



THE LEGAL RESPONSIBILITY OF A PRIVATE MILITARY COMPANY (PMC) IN AN INTERNATIONAL ARMED CONFLICT UNDER HUMANITARIAN LAW

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Abstract

The existence of Private Military Company (PMC) in most contemporary armed conflicts as a non-participant has raised the legal question regarding the status and legal standing of PMC. This research aims to analyze the legal position and determine the legal responsibility of PMC in international armed conflicts according to Humanitarian Law. The research employed a normative legal research method, utilizing international treaties, national legislation, and international customary law as the basis. The findings reveal that, under international law, the PMC is not a party legally authorized to engage in armed conflicts. The legal responsibility of the PMC for crimes in violation of international humanitarian law and human rights can be attributed to both civil responsibility and criminal responsibility for war crimes, based on the principle of corporate criminal responsibility. However, the non-recognition of PMC as subjects of international law means that PMCs cannot be held criminally liable under international law. Therefore, the existence of humanitarian law in the national legal system paves the way for the criminal prosecution of PMC as a company.

Keywords: *International Armed Conflict; Legal Responsibility; Private Military Company*

A. INTRODUCTION

Humanitarian Law is a law that focuses on providing protection to each individual in the event of armed conflict, both for civilians and combatants who are directly involved in an armed conflict. This is in accordance with the opinion of a legal expert named Mochtar Kusumaatmadja who said that humanitarian law is part of the law that functions to regulate the provisions for the protection of war victims, this is different from the law of war, which is a legal instrument that has a function related to

the regulation of war itself and everything that has to do with the method or way of war itself.¹

In providing protection to these parties, there are different forms of protection provided to civilians with combatants who are directly involved in the field. Of course, it must be done measurably and in accordance with the rights and obligations of the parties to the dispute and the legal subjects involved. So that in terms of efforts to provide protection and prosecution of accountability of each humanitarian law subject involved in armed conflict, it must be clearly distinguished first the subjects of humanitarian law who are classified as combatants and those classified as non-combatants.

Humanitarian Law itself, in general, has two types of classification of legal subjects, namely legal subjects classified as combatants and non-combatants. According to the Article 43(2) of Additional Protocols I 1977 Regarding the protection of victims of international armed conflicts, combatants are all armed forces personnel of the parties to the conflict except medical and religious personnel². In practice, the armed forces, classified as combatants, are defined more specifically as the Armed Forces of the conflict, members of the military, volunteer corps, resistance movements, and civilians who take up arms spontaneously (*Levee en masse*). Combatants have the right to participate directly in armed conflict, either to kill or to be killed and to Prisoner of War status if caught or detained by the opposing party. Civilians affected by armed conflict, on the other hand, have the right to general protection from the dangers posed by military and non-military operations that occur in armed conflict, and also not to be subjected to attacks, as well as security guarantees of actions or threats aimed at spreading terror among the civilian population. In addition, civil society, especially residents in conflict areas, has the right to defend and should not be subject to removal except for their own security or for coercive military reasons or imperatives.³

Classification of legal subjects affected or involved in an armed conflict is a very important instrument and must be considered in detail, both from the status and the use of attributes that distinguish subjects of humanitarian law. Because of the class distinction of these parties, it will determine as a whole both their respective rights, obligations, and responsibilities if involved in a war crime or violation of law in the context of humanitarian law.

The reality on the ground is that there are still points where the legal status of parties participating in armed conflict is still unclear. For example, there have recently been entities that are not part of the subject of humanitarian law that are not a part of combatants but participate in armed conflict. This entity is known as Private Military and Security Company and is commonly referred to as PMC.

Private Military Company is a commercial company that has a good business in the field by offering some of goods and services, especially those related to the military. The services offered and able to be carried out by PMC are as diverse as transportation, distribution, supplies, equipment, personel, construction, maintenance of military

¹Permatasari Arlina,*et.all.*,(1999), *Introduction to Humanitarian Law*, Jakarta: International Committee of the Red Cross.

²International Committee of the Red Cross, (2023), *International Humanitarian Law Customary Rules*, Chapter 1, Rule 3., Definition of Combatants.

