

Private Military and Security Companies in the United States -Evolution, Legal Regulation and Perspectives

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Abstract

Summery-The United States is currently the most important subject of international law regulating and using the services of private military and security companies nationwide. This type of companies, as well as mercenary as a negative phenomenon specific to armed conflicts, did not appear on the USA territory, still, in the second half of the 20th century, they had here the most dizzying development in the world. The United States regulates very closely the activity of military and private security companies and uses the specific and complex services provided by them to increase the military and operational capabilities of its own forces. These companies participate directly or indirectly in most military operations, both official and those that the government does not assume. This article analyzes the evolution and essence of the normative acts system that regulates the legal status of companies and their employees in the USA, in the light of specific examples and judicial practice.

Index terms— private military and security companies, national regulation, armed conflict, international humanitarian law.

1 Introduction

lthough the Private Military and Security Companies (hereinafter-PMSC) bear a striking resemblance to mercenaries, the modern private military companies have developed over the years a rather sophisticated business and operations model, depending on the specific needs of the post-Cold War period. We consider that this complex nature of the activities carried out in favor of states and international organizations is in fact the reason why it has allowed them to obtain both implicit and explicit legitimacy.

However, the existence of private military and security companies is not disputed, even though the use of these private actors compromises the security of states and the confidence of citizens in democratic practices and institutions. This is due to the fact that these companies operate without any effective approval, supervision or public accountability, but only in the financial interest. While entrepreneurs are interested in the economic growth generated by private military and security companies, amazingly, the economic support of armed conflicts is not accepted by the international community, just because an armed conflict for a strictly economic reason would be seen as repulsive socially and politically for the majority of society.

Each government operates within a separate national legal framework, which defines the limits of the legal power activity, as well as the decision-making process at the state level. The cooperation between complex and unique decision-making elements is shaped by the rules of law and judicial practice. In democratic states, the rules of law governing the activity of state power, including the use of violence, will result from the will of the citizens who are represented by the government. This is due to the fact that the modern state is built on the principles of the rule of law in which accountability and monopoly on violence are entrusted to the state. The rule of law is most often used as a synonym for law and order and establishes that all power within a government must be exercised in accordance with legal provisions. ?? The 34 th President of the United States, Dwight Eisenhower, mentioned that: "we must avoid the acquisition of unjustified influence by the military-Thus, if the government of a state chooses to use private military and security companies in its operations, then, theoretically, it is at the discretion of the citizens of that state to change the law in such a way as to limit or prohibit the state from recruiting private military and security actors, if citizens are dissatisfied with such decisions.

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46 In 1850, the American detective A. Pinkerton founded a private detective agency, whose services were used
47 by the US Department of Justice to detect and capture criminals who disrespected the federal laws. The agency
48 was engaged in investigating crimes, gathering evidence, conducting interrogations and assisting in the arrest of
49 criminals. However, in 1893, the Anti-Pinkerton Act was adopted, which prohibited the government from hiring
50 Pinkerton and other similar private companies to execute government functions.

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55 The US Congressional Budget Office provided in August 2008 information on the number of PMSC employees
56 working in Iraq under federal contracts, which numbered about 190,000 people in more than 100 companies. 5
57 From 2003 to 2007, the US government allocated \$ 85 billion to contracts with private companies to provide
58 military and security services in Iraq. It should be noted that the number of US PMSC employees predominated
59 significantly over the rest of the Iraqi coalition forces, among them: about 20% were third-country nationals,
60 including locals. 6 The circular aims at implementing the provisions enshrined in Regulation no. 700-137,
61 respectively the Program for increasing the involvement of civilians in logistics insurance.

62 The legal regulation of PMSC activities is the most developed in the United States compared to other countries.
63 US Office of Management and Budget has developed in Circular no. A-76 guidelines according to which only
64 certain government functions can be delegated to private companies for execution. The 1998 federal law "on the
65 reform of the functions accomplished by federal authorities" required all federal agencies to conduct an audit and
66 identify activities that could be classified as state-owned or

67 The circular defines an exclusively governmental function, which is so closely linked to the public interest that
68 it requires only government officials to perform it. The criteria that would make it possible to define a function
69 as exclusively public or state one are not provided in the Circular.

70 ?????????? ? : ?????????????? ?????????? ?????? ? ?????????????????? ??????????, 2009, ?1, c. 12-17. industrial complex.
71 The potential for disastrous growth in their power exists and will persist". 2 Only few years later, the private
72 military and security companies initiated a new market and transformed this concept into a worldclass industry.
73 As Jennings K.M. stated: "The war has always been a matter of profit and plunder. What is changing is how
74 those profits are distributed". 3 One of the reasons for returning to the services of private companies, scientists
75 say, is the preconception of American politicians regarding the reduction of costs for PMSC services compared
76 to the cost of maintaining the army.

