



GLOBAL JOURNAL OF HUMAN-SOCIAL SCIENCE: A
ARTS & HUMANITIES - PSYCHOLOGY
Volume 21 Issue 15 Version 1.0 Year 2021
Type: Double Blind Peer Reviewed International Research Journal
Publisher: Global Journals
Online ISSN: 2249-460X & Print ISSN: 0975-587X

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GJHSS-A Classification: FOR Code: 390404



PRIVATE MILITARY AND SECURITY COMPANIES IN THE UNITED STATES EVOLUTION LEGAL REGULATION AND PERSPECTIVES

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

Cauia Alexandr ^α & Zacon Corina ^ο

Summary 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. The aim of the research is to highlight the shortcomings and to point out the deficiencies and challenges posed by this process for the system of international humanitarian law generally and the legal regulation of these new subjects of contemporary armed conflict particularly.

Keywords: *private military and security companies, national regulation, armed conflict, international humanitarian law.*

INTRODUCTION

Although 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.¹

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.

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

The 34th President of the United States, Dwight Eisenhower, mentioned that: "we must avoid the acquisition of unjustified influence by the military-

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¹ Jennings W.I., *The Law and the Constitution*, University of London Press, 1959, 5th ed. 354 p.

industrial complex. The potential for disastrous growth in their power exists and will persist".² Only few years later, the private military and security companies initiated a new market and transformed this concept into a world-class industry. As Jennings K.M. stated: "The war has always been a matter of profit and plunder. What is changing is how those profits are distributed".³

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

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

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

The US Department of Defense became more interested in the services of private companies during the ruling of President B. Clinton, when the auction took place and some radio bands and space communication channels, previously reserved by the military, were sold to private individuals.

One of the reasons for returning to the services of private companies, scientists say, is the preconception of American politicians regarding the reduction of costs for PMSC services compared to the cost of maintaining the army.⁴

² Dwight D. Eisenhower, Farewell Address IV, Jan. 17, 1961. [on-line]. [accessed 05.11.2021]. Available on Internet: <URL: <https://www.ourdocuments.gov/doc.php?flash=false&doc=90&page=transcript>>

³ Jennings, K.M. Armed Services: Regulating the Private Military Industry, Fafo report nr.: 532, Oslo: Fafo, 2006, p.7 [on-line]. [accessed 05.11.2021]. Available on Internet: <URL: https://www.fafo.no/media/com_netsukii/532.pdf>

⁴ Волеводз А.Г. О международных инициативах в сфере правового регулирования деятельности частных военных и охранных

The US Congressional Budget Office provided in August 2008 information on the number of PMSC employees working in Iraq under federal contracts, which numbered about 190,000 people in more than 100 companies.⁵ From 2003 to 2007, the US government allocated \$ 85 billion to contracts with private companies to provide military and security services in Iraq. It should be noted that the number of US PMSC employees predominated significantly over the rest of the Iraqi coalition forces, among them: about 20% were third-country nationals, including locals.⁶

The legal regulation of PMSC activities is the most developed in the United States compared to other countries. US Office of Management and Budget has developed in Circular no. A-76 guidelines according to which only certain government functions can be delegated to private companies for execution.

The circular aims at implementing the provisions enshrined in Regulation no. 700-137, respectively the Program for increasing the involvement of civilians in logistics insurance.⁷ The circular defines an exclusively governmental function, which is so closely linked to the public interest that it requires only government officials to perform it. The criteria that would make it possible to define a function as exclusively public or state one are not provided in the Circular.

The 1998 federal law "on the reform of the functions accomplished by federal authorities" required all federal agencies to conduct an audit and identify activities that could be classified as state-owned or

компаний. В: Международное уголовное право и международная юстиция, 2009, №1, с. 12-17.

⁵ US Congressional Budget Office Report, Contractor`s Support of U.S. Operations in Iraq, August 2008. [on-line]. [accessed 05.11.2021]. Available on Internet: <URL: <https://www.cbo.gov/sites/default/files/110th-congress-2007-2008/reports/08-12-iraqcontractors.pdf>>

⁶ Sing & P. Corporate Warriors: The Rise of the Privatized Military Industry. Cornell University Press, 1st edition, 2008, 360 p.

⁷ Office of Management and Budget Circular, Performance of Commercial Activities № A-76 (Revised 1999). [on-line]. [accessed 10.10.2021]. Available on Internet: <URL: https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/circulars/A76/a76_incl_tech_correction.pdf>; Logistic Civil Augmentation Program (LOGAP), Army Regulation (AR) 700-137) on-line]. [accessed 10.10.2021]. Available on Internet: <URL: https://armypubs.army.mil/epubsDR_pubs/DR_a/pdf/web/ARN2768_AR700-137_Web_FINAL.pdf>

commercial.⁸ The Annex to the Circular provides examples of commercial activities that can be outsourced to private contractors: food preparation, health services, communication services, training, security, equipment transport.

In the United States, there are two acts, the Alien Tort Claims Act ("ATCA")⁹ and the MEJA,¹⁰ which provide some regulation and control over private military and security companies. However, both acts are severely limited in scope.

Some mark that ATCA provides an adequate and viable basis for prosecuting private military companies under international law.¹¹ However, as the Supreme Court's judgment on ATCA describes, only foreign nationals can initiate an action under the ATCA, they must do so in the United States and can do so only for acts that disrespect a treaty signed by the United States or "the customs and traditions of civilized nations".¹² Therefore, the scope and legal power of the ATCA are limited and many categories of crimes are not subject to its jurisdiction.