³Soeprapto Enny, *Hukum Humaniter Internasional dan Konflik Bersenjata di Aceh*, <https://referensi.elsam.or.id/> diakses pada 28 Juni 2023.

equipment, intelligence operations, to the security of headquarters. The PMC itself can also carry out small training missions to establish trained combat units consisting of several hundred personnel with complete individual equipment, to those based on heavy combat equipment such as tanks and helicopters. At the same time, however, the PMC is only a business entity that provides goods and services in armed conflict and it is not an entity who are considered as combatants such as military personnel, belligerents, and *Levee en Masse*, who are entitled to participate in armed conflict and are entitled to protection and legal certainty when directly participating in armed conflict under applicable international humanitarian law.

In the history of PMC deployments in armed conflict, there have also been several cases of operations conducted by PMC personnel, which have not escaped blame or potential violations of the principles of international humanitarian law such as those of PMC Blackwater and PMC Wagner. The violations committed by PMC personnel are clearly a violation of the basic rules of Humanitarian law by being directly involved in armed conflict.

The involvement of PMC personnel in committing a serious violation of international humanitarian law, of course, for the sake of justice, the perpetrators of these crimes must be held accountable for the crimes committed both against humanitarian law and human rights. So, the presence of a new entity such as a Private Military Company (PMC) raises the question of what is the form and mechanism of legal responsibility of a Private Military Company (PMC) if the entity is involved in a violation of the principles of Humanitarian Law?

B. METHOD

This study using normative legal research with the approach methods used are a statutory approach, a conceptual approach, and a case approach.⁴ While the source of the type of legal material and data uses legal material type literature and field data in the form of primary, secondary, tertiary legal material. The author tries to find out the legal responsibilities of Private Military Company in international armed conflicts according to humanitarian law, by analyzing the legal position of Private Military Company and their forms of responsibility based on such as the Geneva Conventions and their additional protocols, international customs, guiding principles (soft law), and other internationally recognized legal norms.

C. ANALYSIS AND DISCUSSION

Legal Status of Private Military Company (PMC)

The existence of a Private Military Company as an incorporated entity, gives it an attribute that cannot be separated from the legal person as a legal subject which is ownership of the attributes of rights and obligations. The existence of rights and obligations owned by companies such as Private Military Company makes them a subject of law or a complete person before the law so that in the event of a violation of the law,

⁴Amiruddin dan Zainal Asikin, (2004), *Pengantar Metode penelitian Hukum*, Jakarta : Rajawali Pers.

the Private Military Company can be held accountable in a positive legal manner. A complete person before the law means Private Military Company as a corporation is considered to be able to stand and can be considered to carry out a separate act, as well as for its own interests both in the form of making an agreement and other legal actions, so that this legal entity can be said to be a personality that is different from the state and can act without being related to a state.

A company known as a business entity by holding its status as a personality itself can act and carry out business activities that are not only carried out in the country of origin but also often carry out operations in various countries outside the country where the company was established. This makes the company such as Private Military Company itself can be said to carry out a legal action transnationally or carry out a legal action related to more than one country so that Private Military Company itself can be categorized as a multinational company (MNC).

A Multi National Corporation (MNC) is a company that operates internationally or covers more than one country. The existence of MNCs in the scope of international interaction itself is a debate in the international community. This is because at the beginning of the existence of international law, it did not recognize a company like MNC as its legal subject. However, along with the development of business and free markets, companies develop into entities that can conduct business activities and make agreements with a country or parties from other countries independently and with their own personalities whether the agreement is carried out with a country or with other subjects of international law. The personality of a multinational company that can act independently without state involvement, has made MNC a business entity that is a Non-Sate Actor who can be the subject of ownership of legal rights and responsibilities internationally so that MNC remains part of the international community regardless of the existing debate related to MNC as a subject of international law.⁵

The historical presence of the Private Military Company is not a new phenomenon in the field of international security. Indeed, PMC have existed throughout warfare itself, manifesting in the form of highly organized entities or individual mercenaries. Early records of warfare reveal instances in which foreign fighters were deployed as part of national forces, such as Macedonian mercenaries who served in the armies of the ancient Greek or Roman Empire. Hiring mercenaries from different regions to defend the empire's borders from outside threats was a common practice between 1600 A.D. and 1800 A.D. During this period, it was common practice to register foreigners as part of the national armed forces and allow civilians to join the armies of other countries, with nationality or origin not being the main determinant of service obligations.