77 The private international military and security companies, such as Blackwater Consulting USA, Executive
78 Outcomes, DynCorp, Military Professional Incorporates, Titan and California Analysis Center Incorporated, are
79 just a few entities that provide competitive services for private warfare and the development of armed conflict.

80 The international community has frequently referred to these actors and defined them as: mercenaries, security
81 consultants, civilian contractors, private military companies, private security companies, private military security
82 companies and private military companies, combatants, but so far neither people who form these entities nor the
83 companies, do not have a well-established national or international legal status.

84 The involvement of the private sector in carrying out government tasks in the United States is not new: during
85 the First World War, the ratio between private employees and the US military was 1:24, during the Second World
86 War 1:7, during the conflict in Vietnam -1:5, and in Iraq -1:13.

87 The US Department of Defense became more interested in the services of private companies during the ruling
88 of President B. Clinton, when the auction took place and some radio bands and space communication channels,
89 previously reserved by the military, were sold to private individuals. commercial. 8 In the United States, there
90 are two acts, the Alien Tort Claims Act ("ATCA")

91 The Annex to the Circular provides examples of commercial activities that can be outsourced to private
92 contractors: food preparation, health services, communication services, training, security, equipment transport.
93 9 and the MEJA, 10 Some mark that ATCA provides an adequate and viable basis for prosecuting private
94 military companies under international law. which provide some regulation and control over private military
95 and security companies. However, both acts are severely limited in scope. 11 However, as the Supreme Court's
96 judgment on ATCA describes, only foreign nationals can initiate an action under the ATCA, they must do so
97 in the United States and can do so only for acts that disrespect a treaty signed by the United States or "the
98 customs and traditions of civilized nations". ??? Instead, MEJA is beginning to provide some security when
99 it comes to prosecuting employees of private military companies for committed crimes. However, MEJA has
100 serious shortcomings, as it only applies to service providers who have contracted directly with the Department
101 of Defense. After the events in Abu Ghraib Prison highlighted the fact that some Therefore, the scope and legal
102 power of the ATCA are limited and many categories of crimes are not subject to its jurisdiction. However, none
103 of the draft laws has yet been adopted. In addition, an amendment to Ronald W. Reagan's National Defense
104 Authorization Act for fiscal year 2005 and the Contract Accountability Act.

105 Both acts seek to expand to include the staff of private military and security companies, removing the limitation
106 that they must be employed by the Department of Defense. Under the proposed acts, any private military staff
107 employed by any agency would fall within the regulatory area of the MEJA as long as their recruitment was in
108 support of a mission of the Department of Defense. 14 On December 5th, 2007, a memorandum of understanding
109 was signed between the US Department of Defense and the State Department. Under the Memorandum, the
110 State Department and the Pentagon coordinate PMSC operations, establish grounds for expands jurisdiction
111 over the private military and security companies' staff, regardless of the agency that hired them, still it states
112 again that they must not be hired in supporting a mission of the Department of Defense abroad.

113 All of this is widely discussed, but none of the proposed draft law address situations where the Department
114 of Defense is not involved. There are hundreds of military projects in which the Department of Defense is
115 not involved, but in which the United States should extend its jurisdiction and oversight over private military
116 and security companies operating in those conflict zones. Despite the bans, PMSC staff defended the military
117 installations in the War Zone. In its reports, the US Congress indicated that since 2005, "Xe company"
118 (Blackwater) employees have been involved in 200 escalation incidents involving the use of firearms. Under
119 the contract, PMSC employees are not allowed to use firearms for the purpose of the attack; meanwhile, in 80%
120 of cases, they were used in such circumstances.

