

## Criminal Responsibility for Mercenaries: A Comparative Study Between Islamic Criminal Law and International Criminal Law

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### Article history:

Received in revised form: 01 July 2025

Acceptance date: 17 July 2025

Available online: 25 July 2025

### Keywords:

Mercenaries; Criminal Responsibility;  
Bughāt; Islamic Criminal Law;  
International Criminal Law.

### How to Cite:

Brahmana, F. F. S., & Ramadani. (2025).  
Criminal Responsibility for Mercenaries: A  
Comparative Study Between Islamic  
Criminal Law and International Criminal  
Law. *Al-Risalah Jurnal Ilmu Syariah Dan  
Hukum*.

<https://doi.org/10.24252/al-risalah.vi.58863>

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### Abstract

This study explores the issue of criminal responsibility for mercenaries, individuals who participate in armed conflicts for material gain, either through direct recruitment or as part of organized groups. The primary purpose of the research is to analyse how criminal liability for mercenary actions is conceptualized in both Islamic Criminal Law and International Criminal Law, given the complex legal challenges posed by their involvement in cross-border conflicts. The methodology employed is normative juridical with a comparative approach, analyzing relevant legal sources including the 1949 Geneva Convention Additional Protocols and primary Islamic legal texts. The study systematically compares how each legal system treats the criminal accountability of mercenaries based on their roles during conflict. The results reveal that under Islamic Criminal Law, mercenaries who engage in rebellion (*bughāt*) may be subject to capital punishment, as referenced in Qur'an Surah Al-Hujurat verse 9. In contrast, International Criminal Law treats mercenaries as individuals subject to the national laws of the country where the offense occurs (*locus delicti*), with limited recognition of mercenaries as combatants. The originality of this study lies in its comparative framing, bridging two distinct legal traditions that are rarely analyzed together in the context of modern warfare. The implications underscore the need for a more coherent and adaptive policy framework to address the transnational nature of mercenary activity and ensure equitable legal accountability across jurisdictions.

## INTRODUCTION

International law is a body of rules that governs relations between states and operates across national boundaries.<sup>1</sup> International humanitarian law (IHL) refers to a set of rules designed to limit the humanitarian impact of armed conflicts. It is often referred to as the law of armed conflict or the law of war (*jus in bello*). The primary objective of IHL is to regulate the means and methods of warfare used by parties to a conflict and to ensure the protection of victims. It seeks to strike a balance between military necessity and humanitarian considerations. IHL must be distinguished from other legal frameworks that may operate in parallel but have different purposes and subjects, such as the UN Charter, the law of neutrality, human rights law, and international criminal law.

Parties to a conflict are obliged to comply with humanitarian obligations under all circumstances, regardless of the behavior of the adversary or the nature and origin of the conflict. Although IHL is now one of the most codified and widely ratified branches of international law, its rules also derive from customary international law and general principles of law. Recent political, social, economic, and technological developments present new challenges to the effective implementation and fundamental goals of IHL. In short, IHL consists of international legal norms that establish minimum humanitarian standards to be upheld in situations of armed conflict.<sup>2</sup>

Mercenaries are commonly defined as individuals who participate in armed conflict primarily for material gain or ideological and political motives.<sup>3</sup> They are often former military personnel or soldiers whose service terms have ended, usually discharged due to disciplinary reasons or downsizing within the armed forces. Notable examples of mercenary organizations include Blackwater (now Academi), Executive Outcomes, and Sandline International—entities known for their involvement in security operations in Iraq, Pakistan, Afghanistan, and their support for the Sierra Leonean government against the Revolutionary United Front. Initially, the demand for mercenaries arose from the high cost and difficulty of maintaining a large and capable military force. As time progressed, private military companies increasingly offered lucrative salaries to attract individuals to join.

For instance, UG Solutions, a company established in 2023 and headquartered in Davidson, North Carolina, offered veterans a starting salary of USD 1,100 per day and a

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<sup>1</sup> Ni Putu Era Daniati, Dkk. “*Status Hukum Tentara Bayaran Dalam Sengketa Bersenjata Ditinjau Dari Hukum Humaniter Internasional*”, Jurnal Komunitas Yustisia Universitas Pendidikan Ganesha, Vol. 3 No.3, (2020).

<sup>2</sup> Nils Melzer, *Hukum Humaniter Internasional Sebuah Pengantar Komprehensif*, Jakarta Selatan, 2019.

<sup>3</sup> Himmah A’la Rufaída, Skripsi: “*Status Hukum Tentara Bayaran (Mercenary) Dalam Hukum Internasional*”, (Bandar Lampung: Universitas Lampung, 2019).

USD 10,000 advance payment (approximately IDR 168 million). These individuals were deployed to checkpoints located at the Netzarim corridor, which divides northern and southern Gaza, and Salah al-Din Road, which separates eastern and western Gaza.

