

Analysis of the Legal Status of Mercenaries of War (Iran-Iraq War Case Study)

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Abstract: The main objective of this research is to analyze the legal status of mercenaries of war (Iran-Iraq War Case Study). In classical customary international law, mercenary is a soldier who has uttered an oath of allegiance to submit a government or king and presents his military service. From the perspective of classical international law, mercenaries are military professionals that regardless of the nationality and residence of the parties involved in the war gave their military service for whoever hired them to fight. The main objective of mercenaries is not loyalty to a particular political or social ideal, but to gain material benefits (money, Booty and the like). For this reason, they are not primarily committed to complying with local laws and international conventions. Protocols, Geneva Conventions and indeed, all the rules of the (including Convention and customary) armed conflict must be interpreted in a way that first, prevents the growth and spread of war crimes and, secondly, the interpretation must be in support of victims of war. Therefore, it must be said that the role of a mercenary depends on his action. Because, basically a mercenary's act breaches the peace and international security, or provides incentives that promote or provide a violation of international peace and security; interpretation of international conventions and norms must be done to reduce and prevent mercenary action.

Keywords: War mercenaries, Iran and Iraq, social idea, growth, action

INTRODUCTION

In classical customary international law, mercenary is a soldier who has uttered an oath of allegiance to submit a government or king and presents his military service. Basically, according to this theory, the purpose of mercenaries in military service, in addition to material benefits, can also be intangible benefits (business reputation, honor, family status, etc.). Given the gradual increasing importance of international law Convention and then its relative priority on customary international law after the Second World War developments, United Nations from the very beginning of its establishment condemned the phenomenon through documents and knows it as the violation of UN Charter obligations, in particular violations of Paragraph 1 (peacekeeping and international security), Paragraph 2 (development of friendly relations) of Article 1, Paragraph 4 of Article 2 (non-use of force or the threat of it). In addition, both the General Assembly and Security Council through resolutions have stated that the use of mercenaries is as foreign interference in the internal affairs of countries, with the aim of destabilizing and violates the territorial integrity, sovereignty and independence of them. This is important as much for the United Nations that established Special Rapporteur for it. Basically, mercenaries are used

when one side wants the fastest possible score on the other side for quick prevail. Therefore, even if for the premise and the most strict form (to advance debate) we do not consider the organization known as KMO as mercenary, Since their presence and actions during the Iran-Iraq war was only temporarily and at times, that due to various factors War has been to the loss of Iraqi forces and they have entered the conflict in favor of them and to the detriment of Iranian forces and the fact that by acting in favor of Iraqi forces they gained broad financial rewards (pre- and postoperative), they are not definitely fighters. It can be said that Protocols, Geneva Conventions and indeed, all the rules of the (including Convention and customary) armed conflict must be interpreted in a way that first, prevents the growth and spread of war crimes and, secondly, the interpretation must be in support of victims of war. . Therefore, it must be said that the role of a mercenary depends on his action. Because, basically a mercenary's act breaches the peace and international security, or provides incentives that promote or provide a violation of international peace and security; interpretation of international conventions and norms must be done to reduce and prevent mercenary action. In Khordad,30th, 1366 the organization officially known as the People's Mujahedeen established its military wing of the "National Liberation Army" by the

