
The Existence of Mercenaries and Private Military Companies in Defending the Country from Colonization

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Abstract

This article examines the existence of mercenaries and PMSC in a war with the context of defending the sovereignty of a State from colonialism. There were some conventions that mentioned some regulations about mercenaries. Although the use of mercenaries for offensive actions was prohibited regarding the violation of the principle of chivalry in international humanitarian law, none of them strictly prohibit the existence of mercenaries and PMSC in the context of defensive. This article uses the normative juridical as the research method. The conclusion that can be inferred from the article is that the use of mercenaries, even in the context of defending the sovereignty of a State from colonialism, is not recommended. However, the use of PMSC can be an alternative option for urgent situations based on further consideration of the legal basis, history, and principles of international humanitarian law.

Keywords: International Humanitarian Law, Mercenary, PMSC.

Introduction

Armed conflict is an event filled with acts of violence and hostility between the parties involved. In history, armed conflict not only occurred with injustice, but also gave rise to cruel acts. Conflicts and wars of this kind create contemporary issues in international legal research, especially in terms of the large number of casualties resulting from these events (Ardiata et al., 2022: 25). International Humanitarian Law (IHL) emerged as an attempt to balance military interests and the need to respect basic human rights (Asnawi, 2017: 112).

Nowadays, the use of mercenaries when involved in war is considered unethical. This is based on the fact that in a war the values of honesty and justice must be upheld, or in other words, war must be carried out fairly and by upholding applicable international rules, both in a broad scope and in treaties that are even only held by two Countries that are going to war, as well as the emergence of several conventions, such as Additional Protocol I of 1977.

Several things that are thought to be the cause of a country using mercenaries are a country's lack of confidence in its war strength, or it could also be caused by a country's lack of troops which is then related to the principle of supply for demand. This is not only related to fundamental factors such as a lack of personnel, but more than that. The readiness, expertise and experience of personnel in fighting are also factors that a country needs to consider when employing mercenaries (Branco, 2017:40).

The emergence of mercenary troops often has its roots in armed conflicts which mainly occur in third world countries. These conflicts are often related to political issues, power competition, exploitation of natural resources, economic interests, as well as religious and ethnic issues. This results in the parties involved in the conflict seeking and expecting assistance from other countries, especially developed countries. The United States is an example of a country that is actively developing mercenary troops (Daniati, Mangku & Yuliantini, 2020:285).

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Further analysis regarding humanitarian law is that there are several principles that must always be upheld, including the principle of military interests, the principle of chivalry and the principle of humanity. In terms of upholding the value of justice in war, the principle of chivalry is a guideline that must always be upheld and implemented by every country. In this case, the principle of chivalry emphasizes the principles of honesty and justice in war, so of course this should be the case in practice, the countries at war must be truly balanced and equal in military strength. This is in line with Kunz's opinion that: "The 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 interests" (Nurainun et al., 2023:440).

In line with this, it is clear that war must be carried out fairly and prioritize aspects of honesty. However, of course this only applies to countries that are balanced in terms of military strength that are at war and does not apply to small countries which are then attacked by countries that have large military strength and are accompanied by the intention of colonizing the small country. This argument was then strengthened by Samuel Huntington's opinion which stated that war must be carried out by two countries with the same strength, because if one country is much stronger in terms of military strength, then this can be said to be oppression.

This raises a question regarding the fate of small countries which only aim to defend their sovereignty from attacks by invaders, but are hampered by the lack of numbers of their troops. Likewise, there are also shortcomings in terms of readiness, physical strength, and the experience needed to support them in fighting to defend the sovereignty of their country which is threatened by the colonialism of large countries which are clearly unequal in terms of military strength.

International humanitarian law certainly provides some legal basis relating to mercenaries. From a legal perspective, there are several conventions that regulate the legal status and classification of mercenaries as stated in Additional Protocol I of 1977. However, there is not a single convention that expressly prohibits the use of mercenaries in a defensive context along with sanctions.