A well-known case involving mercenaries occurred during the Angolan conflict. In 1976, thirteen mercenaries were tried for their involvement in armed conflict in Angola. Approximately 100 mercenaries had been recruited by the FNLA (National Front for the Liberation of Angola), a U.S. and South Africa-backed non-communist group, to fight against the Soviet- and Cuban-supported communist MPLA (People's Movement for the Liberation of Angola). Of these, thirteen were captured by MPLA forces and prosecuted in an Angolan court for crimes including mercenaries', crimes against peace, murder, brutality, and looting. They were treated as civilians unlawfully participating in hostilities. The court sentenced four to death, four to 30 years' imprisonment, three to 24 years, and two to 16 years.<sup>4</sup>

Mercenary issues were first raised at the United Nations in 1961 in connection with the Katangese secession. In 1964, the Congolese government itself hired mercenaries to suppress a rebellion. When ordered to disarm in 1967, most refused and openly rebelled against the government. The government sought assistance from the UN Security Council and the Organization of African Unity (OAU). Both the Security Council and the OAU urged member states to prevent the recruitment of mercenaries within their territories for the purpose of overthrowing foreign governments. The epilogue of this troubling event occurred in Rwanda, where the mercenaries sought refuge and were later repatriated with ICRC assistance on the condition that they not return to Africa.

Since then, mercenaries have played a role in nearly every conflict involving military operations. Nevertheless, since 1968, the UN General Assembly has maintained a firm stance, declaring the employment of mercenaries against national liberation movements to be a criminal act and labeling mercenaries as criminals. In 1977, the UN Security Council adopted a consensus resolution condemning the recruitment of mercenaries to overthrow the governments of UN Member States. That same year, the OAU adopted the Convention for the Elimination of Mercenarism in Africa at its 29th session in Libreville.

Article 47 of Additional Protocol I to the Geneva Conventions explicitly establishes that the recruitment of mercenaries constitutes a criminal act, particularly when they are employed to destabilize UN member states. In the present era, the use of mercenaries is

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<sup>4</sup> Geraldly Diandra, *Peran Dan Status Private Military Companies Dalam Konflik Bersenjata Ditinjau Dari Hukum Humaniter International*. Diponogoro Law Jurnal, 6 (1).

considered unlawful, as it serves the private interests of certain parties rather than legitimate military operations. Individuals who choose to become mercenaries typically do so purely for financial gain, without ideological commitment to any nation.

The Geneva Conventions do not recognize mercenaries as lawful combatants, meaning they are not entitled to prisoner-of-war status. Nonetheless, this has not deterred individuals from becoming mercenaries. The demand for their services remains strong, particularly during wartime, when nations often require additional human resources. States generally apply their domestic laws to mercenaries who commit crimes within their territories, following the principle that jurisdiction lies with the country where the offense occurs (*locus delicti*).<sup>5</sup>

Mercenaries, driven by financial incentives, are willing to risk their lives to achieve victory in war.<sup>6</sup> According to international practice, a mercenary captured during a conflict is subject to the jurisdiction of the detaining state. Under Article 47(1) of Additional Protocol I (1977), a captured mercenary is not entitled to combatant or prisoner-of-war status. Generally, becoming a mercenary constitutes a criminal act when:

1. They engage in activities that violate international law;
2. They commit crimes during armed conflict;
3. They lack formal authorization from any party to the conflict;
4. The host state has laws explicitly prohibiting mercenary activity.

Assessing the unlawfulness of mercenary recruitment also requires an understanding of military conduct under Islamic law. In Islamic criminal jurisprudence, military engagement is categorized under *jihad*, and when it involves rebellion or criminal activity against civilians, it falls under *bughāh* (armed rebellion). *Bughat* refers to defiance against a legitimate ruler (*imam*) using force based on certain justifications (*ta'wil*). It has three legal elements: rebellion against the ruler, the use of force, and the intention to violate legal order.<sup>7</sup> The Qur'anic basis for *bughat* is found in Surah al-Hujurāt (49:9).

When a conflict escalates into warfare between states, national military forces are deployed to protect civilians and defend sovereignty. This underscores the essential role

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<sup>5</sup> Porong Ronaldo Joseph Branco, *Pemberian Sanksi Terhadap Tentara Bayaran (Mercenary) Yang Ikut Serta Dalam Sengketa Bersenjata Ditinjau Dari Hukum Humaniter Internasional*, Jurnal Lex Crimen, Vol. 6 No. 6, (2017).

<sup>6</sup> Christine Sri Marnani, *Fenomena Tentara Bayaran Dan Kemungkinan Implementasinya Di Indonesia: Analisis Dari Perspektif Sistem Pertahanan Negara*, Jurnal Dinamika Global, Vol. 8, No.2, (2023)

<sup>7</sup> Erpandi, *Bughat Terhadap Pemimpin (Studi Analisis Sanad Dan Matan)*, Lampung: Universitas Islam Negeri Raden Intan Lampung, 2020.

of official military personnel, who are trained to engage enemies and distinguish themselves from civilians. Therefore, lawful armed forces should be used in warfare rather than irregular actors like mercenaries.