121 PMSC employees are given permission to carry weapons in accordance with Part 5 of the Memorandum, after
122 confirming their ability to use them. 20 The right to bear and use weapons is enshrined in a federal contract
123 between the government and the PMSC and in a contract between the employee and the company. In this case,
124 special permit to transport and use weapons issues to the employee. ??1 For the past two decades, the United
125 States has issued export licenses to US private military and security companies, in accordance with the United
126 States Arms Export Control Act and international arms transfer regulations. ??2 In addition, once a company
127 has received its license, there are no other control or reporting requirements. In fact, the proposed Green Paper
128 in the United Kingdom takes into account the American type of regulatory system, although it has pros and cons.
129 The The system has been described as uneven, as the contributions of the Departments of State and Defense vary
130 from one contract to another. emergency operations, adopted on July 22, 2009, No. 3020.50. 20 main factor in
131 the implementation of the regulatory system is the financial support and the degree of expenses for it to work. 23
132 In accordance with the United Code of Military Justice (UCMJ), Another disadvantage of the licensing system
133 is that some may interpret the issuance of the license as evidence of a state sanction for a particular activity of
134 the private military company. Many authors refer to a national regulatory algorithm that involves licensing as
135 providing a "safe harbor" for private military and security companies, insofar as licenses obtained by companies
136 through these algorithms can be presented as proof of approval by the state. 24 Regulation no. 5525.11 of the
137 U. S. Department of Defense, the U.S. courts jurisdiction to prosecute extends to U.S. Department of Defense
138 contractors and contractors of other federal agencies involved in U.S. Department of Defense missions. 25 The
139 legal relationship of US government agencies with private military and security companies is formalized by a
140 federal contract, which is essentially an agreement between the state and "private capital, which aims at meeting
141 the military and civilian needs of the US government". UCMJ's jurisdiction has been extended to civilians hired
142 by the US Department of Defense to work abroad. This means that if a PMSC employee commits a crime, the
143 US Department of Defense must notify the Department of Justice and provide all the information necessary to
144 conduct a thorough investigation. 26 The latest armed conflict in Equatorial Guinea illustrates how the United
145 States uses the licensing system of private military companies to influence the activities of private military and
146 security companies Parties to a federal contract do not have the right to modify or revoke contracts in the same
147 manner as parties to commercial transactions. 23 The US refusal to issue a license continued until the nature
148 of the commitment included human rights training. After spending a considerable amount of money and time
149 to obtain a license from the United States government, MPRI could now claim, with some justification, that the
150 United States supported their intervention.

151 4 Memorandum of the Congress of the United States Additional 152 information about Blackwater

153 By hosting private military companies within its borders, the United States has successfully influenced the
154 activities of private military companies with reduced expenses for taxpayers. The disadvantage of this contract
155 is that the process leaves the mark of state approval on the activity of private military and security companies.

156 In accordance with the Arms Export Control Act 27 and the International Arms Trafficking Regulations, ??8
157 The US Congress has repeatedly noted that federal laws require the executive branch to report to Congress
158 only on contracts totaling more than \$ 50 million, the US State Department grants PMSC licenses that operate
159 under a contract with foreign states. US PMSCs often register their business in another country, avoiding the
160 high costs of the licensing procedure. In this regard, the United States should require private military and
161 security companies in its territory to be accredited or licensed independently. A likely source of this independent
162 accreditation would be one of the many associations of existing private military and security companies. In fact,
163 some of the associations have already launched limited regulatory and accreditation mechanisms. So far, however,
164 the United States has not required any of its private military contractors in Iraq to receive such accreditations.

165 Licensing or accreditation would help ensure the transparency of the company's activities and the contract.

4 MEMORANDUM OF THE CONGRESS OF THE UNITED STATES ADDITIONAL INFORMATION ABOUT BLACKWATER

166 While the US has tried to license US-based companies, they have failed to adequately monitor these companies
167 once the license is issued. Only an international accreditation system is able to ensure quality private military
168 and security companies, trained to carry out security missions. Thus, the US should make a concerted effort to
169 encourage the use of these independent international systems and use them as part of their contracts.

170 Even if the industry may not have been mature enough at the beginning of the Iraqi invasion to provide such a
171 system of verification of private military companies, this can no longer be an excuse. In addition, while the costs
172 of checking and monitoring Iraqi military and private security companies can be costly, poor monitoring and
173 surveillance leads to corruption and wastage that is in itself quite costly. This is the right time for the industry
174 to develop a program to accredit private military and security companies and to provide at least minimum
175 guarantees that they meet basic standards. As the largest user of these forces, the United States should initiate
176 the process, requesting an independent international accreditation of the private military and security companies'
contracts. ^{1 2 3}

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Contractor's Support of U.S. Operations in Iraq,
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[Note: Civil Augmantation Program (LOGAP), Army Regulation (AR) 700-137) on-line]. [accessed 10.10.2021].
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Figure 1:

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Military Jurisdiction
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Figure 2:

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Criminal Jurisdiction of Civilians Employed or
Following the Armed Forces Outside the United
States, dated 03.03.2005 Nr. 5525
26 ????????? ? . ? . ????????? ? . ? ., ?????????
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??????????, 2013, c. 30.

[Note: operating]

Figure 3:

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²Public Law 105-270 Federal Activities Inventory Reform Act, 19.10.1998. [on-line]. [accessed 08.09.2021].
Available on Internet: <URL: <https://www.congress.gov/105/plaws/publ270/PLAW-105publ270.pdf>>

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ADDITIONAL INFORMATION ABOUT BLACKWATER**

4 MEMORANDUM OF THE CONGRESS OF THE UNITED STATES ADDITIONAL INFORMATION ABOUT BLACKWATER

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