, including such acts or omissions that would violate the principles contained in this Code. Procedures must be fair, accessible and offer effective remedies, including recommendations for the prevention of recurrence. They shall also facilitate reporting by persons with reason to believe that improper or illegal conduct, or a violation of this Code, has

occurred or is about to occur, of such conduct, to designated individuals within a Company and, where appropriate, to competent authorities;

- a) publish details of their grievance mechanism on a publically accessible website;
- b) investigate allegations promptly, impartially and with due consideration to confidentiality;
- c) keep records about any such allegations, findings or disciplinary measures. Except where prohibited or protected by applicable law, such records should be made available to a Competent Authority on request;
- d) cooperate with official investigations, and not participate in or tolerate from their Personnel, the impeding of witnesses, testimony or investigations;
- e) take appropriate disciplinary action, which could include termination of employment in case of a finding of such violations or unlawful behaviour; and
- f) ensure that their Personnel who report wrongdoings in good faith are provided protection against any retaliation for making such reports, such as shielding them from unwarranted or otherwise inappropriate disciplinary measures, and that matters raised are examined and acted upon without undue delay.

68. No provision in this Code should be interpreted as replacing any contractual requirements or specific Company policies or procedures for reporting wrongdoing.

#### **Meeting Liabilities**

69. Signatory Companies will ensure that they have sufficient financial capacity in place at all times to meet reasonably anticipated commercial liabilities for damages to any person in respect of personal injury, death or damage to property. Sufficient financial capacity may be met by customer commitments, adequate insurance coverage, (such as by employer's liability and public liability coverage appropriately sized for the scale and scope of operations of the Signatory Company) or self insurance/retention. Where it is not possible to obtain suitable insurance cover, the Signatory Company will make alternative arrangements to ensure that it is able to meet such liabilities.

#### **H. REVIEW**

70. The Swiss Government will maintain a public list of Signatory Companies and convene an initial review conference with a view to reviewing the Code after governance and oversight mechanisms (as referenced in the Preamble and Section C "Implementation" to this Code) are developed



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NIK : **931002119**  
Jabatan : **Kepala Divisi Perpustakaan Fakultas Hukum UII**

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Nama : Nasrullah Mazii  
No Mahasiswa : 12410343  
Fakultas/Prodi : Hukum  
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# THE LEGAL STATUS OF PRIVATE MILITARY AND SECURITY COMPANY (PMSC) PERSONNEL INVOLVED IN ARMED CONFLICT UNDER INTERNATIONAL HUMANITARIAN LAW

*by* 12410343 Nasrullah Mazii

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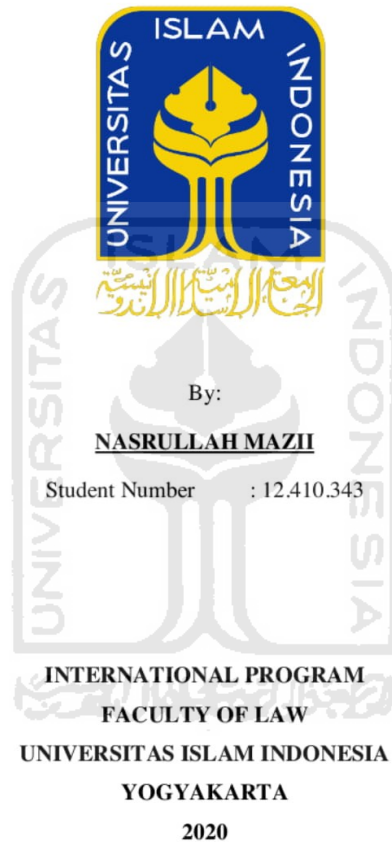
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COMPANY (PMSC) PERSONNEL INVOLVED IN ARMED CONFLICT  
UNDER INTERNATIONAL HUMANITARIAN LAW**

A THESIS



# THE LEGAL STATUS OF PRIVATE MILITARY AND SECURITY COMPANY (PMSC) PERSONNEL INVOLVED IN ARMED CONFLICT UNDER INTERNATIONAL HUMANITARIAN LAW

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<b>No. Mhs</b>	<b>: 12410343</b>
<b>Judul</b>	<b>: The Legal Status of Private Military and Security Company Personnel involved in an Armed Conflict under International Humanitarian Law</b>














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Yogyakarta, 08 June 2020

Sekretaris Prodi Hukum

Ari Wibowo, S.H.I., S.H., M.H.

### Catatan Konsultasi Proposal Tugas Akhir

No.	Tanggal	Keterangan	Paraf Dosen
01	April 29, 2019	Acc Proposal Exam (for Proposal Seminar)	
02	August 29, 2019	Consultation (Progress Report)	
03	September 02, 2019	Consultation and Progress Report	
04	September 09, 2019	Consultation and Progress Report	
05	October 02, 2019	Consultation and Progress Report Ch.2	
06	October 26, 2019	Progress Report Ch.2 & 3	
07	November 01, 2019	Reviewing Ch.2	
08	May 21, 2020	Collecting Ch.2	
09	June 04, 2020	Consultation and Collecting Ch.3 & 4	
10	June 05, 2020	Daring/Online Consultation (SITA); Uploading Thesis Outline	
11	June 08, 2020	Consultation on Ch. 3 & 4	
12	June 15, 2020	(Sending) Thesis Revision	
13	June 16, 2020	Consultation; Revision	
14	June 21, 2020	Thesis Revision and Re-Checking; Final Approval	