This has certainly given rise to several debates and considerations in the academic world regarding the existence of mercenaries and PMSCs, especially in terms of maintaining the sovereignty of a country, protecting the rights of civilians living in their country, and not destroying or endangering the territory of opposing countries or the country's civilian population. against. It cannot be denied that some small countries who feel oppressed need help from countries whose military strength is far above them.

Based on the above, this article tries to find out whether the existence of mercenaries and PMSCs can be used for urgent needs such as protection from colonialism with a series of consequences such as protecting citizens, and defending the sovereignty of the State when a State does not have sufficient troop personnel. sufficient so that it is forced and there is no other choice to use the services of mercenaries or similar groups.

Method

This research adopts a library research method or normative approach. Literary research explores legal positions in the context of specific legal issues. This legal position was found through in-depth analysis of national and/or international regulations, court or arbitration decisions, as well as concepts put forward by legal experts (Mahawijaya et al., 2023:19).

Normative legal research is a research method used to search for legal principles, doctrines and regulations in order to find solutions to the issues being faced (Soemitro,

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2009:36). The data sources used in this research consist of primary, secondary and tertiary legal materials. Secondary data types include information found in literature, including legal regulations, books, scientific journals, scientific writings, documentary materials, and other written sources (Marzuki, 2008:15).

In an effort to find answers to this research, the author uses four problem-solving approach models, namely: statutory regulatory approach, conceptual approach, comparative approach, historical approach (Marzuki, 2005:102; Ibrahim, 2007:318). With this, the author was able to dig deeper into all the information and collect valid data to support the preparation of this article.

Results and Discussion

The Mercenary Problem

Basically, military pay has been around for a long time, even in ancient times, so army pay is not something foreign or taboo. However, problems began to emerge during the UN session in 1961 which at that time discussed the classification of Katanga from Congo (Permanasari et al., 1999:95). In 1964, the government, then dominated by Congolese, recruited mercenaries to face the rebels. Furthermore, in 1967, when the mercenaries were given orders to stop the attacks, they actually rebelled and fought the government. In the end, the Organization of African Unity or OAU for short, through a resolution issued, sent to States not to use mercenaries. Examples include Security Council Resolution Number 405 (16 April 1977) which condemned the recruitment of mercenaries; Furthermore, UN General Assembly Resolution Number 33/24 (8 December 1978) stated that the use of mercenaries against the national transmission movement was considered a crime and individuals who became mercenaries would be considered ordinary criminals, not as combatants. In fact, in the same year, the Council of Ministers of the OAU (Organization of African Unity) countries ratified an agreement known as the 'Convention for the Elimination of Mercenaries in Africa' which came into force on April 22 1985 (Permanasari et al., 1999: 97).

Moreover, the use of mercenaries in an offensive context is clearly contrary to the principles of chivalry contained in humanitarian law itself. This is because soldiers spend money potentially doing whatever they want to complete their tasks, without causing an impact that threatens the civilian population of the country itself. Moreover, no one can guarantee the loyalty of the mercenaries themselves based on ideology. More than that, attacks using hired soldiers reflect cunning and do not convey the high level of justice and honesty in war. This is also in line with Machiavelli's opinion, which condemns all acts of disloyalty by mercenaries and their tendency to damage the State (Coedelli, 2023:1).

As stated in Additional Protocol I of 1977 in Article 47 paragraphs (1) and (2), paragraph (1) provides a regulation regarding the status of mercenaries, where they are not entitled to have the status of prisoners of war. So, if these mercenaries are caught and if a country has a regulation that states that mercenaries are a criminal act, then the soldiers can be tried and national law becomes the applicable law because it is based on the place where the incident took place or the locus of delicti. Furthermore, in paragraph (2) there are categories of groups that can be identified as mercenaries, in essence they are: a. Exclusively drawn, either from within or outside the country, to take part in fighting in an armed conflict; b. Be directly involved in these conflicts; c. Being involved in a conflict with the aim of seeking personal gain, may even have been promised large material compensation by one of the parties to the conflict, exceeding the pay given to soldiers of similar rank in that party's army; d. Not having the same nationality as one of the parties to the conflict or not being a resident of an area

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controlled by one of the parties; e. Not a member of the military forces of either party; and f. Never sent by a country that is not a party to the conflict to carry out official duties as part of that party's military forces.