commander in chief Massoud Rajavi and after that Maryam Qajar Azdanlo (Abrishamchi, Rajavi) (monthly National Council of Resistance of Iran, 1366) . This army had at least three large-scale direct military operations against Iran during the Iran-Iraq war and sometime after that: “Sunshine Operation” on Farvardin, 8th, 1367 in the area around Soush and Fakeh, “Chandelier” Operation in Khordad 28th, 1367 with the aim of capturing the city of Mehran, - “Eternal Light Operation “, in Mordad 3rd, 1367 (one week after the adoption of UN Security Council Resolution 598 by the Islamic Republic of Iran), and the influx of Qasr-e Shirin to occupy Tehran. This organization also have had multiple limited operations (i.e., mined, the invasion of outposts, ambushed investment, etc.) during the Iran-Iraq war (in the region of Kurdistan) under the guise of “peshmerga MKO, MKO fighters and the like. Almost the majority of these kinds of operations have been done in parts of the war of Iraq against Iran which is called the passive side as a result, both the Iraqi and Iranian armed forces deployed less equipment and personnel. Since the military and even the political operations of these organizations and its military forces was principally to the full benefit of one of the parties involved in an armed conflict (Iraq) and since none of the major or limited operations of them are not accompanied by the people of those areas and also in most cases (for example, during Eternal Light Operation and counter-offensive before Mersad Operation) people have had resistance response to them as the invading forces of Iran's and since, according to documents published after the fall of the Pahlavid government, they had extensive intelligence, security, counterintelligence and military cooperation with it, they cannot be considered among the liberation movements. Therefore, it should be said that this organization and its affiliated front institutions during the Iraq war against Iran are known as mercenary forces that act in favor of one of the parties involved in a war (Iraq) with the aim of intensifying and prolonging the conflict between the parties and hence, could be prosecuted charged with the breaching of peace and international security and war crimes.

Research purposes:

- Analysis of the legal status of mercenaries of war (Iran-Iraq War Case Study)
- The evolution of the rules of international law on mercenaries
- Review the strengths and weaknesses of the rules of international law on mercenaries

The main research question: Are the mercenaries of Iran-Iraq war can be examined with the norms of international law?

The main hypothesis of research: It seems that the mercenaries' situation in Iran-Iraq war can be examined with the norms of international law.

MATERIALS AND METHODS

Theoretical principals: The literal meaning of mercenaries and mercenary formation: The term Mercenary in English and Mercenaire in French is taken from Mercenarius in Latin which means any person who merely offers services when they are paid. This term is used especially for soldiers who offer their military service to foreigners in return for wages and without regard to political principals. The term has entered the English language from fourteenth century However; the use of professional military service goes back to ancient Greece.

The use of mercenaries especially in military operations returns to the city states of ancient Greece. For example, in two competing city-states of Athens and Sparta residents in the city were divided into two groups, citizens and non-citizens. Citizenship is defined as those who were men and between the ages of 15-70 years and were not maiming. Therefore, women, children, adolescents and the elderly were not considered citizens .Another class who were not considered as citizens were the men who were owed to other men and could not pay their loans. The debtors must have worked for a while. One of the things that they were obliged to do in return for their debt to the creditor was fighting. Gradually, some of the wealthy Athenians when they were united with Spartans to fight against the Empire of Iran, in the promise of money and productivity of trophies sent some to the battlefield instead of themselves, so that on the one hand, one of the duties of citizenship have been done and because of his absence others cannot encroach on their property and their families. In addition, the Greeks regarded others as barbarians and, therefore, they deserved themselves as masters and considered others as slaves. This is considered even in Aristotle's “Politics” essay. He believes that there are people who live slaves anywhere and people who aren't slaves nowhere. The latter are the Greek citizens. Greek citizens assume a citizen right for themselves not only in their country but in the whole world, while the Berbers are noble only in their own territory and when they leave their territory (whether through travel or through war, etc) they are considered as slaves. During the war with Iranians, Greeks made a contract with some people who were really into captivity, that if they participate in a war as their delegates can return to their homeland or later, because of fighting on behalf of others to receive part of trophies or sum of money. Roman Empire gradually tried to make its armed

forces of people who were professional fighters. They called these people, "Legionnaire". The major success and the increasing development of the Roman Empire was due to the establishment of such an army. Because access to more land for each Legionnaire" was meant to achieve more trophies This idea was followed in medieval Europe and then in the form of Swiss Guards, the French Foreign Legion and the British Army Gurkha brigade. Sixties (twentieth century) was a period in which the phenomenon of mercenaries and mercenary was considered again because of decolonization movements (especially in Africa). Most colonial governments recruited and paid to people of different nationalities to fight the pro-independence movement and stand against the forces of independence.