The use of mercenaries is an old and historically accepted practice. It is not uncommon for a country to employ foreigners as part of its national military personnel. However, the contemporary relationship between private military organizations and the state has unique characteristics, with an approach that may be mercenary-like but a private entity with a professional management structure like an MNC.

PMC themselves can be divided into three typologies based on their services. Type 1 focuses on tactical services, providing customers with military personnel on

⁵Mansyur, S., & Zunnuraeni, Z. (2017). "The New Development Of Subject Of International Law". *Unram Law Review*, 1(1), 1–15. <https://doi.org/10.29303/ulrev.v1i1.3>

the front lines of combat with less military capability. Companies with battlefield capabilities include Executive Outcomes (based in South Africa), Sandline, and Airscan. Type 2 includes PMC that offer consulting and training services and provide strategic, operational, and organizational analysis. Companies in this category, such as Military Professional Resources Inc. (MPRI), typically consist of former senior military personnel capable of providing strategic advice. The fundamental difference between type 1 and type 2 lies in the latter company offering consulting services to improve clients' military training and management skills, usually not in direct combat warfare. Their goal is to transform military capabilities for long-term goals, although the application of knowledge and training offered by the PMC corresponds to that in real warfare. Type 3 PMC provide rear and auxiliary echelon services, do not participate in the planning or execution of direct hostilities, but meet functional needs within the military sphere, including logistics, technical support, and transportation. Examples of PMC type 3 include Ronco and Kellogg, Brown & Roots (KBR), a subsidiary of Halliburton.⁵

Private Military Company have been involved in numerous armed conflicts around the world. Their involvement spans a wide range of services, from security and protection to military training and strategic advisory. Such as some examples of PMC involvement in the armed conflicts of Iraq and Afghanistan (Post-9/11), Africa, South America, the Middle East and Regional Armed Conflicts. PMC involvement in armed conflict has often been controversial, with concerns over accountability, transparency, and the use of private military force. Some cases involve allegations of human rights violations and violations of international law. Responsibility in terms of violations of international humanitarian law committed by a PMC ranges from responsibility committed by the company itself as a corporation through Corporate Criminal Responsibility which means that a corporation can be prosecuted for responsibility, especially in criminal law if the elements contained in the theory are met, such as crimes committed solely for the benefit of the corporation, para Employees commit crimes that are part of the responsibility of the corporation as their superiors, or employees who get delegation of authority from their superiors commit crimes for the corporation so that these actions are considered as acts that are the mind of the corporation or actions that represent the corporation itself.⁶

Corporate criminal responsibility is often directed by the authorities through their claims, but it is often difficult to hold corporations accountable in the criminal field so most court decisions are prosecuting members of the corporation as individuals.

Legal Responsibility of Private Military Company (Pmc)

Private Military Company (PMC) is a multinational company that often does business outside its home country. The act of a Private Military Company conducting business ventures abroad, makes a Private Military Company that is not only bound by the national legal jurisdiction of its country, but also bound and viewed as a subject of international law. With the recognition and attachment to the norms of international law, it has implications for the possibility of Private Military Company to undergo a judicial

⁶Rodliyah, R., Suryani A., & Husni, L. (2020), *Konsep Pertanggungjawaban Pidana Korporasi (Corporate Crime) Dalam Sistem Hukum Pidana Indonesia*, Magister Hukum Universitas Mataram.

effort in international judicial institutions. Of course, this makes the law enforcement posture for Private Military Company more complex in practice. However, the existence of a Private Military Company that conducts foreign business activities does not reduce its obligation to comply with legal norms and law enforcement mechanisms applied in the country of origin and the country where it operates when the business entity commits a violation of applicable norms.