Apart from that, what was later stated in the Hague Convention V in 1907 actually implicitly referred to mercenaries. In essence, the implied meaning reveals that the State is obliged to be neutral and not interfere in the disputes of other States. The Hague Convention then gives the meaning that by sending mercenaries, it can be said to be interfering, and of course the neutrality of that State is questioned. The implication is that it is very possible for war disputes to widen with new targets, namely countries that send mercenaries to countries in conflict.

In terms of international concerns regarding the threat to world peace, of course there needs to be reconsideration in deciding to hire mercenaries. Based on the Humanitarian Principles in humanitarian law, parties to a dispute are strictly prohibited from using violence that has the potential to cause unnecessary injuries. Moreover, regarding the absence of strict regulations and sanctions, the use of mercenaries has the potential to cause much more massive damage, and civilians also have the potential to become victims.

The Existence of Mercenaries in Defending State Sovereignty from Colonization

The Big Indonesian Dictionary explains colonization as "the process, method, act of colonizing". Colonizing itself is defined by the KBBI as "controlling and governing a country" (Choiruzzad, 2021:71). In the case of colonialism, each of us can already imagine how such colonialism would work. Of course, colonization originates from the cunning brain of a country which tends to have strong military strength and sufficient support, so that these things bring a country to a certain point of self-confidence in carrying out colonization. Mercenaries are generally contracted to engage directly in armed conflict.

Apart from the various consequences bestowed upon mercenaries, it cannot be denied that the current governing conventions do not clearly include sanctions for States that use mercenaries, whether in an offensive or defensive context. As a result, this becomes a loophole and is exploited by cunning countries to hire mercenary services to oppress and plunder a country. In fact, the country that is the object of oppression is far weaker in military strength than the country that is attacking.

Bearing this in mind, the author believes that the use of mercenaries cannot really be called a crime if the context is that a country only wants to fight to defend its sovereignty. Especially regarding a country whose intention is only defensive towards the colonizing country, so that the risks related to rebellion and a series of other risks are only borne by the renting country, because if you look at various conventions or early history prohibiting mercenaries, these things refer to the risks that might arise when using mercenaries. This is then reinforced by the view of Cecile Fabre (2012: 218), that under optimal conditions, private entities have the right to offer their soldier services to countries with the intention of protecting themselves fairly, and countries also have the freedom to obtain services. it's from them.

When talking about mercenaries, of course this will have some risks. However, then it seems necessary to think about the consequences of legal status as a mercenary, because this will be a rough prediction regarding the possibilities that will occur. It should be noted that individuals who are categorized as mercenaries, as explained in Additional Protocol I Article 75, in fact still have special protection rights under international humanitarian law. The provisions stated in Article 75 include the right to be treated with humanity in all situations as

well as the right to avoid acts of murder, torture, harmful physical treatment and insults to individual dignity. Even though they lose their status as fighters and prisoners of war, mercenaries must be treated as non-combatant individuals who take part in conflict situations (Karwur, 2014: 215). In connection with this, Prof. Haryomataram revealed that to be categorized as a mercenary, a person must fulfill the requirements outlined in the six criteria. Although this provision is not explicitly stated in Article 47, it has been agreed that mercenaries are entitled to protection in accordance with the provisions contained in Article 75 of Additional Protocol I (Haryomataram, 2005: 170).