Based on the above discussion, the author identifies a significant difference between Islamic criminal law and international criminal law concerning the criminal liability of mercenaries. This divergence is evident in how each system defines legal subjects, applies individual responsibility, and views the legitimacy and motivation behind participation in armed conflict. Previous studies have explored mercenaries from the standpoint of international humanitarian law and national legal systems, but few have conducted comparative analyses on how Islamic criminal law—particularly *fiqh al-jināyah* and *maqāṣid al-sharī'ah*—addresses the criminal responsibility of mercenaries. This article aims to fill that gap. The absence of research bridging these two major legal frameworks highlights the urgent need to explore points of convergence, divergence, and normative relevance in their treatment of non-state armed actors.

## METHODS

This study employs a normative juridical method with a comparative legal approach.<sup>8</sup> This approach is utilized to analyze the criminal responsibility of mercenaries from the perspectives of Islamic criminal law and international criminal law, by comparing legal principles, normative structures, and jurisprudential doctrines within both legal systems. The data used are secondary sources, obtained through a literature review of primary and secondary legal materials, including classical Islamic jurisprudence texts (*fiqh*), international conventions, academic journals, and relevant legal documents. The analysis is conducted through a normative-comparative lens, highlighting the differences in foundational principles and legal reasoning between the two systems. This study is limited to the substantive aspects of criminal responsibility and does not cover procedural or implementation-related issues.

## RESULTS AND DISCUSSION

### 1. Definition of Mercenary in Islamic Criminal Law

According to Asad M. Al-Kalali and A. Thoha Husein, the term "soldier" in Arabic can be translated into three different terms: *jund*, *jaysh*, and *'askari*. M. Ismail Ibrahim explains that *jund* refers to a group of people, which may consist of soldiers, troops, or other collective units. The term *al-jaysh* signifies a military force or a group of soldiers

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<sup>8</sup> Sigit Sapto Nugroho dkk, *Metodologi Riset Hukum*, (Surakarta: Oase Pustaka), 2020.

engaged in a struggle. It may be used to denote an organized military body, either in the context of warfare or peacekeeping. According to the Arabic dictionary *Muhit al-Muhit* (p. 140), the smallest unit classified as a military group consists of 400 soldiers (equivalent to four companies), while other sources claim it must consist of at least 4,000 troops. The term *al-'askariy* refers to a larger military body or an army, and *Muhit al-Muhit* (p. 601) notes that *al-'askar* generally implies a large number of troops.<sup>9</sup>

In relation to the term "mercenary", the Arabic equivalent found in the Qur'an is *al-ujrah*, which refers to a reward or compensation (*al-thawāb*) given in return for services rendered. In several verses, this term is associated with *ajr* or spiritual reward, either in this life or the Hereafter. Legally, however, *al-ujrah* in the context of *mu 'āmalah* refers to lawful remuneration for services through a contract of *ijārah*. When *al-ujrah* is linked to participation in armed conflict, it raises normative questions about the legitimacy of such action—particularly when involvement in warfare is not authorized by a legitimate legal authority or lacks a purpose consistent with Islamic law.

Based on this understanding, a mercenary (*al-junūd al-murtaziqah*) can be defined as an individual or group that offers military services to a particular party in an armed conflict, with the primary motivation of receiving financial compensation. Such individuals are not bound by a national oath of service or ideological commitment, rendering their engagement in war pragmatic and profit-driven. In practice, mercenaries are employed by both states and non-state actors, including separatist factions, to strengthen combat capabilities.

In Islamic law, however, warfare is only justified within the framework of *jihad*—a struggle undertaken in the path of God (*fī sabīl Allāh*). *Jihad* is subject to strict legal conditions and requirements, such as the presence of legitimate leadership, just objectives, and a prohibition against fighting for worldly gain. Consequently, participation in war for the sake of financial gain (*al-ujrah*), without legitimate authority and a lawful purpose, stands in contradiction to the principles of *jihad* and may constitute a criminal offense under Islamic criminal law.

As stated in the Qur'anic verse Al-Anfāl [8]:39:

"And fight them until there is no more *fitnah* (persecution or idolatry) and [until] the religion, all of it, belongs to Allah. But if they cease, then indeed, Allah is Seeing of what they do."

According to al-Wahidi, this verse signifies that war is to be undertaken so that the polytheists embrace Islam and all people worship Allah alone. As-Sam'ani interprets the

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<sup>9</sup> Muhammad, S. (2020). *Militer Dalam Al-Qur'an (Relevansi Konsep Militer Nabi Muhammad SAW dan Implementasinya dalam Kepemimpinan Tentara Nasional Indonesia)*. al-burhan, 20(1), 98-127.

verse as a command for Muslims to fight until there is no more polytheism and submission is made to Allah. Once that goal is achieved – meaning the adversaries have accepted Islam – then acts such as pillaging, captivity, and killing are no longer permitted, except against those who persist in their polytheism. This objective is reinforced in the Hadith of the Prophet Muhammad (peace be upon him): *"Whoever fights so that the word of Allah may be upheld is in the path of Allah."* (Narrated by al-Bukhari, Muslim, Abu Dawud, and others).

