1. Introduction

The employment of private military companies (PMCs) in present war-scenarios is unprecedented in both its size and scope. The performed activities include protecting military personnel and assets, training and advising armed forces, maintaining weapons systems, interrogating detainees, and sometimes even fighting. Various commentators have already dealt with the legal status of private contractors personnel under international humanitarian law. Thus far, the main conclusions reached can be summarized as follows.

First, an all-encompassing notion of such companies does not exist under the law of armed conflict. The distinction between military and security companies is not useful for the determination of their nature and status. Secondly, there is no vacuum in the law. Existing international humanitarian law provides a binding legal framework and contains the criteria for identifying the status of the contractors’ staff.

This article will focus on the legal challenges posed by the employment of private companies in the context of an international armed conflict. Therefore, the fundamental principle of distinction between combatants and civilians is unavoidable. The primary status of persons affected by such a conflict is crucial as it determines the rights and the privileges afforded by the law and the legal consequences deriving from the conduct of those persons.

There seems to be little doubt that private contractors’ employees can fall into several categories, once certain criteria are satisfied. In particular, commentators have discussed whether they could fall within the categories of combatants, according to the indirect definition under Article 4(A) of the 1949 Third Geneva Convention; whether they could be members of the armed forces within the meaning of Article 43 of the 1977 Additional Protocol I; whether the they can be mercenaries according to Article 47 of Additional Protocol I; finally, whether they could...
be considered civilians, and possibly “civilians accompanying the armed forces” according to Article 4(A)(4) of the Third Geneva Convention.

Therefore, their legal status depends on both the function they perform and their relationship with the hiring State. In this context, the discussion of the controversial notion of direct participation in hostilities is crucial. In any case, the first issue to be considered is the qualification of the connection with the hiring State.

Finally, having considered their primary status, this article will be able to address the following fundamental aspects: whether PMCs employees are entitled to bear arms and directly participate in hostilities; whether they may become military objectives; and their legal status upon capture.

2. **The Nature of the Relationship between the Contractor and the Hiring State**

There is general agreement that a number of activities that were previously performed by regular military forces are now being outsourced to private contractors. Though most of them carry out functions that are unrelated to the conduct of hostilities, concern has been expressed about their possible involvement in combat operations on behalf of a Party to a conflict. The first problematic aspect is whether they should be considered as legitimate combatants under international humanitarian law. Traditionally only members of the armed forces (regular or irregular combatants belonging to a Party to the conflict) enjoy the “combatant privilege” in war. There is no doubt that the increasing relevance of private sector poses a challenge to the paradigm of international humanitarian law as a State-centric system based on the State monopoly of the use of force.

One cannot exclude a priori that contractors personnel may fall within the category of mercenaries. Episodes of violence and abuses committed by private firms shocked public opinion so much that several commentators have claimed that they should be banned under the existing norms on mercenaries. The essential character of the latter, according to Article 47 of Additional Protocol I, is that they are “motivated to take part in the hostilities essentially by the desire for private gain and, in fact, [are] 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”. However, the definitions in this

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