In terms of prisoners of war, each country has the authority to determine prisoner of war status for mercenaries. On the other hand, mercenaries do not have the right to use such status as a reason to defend themselves in the case of lawsuits. For example, in 1988, the UN reported that Iran acknowledged the arrest of several individuals from other countries suspected of being mercenaries. However, Iran stated that it would treat the mercenaries like ordinary prisoners of war. A similar approach is found in the United States Air Force Commander's Manual which recognizes that the US considers mercenaries to be combatants entitled to prisoner of war status if captured. This suggests that states have the authority to determine the status of prisoners of war. However, the Guide also makes clear that the US government has always stood firm against efforts by other countries to punish American citizens as mercenaries.

In relation to this, if faced with a condition where a country's sovereignty is threatened, especially if the country is a colonial object that has soldiers who are less well trained and less physically strong, then hiring mercenaries targets the needs of personnel and those who others, of course it is still not recommended. This is based on the unclear status of mercenary personnel, which has implications for risks that will occur in the future, so recruiting permanent mercenaries is not a wise thing considering all the possible consequences.

In the context of defending sovereignty from colonialism, of course you must first pay attention to the type of attack carried out by the attacker. The problem is when a country is balanced in strength but still uses mercenaries as additional personnel. However, Prof. Hikmahanto Juwana in an interview put forward the concept of war, namely that it must be between two countries with the same or similar strength. Continuing from this concept, if there is a large inequality in war strength, this can be said to be oppression or colonization. Therefore, protecting citizens is a necessity in this case.

In reality, the main issue regarding mercenaries is whether or not the mercenary's status is known (whether or not it can be proven), so as long as no one can prove that the person is a mercenary, of course the mercenary cannot be tried and sentenced based on *locus delicti*. Moreover, colonization and oppression are offensive actions in realizing the goals of the attacking country in a very inappropriate and unethical way.

Furthermore, if you look at the 1989 International Convention against the Recruitment, Use, Financing and Training of Mercenaries, in Article 1 Paragraph (2) letter (a), the essence is that mercenaries are people recruited with the aim of overthrowing a government. or at least weaken the constitutional order of a country, or weaken the territorial integrity of a country, so that in fact mercenaries in a defensive context are not strictly prohibited.

In terms of defending themselves from invaders, resistance becomes a necessity because this is an attempt by the colonized country to restore what is then called world peace. In dealing with cases such as colonialism or oppression, war becomes something that cannot be avoided. This is because colonization itself was not based on certain agreements, as would be the case when a war was fought over certain territories with healthy rules of the game.

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The existence of Private Military and Security Companies in Defending State Sovereignty from Colonization

There is some debate regarding the legal status of PMSC. Some say that PMSC is a group similar to mercenaries, while others think that PMSC cannot be compared to mercenaries for several reasons. Therefore, in this debate, a view was formed about the possibilities regarding the legal status and risks arising from the use of PMSC services.

Furthermore, what is called PMC (private military company) and PSC (private security company) are often known as PMSC. By definition, Spicer, a former head of Sandline International, defines private military companies (PMCs) as legal entities that do business by providing military capabilities to legitimate governments (Nebolsina, 2020: 63). In line with this, Aliya Brown stated that PMC plays a role as a provider of security services for military purposes and security aspects (Brown, 2018: 436). In general, it can be understood that PMSC is a company that provides military services. PMSC's further role is to provide active and passive services. Active means they are ready to carry weapons directly into the battlefield, while passive means they play an indirect role, such as providing training and/or organizing services.

Referring to Additional Protocol I of 1977, specifically Article 47 paragraph (2), actually PMCs themselves cannot be classified as mercenaries, because PMCs do not meet the six criteria stated in that Article cumulatively. Therefore, if you want to be equated with mercenaries who as a consequence lose their rights as prisoners of war, that is certainly not the right thing either.