Thus, warfare in Islam is conducted solely for the sake of Allah and the supremacy of His religion on earth. Accordingly, mercenaries – who participate in armed conflicts either by joining one state against another, or by siding with rebel groups against a government – do so without valid justification under Islamic law. Their involvement is driven by financial reward, not by lawful objectives as prescribed in Islamic jurisprudence. Therefore, their actions fall outside the bounds of permissible conduct in Islam.

## **2. Islamic Criminal Law Analysis on the Criminal Liability of Mercenaries**

Criminal liability in Islamic law refers to the imposition of responsibility upon an individual for the consequences arising from their voluntary actions.<sup>10</sup> It is therefore assigned only when the act in question constitutes a prohibited behavior under *sharī'a* (Islamic law). For criminal liability to be established, the violation must correspond with the limits and provisions prescribed by Islamic sources. Based on this concept, several key elements of criminal liability in Islamic law can be identified:

- a) The existence of a prohibited act (*harām*)
- b) The act was committed intentionally (*'amdan*)
- c) The perpetrator was aware of the consequences of their action
- d) There is no valid excuse or justification that removes criminal responsibility.<sup>11</sup>

If a person fails to meet these criteria, they cannot be held criminally liable. Islamic law recognizes several exemptions from liability, as mentioned in the following ḥadīth:

*"The pen is lifted from three: from a child until he reaches maturity, from a sleeping person until he wakes up, and from the insane until he recovers."* (Narrated by Bukhari, al-Tirmidhi, and al-Nasa'i)

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<sup>10</sup> Abdul Qodir Audah, *At-tasyri' al-jina'i al-islami*, (Beirut; Mu'assasah ar-Risalah. 1992)

<sup>11</sup> Utami, D. S. Implementasi Konsep Pertanggungjawaban Pidana Islam Dalam Hukum Positif Indonesia. *jurnal Ilmu Pengetahuan, Politik, dan Politik Indonesia*, (2021). 2(1), 180-200.

This narration clarifies that certain individuals are not subject to criminal liability due to their physical or psychological state – namely, children, the sleeping, and the mentally ill – since they lack the *mens rea* or subjective awareness required to bear responsibility.

Mercenaries, as previously defined, are individuals or groups who participate in armed conflict motivated solely by financial gain. Their involvement in conflict is contractual in nature, and they are compensated for their participation. Within the framework of Islamic criminal law, such acts—particularly when they involve participation in warfare, rebellion, or killing—constitute *jarā'im* (criminal acts).

In the modern era, mercenaries are frequently contracted through private arrangements. When apprehended by opposing forces during armed conflict, they are treated as enemy combatants and held accountable under the jurisdiction of the capturing state, based on the crimes they committed – such as murder or rebellion.

**Historical Examples:** *The PRRI/Permesta Rebellion (Indonesia):* This separatist movement sought to overthrow President Sukarno. It involved Allen Lawrence Pope, an American pilot who was later captured and sentenced to death by an Indonesian court for his direct involvement in the rebellion. *Angolan Civil War:* Thirteen mercenaries were captured and tried under Angolan law for various offenses, including the killing of Black civilians. Several were sentenced to death for their crimes.<sup>12</sup>

During the reign of Caliph al-Mu'tasim (833–842 CE), Turkish slave soldiers (*ghilmān*) were employed for their loyalty and professionalism. However, in later periods, these soldiers usurped power and even assassinated caliphs, leading to political instability. Ibn Khaldūn criticized such reliance on mercenary or slave soldiers, arguing that it undermines legitimate authority and lacks loyalty to the people or the *sharī'a*. Thus, even if initially lawful, their use becomes *ḥarām* (forbidden) once it deviates from Islamic political ethics.<sup>13</sup>

From the examples discussed above, mercenaries can be classified based on their actions in the context of their professional activities. Each of these actions entails distinct forms of criminal liability under Islamic criminal law, as elaborated below:

#### 1) Participation in Rebellion (*Bughat*)

A mercenary is considered to be participating in rebellion when they are hired to defend or support a separatist or rebellious group. Fundamentally, mercenaries act out of financial motivation and will work for whoever provides them with payment. In criminal law theory, this falls under the doctrine of *complicity*, specifically *direct*

<sup>12</sup> Laila Yulian Irsan, *Mendalami Praktik Spionase Korporat: Analisis Taktik, Dampak Terhadap Perusahaan, dan Tantangan Hukum yang Dihadapi*, Themis: Jurnal Ilmu Hukum, 2(1), 2024. 60-64

<sup>13</sup> Ahmadie thoha, *Muqaddimah ibn Khaldun*, pustaka Firdaus: Jakarta.



participation. In Islamic criminal law, this concept is known as *ishtirāk al-mubāshir*—referring to individuals who directly participate in the commission of a criminal act (*jarimah*). Classical Islamic jurists from the four major schools of thought define *ishtirāk al-mubāshir* as collective participation in a prohibited act involving coordination between two or more individuals. According to the contemporary scholar Dr. Wahbah al-Zuhayli, in *al-Fiqh al-Islāmī wa Adillatuhu*, *ishtirāk al-mubāshir* constitutes collective criminal involvement, where all participants receive the same punishment as the principal offender, as they are considered executors of the crime.<sup>14</sup>

Thus, in cases of armed conflict, any mercenary who directly engages in battle on behalf of a separatist faction is, by the above doctrinal standards, guilty of *bughat*—rebellion against a legitimate authority. If a mercenary sides with a separatist group in an armed dispute against the state, their actions constitute direct involvement in rebellion.

