

# Are Private Military Companies (PMCs) Exempted from Geneva Conventions?

Written by Richard Rousseau, Contributor | 23 November 2012



The privatization of a growing number of tasks and responsibilities which once seemed to be reserved as the sole responsibility of the state has now seemingly become part of a wider trend. The practice of warfare has not been spared by this trend, especially in Western countries. An ever-increasing number of states, international organizations, non-governmental organizations (NGOs), and businesses hire Private Military Companies (PMCs), Private Security Companies (PSCs), and contractors in related business to perform a variety of tasks in the areas of logistics, security, intelligence, and protection of persons, goods, and transport infrastructures. Such tasks were traditionally and strictly assigned to professional soldiers of the regular armed forces who were bound by law in case of misconduct.

This apparent shift raises a number of difficult issues in International Humanitarian Law (IHL) – the laws regulating armed conflicts and aimed at protecting victims which were primarily codified in the four Geneva Conventions of 1949 and their Additional Protocols of 1977. As fully understood by experts and decision-makers, IHL alone cannot rid the world of the phenomenon of war; its capacity to stop the development of PMCs is weak as well. IHL can only serve as a tool to monitor armed conflicts and make them a little less inhumane for fighters on all sides and the civilian population.

PMC employees do not meet the restrictive definition of what constitute mercenaries. They are also generally not considered part of the armed forces party to the conflict. Therefore, they do not fall into the category of combatants, but are actually regarded as civilians. Legally, they should not take a direct part in hostilities. Moreover, PMCs, like most of the states that hire them, insist that their staff only act in defensive and support roles in any armed conflict. Even if this is the case, the exercise of such a role can, however, lead to some direct participation in hostilities; supporting forces can themselves be caught in the midst of a firefight as active participants.

This is clear if they defend combatants or military objectives for one side or the other during an armed conflict. At the other extreme, there is no doubt that the protection of civilians or civilian buildings against unlawful attacks does not constitute a direct participation in hostilities, but this is only true when this protection falls within the bounds of self-defense or the protection of others under criminal law. The examples from Afghanistan have, unfortunately, demonstrated a “shoot first and ask questions later” attitude, in some cases, that has had far-reaching political and security consequences.

The current controversy discusses whether the protection of civilians against unlawful attacks from a party to the conflict or the provision of security of military buildings or targets against irregular combatants can be considered a direct participation in hostilities. Whatever the answers to these questions are, it is always difficult for PMC employees to determine whether the buildings they protect are used for military purposes and whether those they try to protect are linked to, and engaged in, an armed conflict. To prevent PMC employees from jeopardizing their protection as civilians – a cardinal principle of IHL – they should not be placed in ambiguous military situations.

Under international law and International Humanitarian Law, the outsourcing of military services is explicitly prohibited: Only members of armed forces can participate in hostilities. Moreover, state parties to the Geneva Conventions retain their obligations, even if some of the direct activities undertaken in their name are contracted out to PMCs.

In many cases the contracting state is responsible for the conduct of the contracted PMCs, either because they exercise the powers of a public authority (such as law enforcement or the arrest of individuals) or because they act according to the state's instructions or are under its direction and control. In other cases, the contracting state, or the state on whose territory the PMCs operate, has a duty of care in preventing violations of IHL. Contrary to what many claim, a PMC itself is subject to IHL because employees have the obligation to abide by IHL. A state is responsible for a PMC's conduct, as IHL should be incorporated into the domestic legislation of every state. Under such circumstances, there is no legal vacuum.

The main problems concerning PMCs, however, are those connected to the status, rights, and obligations of PMC employees – as these are not well-known and rarely understood by the employees themselves. PMC employees often lack training in the role they are to play and are not adequately supervised to implement the tasks assigned by their companies. Often their training is purely military and they have not been taught to deal with civilians or work under unconventional military circumstances – what contemporary military specialists and policymakers call “asymmetrical warfare.” If they commit offences or breach the law, any prosecution or action taken against them will quickly fall by the wayside since it will run against legal and factual obstacles – or will quickly fall into oblivion for a lack of political will. *De jure* or *de facto*, they often enjoy immunity in the countries where they operate, and their prosecution in their home countries is still not as well-regulated as prosecution involving members of regular armed forces.

What about current legal developments regarding PMCs? The obligations of contracting states, countries of origin, host states and all other states regarding PMCs were reaffirmed in the Montreux Document, ratified in September 2008, thanks to the initiative of Switzerland and the International Committee of the Red Cross. All signatories pledged to respect some 70 recommendations for good state practices, including verifying PMCs track records and ensuring their personal training.

Similarly, in partnership with the Geneva Centre for the Democratic Control of Armed Forces and the Geneva Academy of International Humanitarian Law and Human Rights in Geneva, the Swiss Federal Department of Foreign Affairs is working, together with PMC representatives, on a Code of Conduct which aims to provide clear guidance to PMCs and their clients as to how PMCs should offer their services with due regard to human rights conventions and IHL. These rules, born of compromise, remain quite general and only partly address the above-mentioned issues.

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