If we look back at Article 43 of Additional Protocol I, if we look carefully, PMSC can actually be categorized as combatants if they are part of a structured group that operates under the control of the parties involved in the conflict and complies with international law that applies during armed conflict. In addition, if PMSC members do not carry out activities according to the categories listed in Article 4A (1), (2), (3), and (6) of the 1949 Geneva Convention III and Article 43 of the 1977 Additional Protocol I, then the PMSC will be considered as citizens. civilians who have the right to receive protection from targets of military attack (Aditya et al., 2017:13). A common thread can be drawn that if these PMSC staff then take up arms to fight, they are actually also entitled to the status of prisoners of war. Furthermore, if some PMSC members should be included in civilian status, the logical consequence is that PMSCs who serve passively have the right to receive humanitarian legal protection, namely to be free from military targets or attacks.

Apart from that, there is public communication regarding the promise that PMSC will always comply with international law, in this case specifically human rights and humanitarian law. The International Peace Operations Association (IPOA), an organization that promotes the role of PMSCs, has adopted a code of ethics that states: "In each of their operations, the signatory parties will follow all relevant international law and human rights-related protocols." (Indrawan, 2014).

In terms of legal standing, PMSC actually has more guarantees in the legal aspect. However, there are still possibilities that could be violated. This is of course an obligation for both the State that establishes the PMSC and the State that hires it to prevent violations that could be committed by the PMSC itself. From the founder's side, prevention can be done with a series of good recruitments, such as developing specific criteria. Furthermore, this can be done with special agreements referring to the commitment of PMSC members to comply with a series of rules contained in humanitarian law. If it is from the tenant's State side, one way to do this is to incorporate several additional provisions in the contractual agreement with the

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PMSC. These provisions could include standard training in the field of international humanitarian law, a request that PMSCs not be involved in military operations, and an assessment of the history of PMSC employees regarding their previous experiences (Karwur, 2014: 137).

In the context of defending a country's sovereignty from colonialism and oppression, the use of PMSC services is actually legal in defensive efforts, as long as PMSC troops do not do things that are prohibited by international humanitarian law. PMSC troops must uphold international rules so that the rights of civilians are guaranteed.

The risks that lie ahead of course still exist, both for mercenaries and PMSCs themselves. However, looking at and considering various legal sources, roles, and looking at the track record of the mercenaries themselves, the use of PMSCs is more recommended than mercenaries. This is because unlike mercenaries who are contracted to go directly into areas of armed conflict, PMSCs have several other services such as training, intelligence activities, and so on. In addition, by integrating PMSCs into a country's military structure, countries that wish to utilize PMSCs can certainly prevent the classification of their staff as mercenaries, even though several classifications in the rules mentioned above have already been met.

Conclusion

Regarding the use of mercenaries in an offensive context, this violates the provisions of International Humanitarian Law. According to Additional Protocol I of 1977, mercenaries in this case are not entitled to the status of war combatants. Apart from that, judging from the principle of chivalry where a war must uphold honesty, the use of mercenaries is certainly not a commendable thing, especially since the two countries have equal military powers.

The use of mercenaries even in a defensive context is certainly not a wise decision. Reflecting on various conventions that then banned mercenaries, this decision certainly had a dark background behind it. Seeing the legal status of mercenaries who are not considered combatants, this could result in an increase in the potential for mercenaries to cause undesirable things, such as rebellion, criminal threats to mercenaries, threats of sanctions from the hiring state, and so on. Even though there is no convention that explicitly prohibits it, basically the use of mercenaries is not recommended

In the use of Private Military and Security Companies, considering the legal standing, of course the use of PMSC is more recommended. Although there are possible risks to both mercenaries and PMSCs themselves, after evaluating various legal sources, roles, and looking at their history, it seems wiser to use PMSCs rather than mercenaries. This is due to the difference in roles between PMSCs and mercenaries. PMSCs are not only directly involved in armed conflicts, but also provide various services such as training, intelligence activities, and so on. In addition, by integrating PMSCs into the country's military structure, countries wishing to utilize them can avoid classifying their staff as mercenaries provided they comply with several established rules.

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