In Islamic criminal law, *bughat* is categorized under *ḥudūd* crimes, which are offenses with fixed penalties stipulated in the *sharī'a*. To be classified as *bughat*, the following elements must be present:

- a) Disobedience or insubordination against a legitimate head of state
- b) Use of armed force
- c) The intent to unlawfully challenge authority<sup>15</sup>

These criteria are derived from Qur'an, Sūrat al-Ḥujurāt [49:9]:

*"And if two groups among the believers fight, make peace between them. But if one of them transgresses against the other, then fight against the one that transgresses until it returns to the command of Allah. If it returns, then reconcile between them with justice and act justly. Indeed, Allah loves those who act justly."* (Q.S. Al-Ḥujurāt: 9)<sup>16</sup>

Although the verse does not explicitly mention *jarimat al-bughat*, the term *إِنْ بَغَتْ* ("if one of them transgresses") serves as the foundation for the concept. According to Ibn Jarīr, this expression refers to those who refuse to accept the rulings of Allah and exceed prescribed limits. Mustafā al-Marāghī interprets it as meaning "to attack and oppress."

Classical scholars from the major Islamic schools offer differing but complementary definitions of *bughat*. Ḥanafī school: rebellion is defined as rejecting the obligation to obey a legitimate ruler. Mālikī school: rebellion entails refusal to follow a lawful ruler through sinful acts under mistaken justification (*ta'wīl*). Shāfi'ī and Ḥanbalī schools: define *bughat*

<sup>14</sup> Widya Astuti, I. E. *Pertanggungjawaban Pidana Terhadap Doen Pleger*. Journal of Islamic Law and Studies, (2020). 4(1), 49-60.

<sup>15</sup> Imam Muyiddin Hutabarat. *Tinjauan hukum pidana islam terhadap pasal 77 ayat 1 undang-undang nomor 23 tahun 2019 tentang pengelolaan sumber daya nasional untuk pertahanan negara*. Amnesti: Jurnal Hukum, (2024). 6(2), 268-282.

<sup>16</sup> Al-Qosbah, A.-Q. (2021). *Al-qur'anulkarim*. alqosbah. 516

as an armed group, led by an obeyed leader, who rises against a legitimate ruler under false justifications.<sup>17</sup>

Contemporary scholars have also contributed modern interpretations. Shaykh al-Sha‘rāwī describes *bughat* as transgressing divine boundaries. Mahmūd Yūnus defines it as armed injustice perpetrated by an individual or group. Tgk. Muhammad Hasbi ash-Shiddiqī explains that if a group breaks a peace agreement and initiates unjustified aggression, the government and Muslim community must combat them and restore order through the Book of Allah. Thus, a mercenary who is hired by a faction to wage war against a legitimate government clearly fulfills all the conditions outlined above: their action is aimed at defying authority, it involves armed force, and it constitutes a criminal act prohibited by both religion and law. Therefore, such a mercenary bears criminal responsibility for participating in rebellion (*bughat*).

Under Islamic criminal law, the penalty for *bughat* is death, as supported by the following ḥadīth: “Whoever comes to you when you are united under one leader, seeking to divide your unity, kill him.” (Narrated by Muslim)

## 2) Committing Murder (*Qatl*)

It is inherent in the role of a mercenary to engage in combat, which often results in the killing of enemy combatants or civilians. For instance, during the Angolan civil war, thirteen mercenaries were tried, and four were sentenced to death for the murder of Black Angolan civilians.

Murder committed by a mercenary falls under the classification of *qiṣāṣ-diyah* offenses in Islamic criminal law. *Qiṣāṣ* refers to retributive punishment equivalent to the crime committed, whereas *diyah* is compensation paid to the victim's family if forgiveness is granted.

