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The Involvement of “Mercenaries” in the Armed Conflict in Nigeria

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Fokus

In light of the alleged involvement of “mercenaries” in the non-international armed conflict in Nigeria, this Bofax recalls pertinent IHL rules defining the status of PSCs in armed conflicts.

Quellen

The New York Times, Mercenaries Join Nigeria’s Military Campaign Against Boko Haram, 12 March 2015.

Al Jazeera, Nigeria acknowledges presence of foreign mercenaries, 14 March 2015.
Mils Melzer, Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law, 2009.

The Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict, 2008.

After months of setbacks, most recently Nigerian armed forces claimed to have regained territory against the Boko Haram group. However, reports suggest that this was not primarily the success of Nigeria armed forces but foreign “mercenaries” played a crucial role in military advancements. Following unnamed Nigerian officials and international diplomats, notably South African contractors play a major operational role in the fighting: Allegedly in order to hide their identities, they attack during the night, push back Boko Haram forces, and the next morning Nigerian troops come in and claim success. The use of private security contractors in armed conflicts made important headlines in the years 1990s and 2000s, which lead to important clarifications of the international legal framework they operate in. This Bofax recalls pertinent IHL rules defining the status of PSCs in armed conflicts.

Colloquially, the term ‘mercenaries’ is often used to describe private foreign contractors in armed conflicts. IHL, however, contains a narrow definition of the term mercenary, which is found in article 47 of Additional Protocol I and applies only in international armed conflicts (IAC). Among its six cumulative requirements, the definition demands that a person is not a national of a party to the conflict or member of its armed forces, is recruited to and factually does participate in hostilities, and is essentially motivated by an interest in private gain. If individuals qualify as mercenaries, they do not enjoy a combatant privilege and are not entitled to POW status. In other words, they can be prosecuted for otherwise lawful acts of war. As the conflict between the armed forces of Nigeria and Boko Haram does not seem to qualify as an IAC, however, PSCs allegedly hired by Nigerian government can in any case not qualify as ‘mercenaries’ under IHL.

What then is their status under IHL? The Nigerian government claims that PSCs involved in the fight against Boko Haram do not participate in hostilities but merely provide “technical and logistical support” as well as training to Nigerian forces. This would mean that these foreign contractors enjoy the protection of civilians, unless and for the time that they participate directly in hostilities. In practice, this can be a fine line to draw if PSCs provide crucial support close to the front lines.

Other reports suggest, however, that “foreign fighters, equipped with heavy weaponry, attack helicopters and armored vehicles” participate directly in military operations and contributed to recent gains by Nigerian forces. If this was the case, and depending on the exact facts on the ground, these PSCs could qualify as an organized group belonging to the Nigerian armed forces. The ICRC DPH Study (p. 23) suggests that this would at least require “a *de facto* relationship between an organized armed group and a party to the conflict”, for which it would appear “essential that it conducts hostilities on behalf and with the agreement of that party”. If that was the case, these private contractors would belong to the armed forces of the state and would no longer qualify as civilians. In any case – either as civilians or members of an armed group belonging to the armed forces – if PSCs participate directly in hostilities, they are bound by pertinent rules of IHL.

Present reports on the use of PSCs in armed conflict in Nigeria reemphasize the importance of the question of how international law responds to the provision of private security services in times of armed conflicts. Unlike in the 1990s and the early 2000s, however, the international legal framework has been significantly clarified. The Montreux Document explains that under international law PSCs are obliged to comply with IHL and international human rights law as applicable. In addition, it reminds states on whose territory PSCs operate that they must ensure respect for IHL, protect human rights of all persons under their jurisdiction, and investigate and prosecute alleged misconduct by PSCs. While Nigeria does not participate in the Montreux Document process, the pertinent international rules apply nonetheless.

Verantwortung

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