In terms of responsibility, both in the Geneva Conventions, its additional protocols, and the customs of international humanitarian law (International Humanitarian Law Customary Rules) or can be referred to as international humanitarian law, in general does not recognize accountability carried out by legal entities and only recognizes the concept of accountability carried out by states and individuals. The regulation of state responsibility, in international humanitarian law can be found in the International Humanitarian Law Customary Rules, Rule 149 which provides that a State is responsible for violations of international humanitarian law that may arise therefrom, including violations committed by its State organs, violations committed by persons or entities of that State, violations committed by persons or groups that act on behalf of the State and offences committed by persons or groups of recognized law and adopt the acts of the State itself. Because an act committed by a person or group recognized and adopted by the state as its act in the future, is also an act that is considered an act of a state, regardless of the fact that the person or entity committing the act at that time is not an organ of the state, and is not mandated by the state to commit an act of violation in the interest of the state.⁷

The existence of International Humanitarian Law Customary Rule 149 attaches the responsibility of international humanitarian law to states while aborting the responsibility of Private Military Company as private entities from the responsibility of international humanitarian law. So, it can be understood that if there is a violation of humanitarian law, the Private Military Company can only be held accountable if it does not meet the elements of International Humanitarian Law Customary Rules 149 which means that the Private Military Company commits a violation of its own will without representing the state and its actions are not recognized and not adopted by the state as its actions.

Generally prosecuting international crimes in the International Criminal Court (ICC) with actors other than states, prosecutions can only be carried out against individuals. This is because the ICC has restrictions on person, place and time of jurisdiction i.e. it can only prosecute individuals within the territory of a state party to the Rome Statute or citizens of states parties to the Rome Statute who committed crimes after 1 July 2002. So, the ICC does not have jurisdiction to prosecute a company if it commits a crime, be it a PMC or other companies in general. However, the ICC is not completely powerless in the event of international crimes committed by companies, but it can prosecute individuals who are executives in the company.⁸

Prosecution conducted in the International Criminal Court (ICC) can only be carried out if the violation of humanitarian law is committed by a specific individual and state as its jurisdiction and not a corporation including a Private Military Company and will be able to be carried out in the event that the state having authority, fails to

⁷IHL Database, *IHL Customary Rules 149*, International Committee of the Red Cross.

prosecute either a company or an individual in it. Thus, the ICC's inability to prosecute companies such as Private Military Company indirectly makes a country's national law the spearhead in prosecuting Private Military Company responsibility.

Despite the ICC's inability to prosecute crimes committed by Private Military Company, national or domestic law as the spearhead of prosecuting responsibility for crimes related to humanitarian law, to date it has not resulted in a single prosecution being made against business entities generally including Private Military Company (PMC) on charges of international crimes, charges related to crimes related to humanitarian law.

Despite the ICC's inability to prosecute crimes committed by Private Military Company (PMC), without going through national legal mechanisms or domestic laws to spearhead the prosecution of accountability for crimes related to humanitarian law, to date national legal mechanisms around the world have not resulted in a single prosecution of business entities in general, on charges of international crimes related to internal crimes scope of humanitarian law.

Prosecution Of Legal Responsibility of Private Military Company (Pmc)

However, the absence of prosecution cases against Private Military Company (PMC) in general suspected of crimes related to humanitarian law does not rule out the possibility that a company can be held responsible for crimes related to humanitarian and human rights law which in this case also applies to Private Military Company. Correspondingly, States subject to international humanitarian law continue to seek prosecution of business entities involved in violations of humanitarian law. One example is the lawsuit brought in the French Supreme Court against the company Nexa Technologies. Nexa Technologies was prosecuted on suspicion of selling Libya and Egypt internet surveillance equipment used to track and spy on political opponents who were later arrested and tortured by those countries' rulers in 2007. In the end, the French Supreme Court did not convict Nexa Technologies but found four executives from Nexa Technologies guilty.⁸

The case heard by the French Supreme Court did not convict Nexa Technologies, but the possibility of a company being prosecuted for a crime is key in holding Private Military Company legal responsibility because then the possibility of holding a company responsible for crimes committed related to humanitarian law is very wide open.