This is affirmed in Qur’an, Sūrat al-Baqarah [2:178]:

“O you who have believed, prescribed for you is legal retribution (*qiṣāṣ*) for those murdered – the free for the free, the slave for the slave, and the female for the female. But if the offender is forgiven by the victim’s heir, then grant fair compensation and pay it with excellence. This is an alleviation from your Lord and a mercy. But whoever transgresses thereafter will have a painful punishment.” (Q.S. Al-Baqarah: 178)

From this verse, the elements required for the imposition of *qiṣāṣ* on a mercenary include:

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<sup>17</sup> Rohmah. Konsep Bughat Dalam Pandangan Al- Mawardi Dan Tradisi Fikih. *Tadrisuna Jurnal Pendidikan Ilam Dan Kajian Keislaman*, (2019 ) 2(2), 182-195]

- a) The perpetrator must be *mukallaf* (legally accountable), meaning of sound mind and having reached maturity; the act must be intentional and voluntary.
- b) The victim must be legally protected under Islamic jurisdiction, and there must be no familial relationship (e.g., parent-child) that would bar the application of *qisās*.
- c) Nature of the act: According to the Ḥanafī school, the murder must be committed directly (*mubāsharah*) rather than indirectly (*tasabbub*). In the case of indirect causation, the penalty is *diyah*, not *qisās*. However, scholars from other schools hold that indirect killings may still warrant *qisās* under certain circumstances.<sup>18</sup>

In summary, when a mercenary intentionally kills without legal justification, they are liable under Islamic criminal law to the punishment of *qisās*, unless the victim's family grants pardon in exchange for *diyah*.

### **3. International Criminal Law Analysis Regarding the Criminal Liability of Mercenaries**

Charles B., as cited in the UNSRI campus journal by Ahmad Romsan, a lecturer at the Faculty of Law, Sriwijaya University, defines a mercenary as a soldier who fights for a foreign government, usually motivated by salary, plunder, or adventure – rarely due to ideological commitment – and has historically been a part of armed forces throughout recorded history. Similarly, Pietro Verri, as quoted in the same journal, defines a mercenary as any individual who voluntarily enlists in the combatant armed forces of a country engaged in war, in which the individual is not a national, motivated by the desire for personal gain. He further asserts that mercenaries are not entitled to the status of prisoners of war and should not be equated with volunteers. However, both opinions do not clearly address the issue of legal accountability in the event that a mercenary is captured. In particular, it remains uncertain whether mercenaries possess the same legal status as combatants upon capture.

According to Article 47 of the Additional Protocol to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), a mercenary is defined as someone who is trained, either domestically or abroad, to directly engage in hostilities during armed conflict, primarily motivated by personal gain, and is remunerated or promised compensation by a party to the conflict. Mercenaries are not nationals or residents of the territory under conflict and are not sent by a neutral state on official military duty.<sup>19</sup>

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<sup>18</sup> Seva Maya Sari. (2023). *Fiqh Jinayah (Pengantar Memahami Hukum Pidana Islam)*. medan: Sonpedia Publishinh Indonesia.

<sup>19</sup> Ahmad Romsan, *Perkembangan Baru Dalam Protokol- Protokol Tambahan Konvensi- Konvensi Jenewa 1949: Analisa Status Hukum tentara Bayaran (Mercenaries)*, (Palembang: UNSRI, 1998).

The contents of Article 47 on mercenaries are as follows:

1. A mercenary shall not have the right to be a combatant or a prisoner of war.
2. A mercenary is any person who:
  - a) Is specially recruited locally or abroad to fight in an armed conflict;
  - b) Does, in fact, take a direct part in the hostilities;
  - c) Is motivated to take part in the hostilities essentially by the desire for private gain and is 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 rank and functions in the armed forces of that party;
  - d) Is not a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
  - e) Is not a member of the armed forces of a party to the conflict; and
  - f) Has not been sent by a state which is not a party to the conflict on official duty as a member of its armed forces.

Furthermore, Article 68 concerning members of the armed forces and military units assigned to civil defense organizations states under section (f) that such members and units are to perform their civil defense duties only within their own national territory. Thus, mercenaries do not qualify as lawful combatants or armed forces under Article 43, and therefore, are excluded from rights and protections granted under Geneva Convention III regarding the treatment of prisoners of war. If a combatant falls into enemy hands but does not meet the criteria of a lawful combatant, such as mercenaries, they lose their combatant status. Nevertheless, they are still entitled to protections under Article 44 (4) of Geneva Convention III.

With the advent of modern private military companies (PMCs), which are private corporations employing armed personnel with salaries reaching up to \$100,000 annually, the legal distinction between PMCs and traditional mercenaries (mercenaries in the classic sense) becomes increasingly important. While both are employed for armed conflict with financial incentives, PMCs often operate under legal corporate frameworks.

Historically, the first known instance of private military contractors dates back to Pharaoh Ramses II, who reportedly employed 10,000 Palestinian mercenaries to defeat the Hittite kingdom in Syria. However, the legal and functional differentiation between PMCs and mercenaries is crucial, even though both are recruited for war in exchange for high compensation.

To qualify as a lawful combatant, an individual must meet the requirements stipulated under Article 4 of the Third Geneva Convention, including:

1. Being a member of the armed forces, militia, or volunteer corps forming part of the armed forces.
2. Belonging to organized resistance groups or other militia that:
  - a) Are commanded by a responsible person;
  - b) Wear a fixed distinctive sign recognizable at a distance;
  - c) Carry arms openly; and
  - d) Conduct operations in accordance with the laws and customs of war.<sup>20</sup>

The question then arises: what is the legal accountability of unlawful mercenaries, especially those recruited illegally and failing to meet the above criteria?