RESULTS AND DISCUSSION

Conceptual developments in the field of public international law: In classical customary international law, mercenary is a soldier who has uttered **an oath of allegiance to submit a government or king and presents his military service. Basically, according to this theory, the purpose of mercenaries in giving military service, in addition to material benefits can also be** intangible benefits (business reputation, honor, family status, etc.). On the other hand, it seems that in terms of history of public international law material and spiritual interest are equally considered in the common sense and classical mercenary. The Swiss Guard at Vatican is the most famous and perhaps the oldest mercenary force that can be introduced as the evidence. This force has served as Pop guards and his subordinate places from the fifteenth century so far. In the fifteenth century, the Swiss Guards offered their military services not only to Pop but also to other European courts. Until the eighteenth century, the Swiss guards continued to offer their services. In 1874, with the approval of the Swiss Confederation constitution, the Swiss military immunity and service was prohibited for foreign powers. But by 1927, virtually the Swiss continued his military service to European governments, of course, as voluntary military service coverage (Hossein, 1967). During this period and with the emergence of the concept of voluntary military service, gradually, the balance between material and spiritual goals were tied for military service and in practice material goals are more important than spiritual purposes (of course as spiritual and voluntary targets in surface). In fact, with the decline of ethics governing the European Communities, ethics governing the war lapsed, too. So that most of the Kings increased the number of agents under different names and sometimes by granting even knight title to

achieve success faster. Since the purpose of mercenaries was earning maximum profits in minimum time; they actually regarded battlefield as a private and business place and did not make any distinction between civil and military people. Thus, the concept of just war generally faded (Hossein, 1967). Therefore, we can say that from the perspective of classical international law, mercenaries are military professionals that regardless of the nationality and residence of the parties involved in the war present their military service, for whoever hired them to fight it. The main objective of mercenaries is not loyalty to a particular political or social ideal but to gain material benefits (money, Booty and the like). For this reason, they are not primarily committed to complying with local laws and international conventions.

Views of contemporary international law: Given the gradual increasing importance of international law Convention and then its relative priority on customary international law after the Second World War developments, United Nations from the very beginning of its establishment condemned the phenomenon through documents and knows it as the violation of UN Charter obligations, in particular violations of Paragraph 1 (peacekeeping and international security), Paragraph 2 (development of friendly relations) of Article 1, Paragraph 4 of Article 2 (non-use of force or the threat of it). In addition, both the General Assembly and Security Council through resolutions have stated that the use of mercenaries is as foreign interference in the internal affairs of countries, with the aim of destabilizing and violates the territorial integrity, sovereignty and independence of them. This is so important for the United Nations that special Rapporteur seat is established for it. (For example, refer to Security Council resolutions 405 and 419 in 1977, 103/36 resolution adopted on 9 December 1981 in General Assembly) (Sadeghi, 1971). In 1989 the General Assembly of the United Nations approved the International Convention against the recruitment, deployment, financing and training of mercenaries. The Convention entered into force on 20 October 2001. Taking dozen years to put into force an international treaty can indicate that not many countries have realized the importance of preventing the hiring of mercenaries in conflicts, or because of the moral and material interests that hiring mercenaries has, the binding of such a convention blocks the substantial benefits of them. In 1977, OAU adopted the Convention on the elimination of hiring mercenaries in Africa in which mercenaries and hiring mercenaries is considered a crime against peace and security in Africa, whether it is done by an individual, group, organization, state government or a representative. In 1967, the UN

Security Council urged governments to avoid of using of mercenaries within their territories to change their political regime. In June 1977, additional protocol I to the 1949 Geneva Conventions deals with mercenary status in Article 47 and provides:

- Mercenary doesn't have the right to be treated combatants or prisoners of war
- Mercenary is someone who
- Is hired in place or out to fight in an armed conflict
- Actually directly involved in hostilities
- His main motivation for participating in the hostilities is essentially personal interests and indeed from one side of the conflict or its representative promised him a material reward and is much more than the amount that is paid to the peers' warriors with similar duties in the armed forces of the other party
- Is not a citizen or resident of the territory under the control of the other party
- Is not a member of the armed forces of the belligerent party
- Is not deployed by the government other than the sides in the conflict as a member of the armed forces of the State to carry out official duties

Three main conclusions that can be drawn from the content of this article are:

First, mercenary is an individual with no direct interest in entering into a conflict to defend his fatherland.