In 2016, the French Supreme Court of an international cement company Lafarge was accused of complicity in war crimes, crimes against humanity and terrorism financing for its role in maintaining business activities during the armed conflict in Syria. The court found that the company purchased resources from several armed groups, including designated foreign terrorist organizations, and paid unofficial taxes to those groups in exchange for safe travel and operations in the region. Eight former company executives were charged with funding terrorism and endangering staff. In October 2022, the company and its subsidiary in Syria pleaded guilty to conspiring to provide material and resource support in Northern Syria from 2013 to 2014 to ISIS and al-Nusrah Front. The defendants were sentenced percobaan dan diharuskan membayar

⁸Australian Red Cross (2016), *The Business of War: IHL and the corporate sector*, International Humanitarian Law Magazine, Issue 1.

denda sebesar USD 777.780.000.⁹ The indictment against Lafarge is an example of the current application of humanitarian law through national legal mechanisms, in which a company can be punished for involvement in war crimes, so it does not rule out the possibility of prosecution of violations of the laws of war committed by a Private Military Company.

One country other than France that has concrete regulations in its national law regarding the prosecution of responsibility for Private Military Company as perpetrators of crimes within the scope of humanitarian law is Australia. Prosecution of a Private Military Company is not only carried out when the corporation commits a direct violation but also includes several other conditions such as:

(a) Committing

Where a member of a company physically commits a war crime. In this case, such actions are performed by “employees, agents, or officers” of the company acting during their employment, and with express, tacit, or implied authority or consent of the company. This does not mean that a director approves of such actions, it may be sufficient that the company culture encourages or tolerates them or it may be sufficient under the condition that the company’s management has not adequately monitored or controlled employee behavior or has not provided adequate systems for conveying relevant information.

(b) Joint Commission

When a company enters into an agreement with another company or person, and criminal acts are committed in accordance with the agreement or during the execution of the agreement. This means that the company can be held liable in cases where it has no intention or plan to allow the crime to occur.

(c) Conspiracy

When the company intends or agrees to commit a criminal act jointly with the company or any other person. Only one party can act as a continuation of the plan to hold all parties criminally liable. The plan doesn’t have to succeed, or even attempt to hold corporations accountable for the crimes.

(d) Complicity

When an unrelated person or entity commits a crime, but the company is involved, it means that the company provides support or encouragement to the person or entity who committed the physical act. Aiding and abetting, advising, or obtaining are common forms of aiding and abetting.

In this case in Australia, prosecution of crimes committed by a Private Military Company can be punished in the form of punishment to Individuals, such as directors, board members, employees or agents of the company, who are found guilty of war crimes can face maximum prison sentences ranging from ten years to life imprisonment. The corporation itself is a legal entity, which can also be found guilty. While a company cannot face jail time, it can be fined. The maximum penalty that can be imposed on a company is five times the penalty imposed on an individual. Companies face a maximum

⁹Nyman Gibson Miralis (2023), *Corporate War Crimes and Other Liabilities*, Australian Red Cross.

fine of between 3,000 and 10,000 Unit Penalty or the equivalent of AUD 666,000 – AUD 2,220,000 for each verdict.¹⁰

D. CONCLUSION

Regarding the legal status of Private Military Company (PMC), the government of the Republic of Indonesia should encourage countries in the international community to initiate the drafting of international treaty rules containing binding regulations regarding the legal status of Multi-National Corporations in general and PMC in particular and the legal status attached to them.

The International Red Cross (ICRC) should encourage countries to agree on the enactment of rules specifically governing the role of PMC in conflict, mechanisms and responsibilities of PMC. Accountability for violations of humanitarian law committed by PMC, shall be regulated in such detail as to provide legal certainty against crimes, by establishing a regulation in the form of an international treaty that can be ratified so that each high member state throughout the world can have a mutually agreed basis for the burden of prosecution for violations of humanitarian law. Claiming equal responsibility for the same types of violations of law in all national legal systems of these countries provides legal certainty regardless of in which country the PMC committed a violation of humanitarian law.

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¹⁰*Ibid.*