Article 47 of Additional Protocol I of the 1977 Geneva Convention explicitly states that mercenaries do not qualify as combatants or prisoners of war. This provision stems from a long history of mercenary involvement in armed conflict, often associated with abuses. One pivotal event occurred in the early 1960s when the mercenary issue was raised at the United Nations amid the Katangese secession conflict in the Congo. Initially hired by the Congolese government to suppress rebellion (1964), mercenaries later revolted in 1967, refused disarmament, and caused political instability. This prompted condemnation by the UN Security Council and the Organization of African Unity (OAU), which called for a ban on mercenary recruitment across member states.

Since then, the UN General Assembly has consistently denounced the use of mercenaries. A 1968 resolution declared the use of mercenaries against national liberation movements a criminal act. The OAU Convention for the Elimination of Mercenarism in Africa (1977) further reinforced this stance. Nevertheless, mercenaries remain active today, often under the guise of private security corporations.

A prominent example is Blackwater, a U.S.-based private military company founded in 1997 by Erik Prince. Blackwater became heavily involved in global military operations, particularly after the 9/11 attacks. However, its reputation suffered significantly following the Nisour Square massacre in Baghdad on 16 September 2007, where Blackwater personnel killed 17 Iraqi civilians. This incident drew international outrage and raised serious legal questions concerning the accountability of non-state armed actors.

Although the Rome Statute of the International Criminal Court (ICC) provides for the criminal liability of individuals for war crimes, crimes against humanity, and genocide, enforcement remains challenging in the case of mercenaries. These actors often

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<sup>20</sup> Heni Cahya Charisma, *Skripsi: Pertanggung Jawaban Private Military Company Atas pelanggaran Hukum Humaniter Internasional Dalam Sengketa Bersenjata*, (Malang: UB, 2011).

operate in legal gray zones, outside the jurisdiction of military law, and shielded by civilian contracts. The Blackwater case highlights the weaknesses in international legal enforcement against private military actors.

In this context, Article 47 of Protocol I remains a crucial legal reference, affirming that mercenaries are not entitled to the legal protections granted to lawful combatants. Their unauthorized involvement in armed conflict is, therefore, considered a criminal act under international humanitarian law.

### **3. Criminal Responsibility Under International Criminal Law**

"Responsibility" or "liability" are terms commonly used in international law to refer to legal accountability. Despite the nuanced debate over their precise definitions, the concept of legal responsibility arises when there is a violation of binding legal norms and principles, whether at the national or international level. In general international legal theory, the notion of responsibility—often equated with *responsibility* rather than *liability*—is recognized as a fundamental principle. It focuses on the causes of a particular act, the consequences of that act when deemed legally wrongful, and especially the provision of compensation. As the state is an abstract entity, accountability is imposed on individuals serving as organs or representatives of the state.<sup>21</sup>

The first international treaty to regulate individual criminal responsibility at the international level was the Treaty of Versailles of 1919, which stipulated: "...the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war" (Versailles, 1919). The growing recognition of individuals as subjects of international law can also be observed in the Case Concerning the Competence of the Court of Danzig, in which Danzig and Poland entered into an international agreement governing the employment terms of Polish railway officials. These officials were granted the right to file claims against the Polish railway administration. In this case, the 1928 Advisory Opinion of the Permanent Court of International Justice (PCIJ) acknowledged that international treaties generally do not create direct rights and obligations for individuals unless explicitly stated. The Treaty of Versailles, signed by Germany, also affirmed the individual criminal responsibility of Kaiser Wilhelm II and the prosecution of German military officers and soldiers for war crimes.<sup>22</sup>

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<sup>21</sup> Vera Novianti, dkk. *Perkembangan Kejahatan Internasional dalam Hukum Pidana Internasional: Tinjauan Pertanggungjawaban oleh Peradilan Ad Hoc Internasional*, Jurnal Nurani Hukum : Jurnal Ilmu Hukum, Vol. 3 No. 1 Juni 2023.

<sup>22</sup> Saskia Nina Sartori, *Perkembangan Doktrin Pertanggungjawaban Individu Dalam Hukum Pidana Internasional*, Nusa Tenggara Barat: Unram, 2022

The establishment of the International Criminal Court (ICC) under the Rome Statute of 1998 marks the apex of the development of individual criminal responsibility in international criminal law. Article 25 of the Rome Statute clearly affirms that the Court has jurisdiction over *natural persons*, and that anyone who commits crimes within the Court's jurisdiction shall be held individually responsible. The framework of individual responsibility is elaborated in detail under Article 25(3), which categorizes perpetration into three forms: Direct perpetration: where the individual personally commits the crime; Co-perpetration: where two or more individuals contribute jointly to the commission of the crime; Indirect perpetration: where the individual causes the crime to be committed by another person, regardless of the latter's criminal responsibility.<sup>23</sup>

Nonetheless, the envisioned international tribunal under the Treaty of Versailles was never fully realized, as Germany refused to surrender 896 suspected war criminals and instead insisted that its Supreme Court be given jurisdiction. Despite this failure, the Treaty played a significant role in the evolution of international criminal law, recognizing the principle that individuals may be held accountable for violations of international norms and war customs, and that such individuals may be tried by either international military tribunals or domestic courts.<sup>24</sup>

The Second World War (1939–1945) and the Asia-Pacific War—as an integral part of World War II—resulted in massive human casualties. After the war, the question arose as to who should be held accountable for initiating and conducting the war and for the atrocities committed. In practice, states and their governments could not be held responsible *per se* under prevailing norms.