Secondly, his main goal to intervene in the conflict is gaining material benefit or at least material benefits fully prevail on the spiritual interests.

Third, mercenary fighter is not a legal fighter. Since, he is not a member of the armed forces of the parties involved in the conflict. Some lawyers believe that the definition based on Article 47 is a strict and restrictive legal concept. Thus, according to this protocol, a person can be considered a mercenary if he has all six conditions listed in Article 2.

The concept contrary to this last conclusion is that if anyone doesn't have even one of these conditions, he cannot be considered a mercenary (Sadeghi, 1971).

The legal status of mercenaries in international humanitarian law. The first additional 1977 Geneva Protocol requires sixth conditions to identify mercenary: Mercenary is any person who:

- Is specifically recruited in or out of the country to fight in an international armed conflict
- Is practically and directly involved in an international armed conflict. It should be noted individuals such as consultants, owners of military technology and other professionals are not considered as mercenaries because they are not practically involved in the conflict

- He is motivated to participate in an international armed conflict essentially for self-interest and in fact, from the other side of the conflict or its representative a material reward is given to him that is much more than the amount that is paid to the peers' warriors with similar duties in the armed forces of the other party. Perhaps this financial greed is one real requirement to recognize a person as a mercenary; this feature distinguishes mercenaries from volunteers who fight for their opinions and ideals
- Is not a citizen or resident of the territory under control of the parties in the conflict, so if one side hired the other side nationals, these persons are not considered as mercenaries
- Is not a member of the armed forces of the parties in the conflict
- From a country that is not party to the conflict have not been sent as a member of its armed forces to perform official duties. Mercenary activity is personal and individual

About the status of mercenaries it can be said that the mercenary is not entitled as a combatant or prisoner of war, however, the mercenaries enjoy the support provided for in Article 5 of the Treaty of Geneva and Article 75 of Additional Protocol I and the customary rules and principles of international human rights (Ali, 1967).

The analysis of the role of mercenaries in the Iran-Iraq war: The right of a soldier as a prisoner of war disappears when he did not distinguish themselves from civilians or placed at the disposal of the other party as spies or mercenaries. It seems that not including these last two categories as prisoners of war is that the Geneva Conventions and the Additional Protocols know these two categories of people disruptive of order created by this Convention and violation of discipline within the armed forces to comply with international humanitarian law (including common-law and the convention). In other words we can say that any unit involved in the conflict that their responsibility for their actions is accepted by their senior officials are considered soldiers and as a result can be war prisoners.

According to the above, we can say that civilians are not members of the armed forces and are not taking part in hostilities.

But, is the diagnosis or distinguishing of a civilian (even with the assumption of good faith) from a military one, in the turmoil of war, as simply and fast as possible? The answer is no. It seems, therefore, that for this reason Paragraph 1 of Article 50 of Additional Protocol I pointed out that in case of doubt about whether an individual is a

civilian or not, he is considered as a civilian (Afkhani and Jannati, 1969). It should be noted that the inclusion of this provision does not mean that those in a conflict who have been trying to intensify the war through wage and deceit, so they can expand their personal interests and ambitions, cannot be known as a breach of national security or international peace. Basically mercenaries are people who are disturbing the order established by the Convention relating to the conflict and violate the discipline within the armed forces to comply with international humanitarian law (including common-law and the Convention). For this reason, some lawyers in interpreting this rule believe that the inclusion of such a provision in the definition of civilians is that "the mere existence of doubt on the identity of the individual cannot be considered as an excuse for attacking him. But on the other hand, someone that violates an order, rule or custom, cannot be treated according to the same order, rule or custom. Because, in principle, these regulations have been established to maintain order and confirming the possibility of Creating disorder and proposing strategies for violation of its own regulations (albeit implicit), causes the disorder and irregularities. According to this view, some legal experts have analyzed that "based on his status (as prisoners of war), a mercenary does not have the right of self-defense.

