

Status of PMSCs under IHL*

*by Dr. Nils Melzer***

Ladies and Gentlemen,

It is a pleasure to be back in Sanremo again and to have the privilege to speak to you on the status of private military and security companies (PMSC) under international humanitarian law (IHL).

As we all know, IHL does not foresee any particular status for corporate actors, such as PMSC. Except for the unlikely case where a PMSC, as such, becomes an independent non-state party to an armed conflict, its rights and obligations as a corporate actor therefore will not be defined by IHL, but by national law including, where applicable, corporate criminal law. To some extent, the absence of direct international legal obligations for corporate actors under IHL is mitigated by the self-commitment of hundreds of ICoC-Signatory Companies (August 2012: 464) to compliance with the standards set by IHL when operating in contexts of armed conflict.

The question of status, rights and obligations under IHL is much more relevant with regard to the individual employees and contractors of PMSC (PMSC-personnel). All PMSC-personnel carrying out activities for reasons related to an armed conflict are bound by IHL and criminally responsible for serious violations (war crimes), irrespective of their status. Individual status becomes relevant primarily for determining the entitlement of PMSC-personnel to a particular regime of protection or treatment under IHL. Which regime will be applicable then depends on whether the individual contractor or employee qualifies as a “civilian”, “civilian accompanying the armed forces”, or “civilian directly participating in hostilities”, or whether he qualifies as a “member of the armed forces”, a privileged “combatant” entitled to “prisoner of war” status, a “civilian internee” protected by the Fourth Geneva Convention or, rather, a “mercenary”. Under IHL, all of these categories of persons have a particular status, to which certain rights and obligations are tied. While these categories cannot be discussed in detail here, it is worth highlighting a few important points.

First, it is uncontested today that the majority of PMSC personnel operating in armed conflicts

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are not members of the armed forces and do not directly participate in hostilities and, therefore, enjoy civilian status and protection against attack. Nevertheless, their proximity to the armed forces and the hostilities may expose them to increased risk of incidental death or injury. In international armed conflict, PMSC personnel formally authorized to accompany the armed forces remain civilians but are entitled to prisoner of war-status upon capture. Just as any other civilians, however, they are not entitled to combatant privilege and, thus, do not have the right to directly participate in hostilities.

Where PMSC-personnel have been incorporated into the armed forces of a belligerent party, they can no longer be regarded as civilians and private actors but become members of that party's armed forces. In this context it is important to note that such incorporation can take place either through a formal procedure (*de jure*), which results in membership in the regular armed forces in accordance with national law, or simply by being authorized to directly participate in hostilities on behalf of the contracting State (*de facto*), in which case one becomes a member of an irregular militia or group belonging to a belligerent party. In international armed conflict, such PMSC-personnel would be entitled to combatant privilege and prisoner of war status according to the same criteria as any other member of the armed forces.

Finally, the question of PMSC-personnel assuming combat function for belligerent parties also raises the delicate question of "mercenaryism". While the threshold of the mercenary definition in Art. 47 Additional Protocol I is very high, it cannot be excluded that some PMSC-personnel may fit the definition. Indeed, where PMSC-personnel are specifically contracted to directly participate in hostilities in return for compensation significantly exceeding the pay level of regular armed forces, they will probably have to be regarded as mercenaries under IHL unless they are nationals of the contracting or the territorial State or incorporated into the armed forces of the contracting State. As mercenaries, they could lawfully be attacked but would not be entitled to combatant privilege and prisoner of war-status.

This being said, what is the practical relevance of the whole status question in the context of PMSC-personnel? As we have seen, under IHL, individual status has consequences in two areas: the conduct of hostilities and protection after capture.

First, in the area of the conduct of hostilities the question of status determines whether someone constitutes a legitimate military target or a person protected against direct attack. This distinction corresponds to the one between civilians and members of the armed forces. While civilians are protected against attack (unless and for such time as they directly participate in hostilities), members of the armed forces constitutes legitimate military targets (unless and for such time as they are *hors de combat*). Note that the exceptions of direct participation in hostilities and *hors*

de combat, are based on individual conduct, not status. In the context of hostilities, any status other than civilian and member of the armed forces is irrelevant. Even combatant privilege does not matter here, because its only consequence is to provide the combatant with immunity from prosecution for lawful acts of war, which becomes relevant only after capture.

Second, as far as protection after capture is concerned, different regimes apply depending on status under IHL. While combatants cannot be prosecuted for having engaged in lawful acts of war, non-combatants do not enjoy such immunity. While prisoners of war can be interned until the end of the hostilities solely based on status, without trial or review, persons interned under the Fourth Geneva Convention are entitled to an individual review procedure at least twice a year, which must determine whether the security threat which justified the internment continues to exist and requires the extension of such internment. Finally, persons qualifying as mercenaries enjoy neither prisoner of war-status nor combatant privilege.

But how relevant is this in practice given that combatant privilege, POW-status and the mercenary definition of Additional Protocol I apply only in international armed conflicts, but that 95% of contemporary armed conflicts are of non-international character? In these contexts, the main practical relevance of the status question concerns the conduct of hostilities, the distinction between legitimate military targets and persons protected against attack. Once a person has fallen into the hands of the enemy, IHL governing non-international armed conflicts does not foresee distinct categories or status but entitles everyone who does not or no longer directly participate in hostilities to the basic protection of humane treatment and judicial guarantees.

So from a practical perspective it is the area of targeting in hostilities which is most relevant, and it is in this area where the presence of thousands of PMSC-personnel have caused a considerable amount of confusion. What are their functions? Why are they armed? What is the distinction between civilian security and military defence in terms of convoy or infrastructure protection? The fact that non-state armed groups are intermingling with the civilian population has for decades been deplored as blurring the distinction between civilian and combatant. However, aren't States contributing to exacerbating this problem when they start inserting large numbers of PMSC-personnel into a growing grey-zone between military and civilian functions? What will be the long-term consequences of such policies, though admittedly not prohibited as a matter of law, for the recognition of, and respect for, the most fundamental principle of IHL, namely the principle of distinction? Are we not in the process of undermining, perhaps by negligence much more than intent, one of the greatest achievements of human history? This is my greatest concern here today, and I hope we will have a fruitful discussion in this respect.

Ladies and Gentlemen, I thank you for your attention!