In response, the London Charter of 8 August 1945 established the International Military Tribunal (IMT) at Nuremberg to prosecute perpetrators of war crimes in Europe. The IMT held personal jurisdiction over individuals—both civilians and military personnel. One of the most iconic statements from the Tribunal, made by Chief Prosecutor Justice Robert Jackson, emphasized:

*“Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.”*

The Nuremberg Tribunal signaled a paradigm shift in international legal theory, moving the focus of responsibility from states to individual actors.

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<sup>23</sup> Saskia Nina Sartori, *Perkembangan Doktrin Pertanggungjawaban Individu Dalam Hukum Pidana Internasional*.

Under the Rome Statute of 17 July 1998, an individual shall be criminally responsible and liable for punishment if that person:

- a. Commits a crime within the jurisdiction of the Court, either individually, jointly with others, or through another person, regardless of the latter's criminal responsibility;
- b. Orders, solicits, or induces the commission of such a crime which in fact occurs or is attempted;
- c. Aids, abets, or otherwise assists in the commission or attempted commission of such a crime, including providing the means for its commission;
- d. Contributes in any other way to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. The contribution must be intentional and:
  - 1) Made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
  - 2) Made in the knowledge of the group's intention to commit the crime;
- e. In the case of the crime of genocide, directly and publicly incites others to commit genocide;
- f. Attempts to commit such a crime by taking a substantial step toward its completion, provided the crime does not occur due to circumstances independent of the person's intent. However, if the individual voluntarily abandons the criminal effort or otherwise prevents the crime from being completed, they shall not be liable under this Statute for attempted commission.

The provision that mercenaries may be prosecuted under the laws of the country where their offense occurs reflects a well-established international custom: if a mercenary is captured, they are subject to the jurisdiction of the detaining state. This principle is grounded in Article 47(1) of Additional Protocol I to the 1977 Geneva Conventions, which explicitly states that a mercenary shall not be entitled to combatant or prisoner-of-war status. Consequently, when a mercenary commits a criminal act within the territory of a particular state, that state applies its domestic criminal law, as the individual does not enjoy the protections afforded to lawful combatants under international humanitarian law.

An illustrative case is that of Stephen Hubbard, a 72-year-old American national who served as a mercenary for Ukraine. He was arrested and brought before Moscow's highest city court. Hubbard had signed a contract with a Ukrainian territorial defense battalion just one day after Russian forces entered Ukraine, receiving a salary of \$1,000 per month,



along with training and a military uniform. He was captured by Russian troops on 2 April 2022. In his initial trial, the judge ruled that Hubbard would be detained for six months. However, in a subsequent hearing on Thursday, 3 October, Russian law deemed his participation as a mercenary in an armed conflict to carry a penalty of up to 15 years' imprisonment. Mercenaries may be held criminally liable for the offenses they commit, in accordance with the legal system of the territory where the crime occurs. Their status under international law does not exempt them from individual prosecution and punishment.

## CONCLUSION

Based on the above discussion, it can be concluded that mercenaries do not possess legal status as combatants under international humanitarian law. Consequently, when captured by opposing forces, they are not entitled to prisoner-of-war protections and may be held criminally responsible for actions committed during their missions. In the context of international criminal law, the jurisdiction to prosecute mercenaries lies with the state that apprehends them. Offenses may include murder, rebellion, or other crimes, depending on the national laws and applicable international legal instruments of the prosecuting country.

In Islamic criminal law, criminal responsibility for mercenaries is assessed based on the nature of their actions. If they engage in armed rebellion or unlawful killing, they may be subject to capital punishment or *qisas*, in accordance with the provisions of *fiqh jinayah*. Islamic law emphasizes intention, action, and the impact on public order and security. Participation in conflict purely for financial gain, without *shar'i* legitimacy, can be considered a transgression that contravenes the objectives of Islamic law (*maqāṣid al-sharī'ah*).

Theoretically, this study highlights the need for a conceptual renewal regarding the legal status of non-state military actors, which are increasingly taking the form of private military companies. Practically, there is a need to harmonize national criminal law, international law, and Islamic legal values in addressing cases involving mercenaries. Going forward, law enforcement against mercenaries must strengthen individual accountability mechanisms through international cooperation, and establish clear standards for the legitimacy of military actions from both Islamic and international legal perspectives, in order to prevent the misuse of armed force in the name of contracts or economic interests.

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