During the Nuremberg trials, the subject of exclusion of humanitarian international law to mercenaries was presented and finally, it was concluded that since these individuals' increase the risks of conflict due to their way of fighting they are not fighters. It would seem that it is because of this main and important reason that the Geneva Conventions and its additional protocols have not recommended explicit directives and regulations on how to deal with mercenaries and they can only by virtue of Article 75 of the Additional Protocol enjoy the minimum support (principle of human behavior) expected in this article.

It seems that these people should be punished in the countries which have employed them based on paragraph 4 of the above mentioned article (see, for example, the People's Revolutionary Tribunal of Angola, in 1976; also, in the armistice agreement between France and Germany on June 22, 1949, France pledged all French to avoid war with Germany or join one of Germany's enemies. The Agreement provides that those who ignore the order will be tried as an illegal militia). Therefore, it can be said that since mercenaries primarily violate the rights in armed conflict, they can be prosecuted in national or international courts for war crimes. On the other hand, it should be noted that the purpose of the principle of

separation is not only identifying the combatants from non-combatants, but also identifying the legal combatants from illegal ones. This would make it possible to comply with the spirit of the Geneva Conventions and additional protocols because these documents introduce the most important effect resulting from the identification of a person's status as legal combatants enjoying the state of prisoners of war. While, the above-mentioned documents, on the other side, is silent about mercenaries when they are in detention. Therefore, it can be said that if they are arrested, they are not considered as prisoners of war and are responsible for all actions which they have done. For example, if the armed forces or civilians are killed in their actions and operations, they can be prosecuted on charges of murder and so on. Due to these facts, we can conclude that according to the protocols and the Geneva Conventions and with regard to the definition of war crimes, crimes against humanity from Nuremberg and Tokyo tribunals' to the International Criminal Court and according to the principles of modern criminology (shifting the focus of the criminal offense and Prevention of Crime) and since the purposes and principles of the United Nations enshrined in Article 1 of the Charter of the United Nations (peacekeeping and international security, prevention and removal of threats to the peace, bringing an end to any act of aggression or breach of the peace and taking other appropriate measures to strengthen world peace, etc.) it is better to describe fighting (conflict) as an international criminality (international crime) and divide the individuals involved in the war into two categories: victims of war (war victims) and criminals of war (war criminals).

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One of the main challenges related to mercenary is the growing presence of private security-military firms in military operations and the active and direct participation of their employees in international armed conflict and even in some non-international cases. Recruitment and employment of persons referred to in armed conflicts in Iraq, Afghanistan and Libya in recent years has faced it with more challenges. The presence of this kind of participation in military-war operations is not new, but what is new and interesting is the increasing number of these participations as well as their variety of security military activities. Countries usually in the context of contracts with private security - military companies that have been established under their laws assign part of their sovereignty in military matters of the war to these companies. International governmental and non-governmental organizations, however, have taken advantage of these companies in their military operations. In general, most of the activities of such companies

include: protection of persons and military property, supporting military operations, training and guidance of armed forces, the running of weapons systems, addressing the detainees' affairs and finally, fighting or direct participation in armed conflicts. In order to reduce the challenges associated with it and having private military and security companies and employees to observe the provisions of international humanitarian law, International Conference of the Red Cross in November 2007 required the countries that have signed the cooperation agreement with these companies to guarantee humanitarian rights by them for their members and monitor their good performance. In addition want their commanders to prevent violations of humanitarian law and, if necessary, deal with it and to report violations to authorities. Based on international responsibility, the wrongful acts of these companies and their employees are attributable to the country or international organization which employed them.

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REFERENCES

- Afkham, H. and S. Jannati, 1969. Aspects and Consequences of the War between Iran and Iraq. Nashr Farhang, Tehran, Iran.
- Ali, S., 1967. Mercenary, Aspects and Approach. Tehran Azad University Press, Tehran, Iran.
- Hossein, S.G., 1967. History and Status of Mercenaries in International Law. Tehran Azad University Press, Tehran, Iran.
- Sadeghi, H., 1971. International Criminal Law. Tehran Azad University Press, Tehran, Iran.
- Shafizadegan, M., 1966. Irans religious-political organizations and movements in the years 1375-1320. Cultural Institute of Science and Modern Thought, Tehran, Iran.