Instead, MEJA is beginning to provide some security when it comes to prosecuting employees of private military companies for committed crimes. However, MEJA has serious shortcomings, as it only applies to service providers who have contracted directly with the Department of Defense. After the events in Abu Ghraib Prison highlighted the fact that some

employees of private military and security companies, who are not employed by the Department of Defense, do not fall within the remit of MEJA, a member of Congress fought fiercely to correct this error, proposing the MEJA Clarification Act¹³ and the Contract Accountability Act.

Both acts seek to expand to include the staff of private military and security companies, removing the limitation that they must be employed by the Department of Defense. Under the proposed acts, any private military staff employed by any agency would fall within the regulatory area of the MEJA as long as their recruitment was in support of a mission of the Department of Defense.

However, none of the draft laws has yet been adopted. In addition, an amendment to Ronald W. Reagan's National Defense Authorization Act for fiscal year 2005¹⁴ expands jurisdiction over the private military and security companies' staff, regardless of the agency that hired them, still it states again that they must not be hired in supporting a mission of the Department of Defense abroad.

All of this is widely discussed, but none of the proposed draft law address situations where the Department of Defense is not involved. There are hundreds of military projects in which the Department of Defense is not involved, but in which the United States should extend its jurisdiction and oversight over private military and security companies operating in those conflict zones.

On December 5th, 2007, a memorandum of understanding was signed between the US Department of Defense and the State Department. Under the Memorandum, the State Department and the Pentagon coordinate PMSC operations, establish grounds for

⁸ Public 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>>

⁹ Garmon T., Comment. Domesticating International Corporate Responsibility: Holding Private Military Firms Accountable Under the Alien Tort Claims Act, 2003, p, 339-343

¹⁰ Military Extraterritorial Jurisdiction Act PUBLIC LAW 106-523—NOV. 22, 2000. [on-line]. [accessed 10.09.2021]. Available on Internet: <URL: <https://www.govinfo.gov/content/pkg/PLAW-106publ523/pdf/PLAW-106publ523.pdf>>

¹¹ Sebok A. J., Assessing Possible Tort Claims by Iraqi Prisoners, May 19, 2004, [on-line]. [accessed 10.09.2021]. Available on Internet: <URL: <http://edition.cnn.com/2004/LAW/05/19/sebok.iraq.prisoners.torts/index.html>>

¹² US Supreme Court, *Sosa v. Alvarez-Machian*, 542 U.S. 692 (2004) [on-line]. [accessed 10.09.2021]. Available on Internet: URL: <https://supreme.justia.com/cases/federal/us/542/692/>>

¹³ MEJA Clarification Act, H.R. 4390, 108th Congress (2003). [on-line]. [accessed 10.09.2021]. Available on Internet: <URL: <https://www.congress.gov/108/bills/hr4390/BILLS-108hr4390-ih.pdf>>

¹⁴ Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Oct. 28, 2004 [on-line]. [accessed 10.09.2021]. Available on Internet: <URL: <https://www.congress.gov/108/plaws/publ375/PLAW-108publ375.pdf>>

Elsa J. K., Congressional Research Service, U.S. Treatment of Prisoners in Iraq: Selected Legal Issues, May 19, 2005). Library of Congress. Congressional Research Service. [on-line]. [accessed 10.09.2021]. Available on Internet: <URL: https://digital.library.unt.edu/ark:/67531/metacrs6483/m1/1/high_res_d/RL32395_2005May19.pdf>

bringing PMSC employees to justice under US law, and coordinate investigations against employees of these companies who are suspected of serious violations of international humanitarian law.

An officer is delegated to investigate this category of cases. In the Memorandum, the signatory parties refer to private companies and/or their staff that provide physical protection services to persons, territories, buildings, infrastructure or transport services. According to the Memorandum, the US Secretary of Defense and Chief of Defense Command are responsible for the safety of Pentagon staff and their contractors.¹⁵

According to the Manual of the Defense Department no. 3-100.21, PMSC employees are not combatants, they are civilians, as they follow the US Army.¹⁶ The instruction no. 3020.41 of the US Department of Defense has established a mechanism for interaction with them.¹⁷ PMSC employees are not part of the military leadership, but they subordinate to their employers. The instruction provides guidance for planning, managing and using PMSC in military operations. According to clause 1-39, private service providers may be hired to support the US military, including abroad. The list of services and terms of service are stipulated in the contract.¹⁸ Former US Secretary of Defense, Gates R., in the Memorandum on Combating International Terrorism in connection with the increase in the number of civilian contractors working for the Department of Defense, mentioned that these people should be under the control of the military commander.¹⁹

¹⁵ US Department of Defense Field Guidelines on Contractor Activities in the War Zone, adopted on January 03, 2003, No. 3-100.21

¹⁶ US Department of Defense Instruction concerning PMSC personnel involved in emergency operations, adopted on July 22, 2009, No. 3020.50.

¹⁷ US Department of Defense Instruction on Contractors Following the US Armed Forces adopted on 03.10.2005, No. 3020.41

¹⁸ US Secretary of Defense Memorandum on Extending the Unified Code of Military Justice jurisdiction to contractors hired by the US Department of Defense, adopted 03/10/2008. [on-line]. [accessed 10.09.2021]. Available on Internet: <URL: <http://fas.org/sgp/othergov/dod/gates-ucmj.pdf>>

¹⁹ US Department of Defense Instruction concerning PMSC personnel involved in

Despite the bans, PMSC staff defended the military installations in the War Zone. In its reports, the US Congress indicated that since 2005, "Xe company" (Blackwater) employees have been involved in 200 escalation incidents involving the use of firearms. Under the contract, PMSC employees are not allowed to use firearms for the purpose of the attack; meanwhile, in 80% of cases, they were used in such circumstances.

PMSC employees are given permission to carry weapons in accordance with Part 5 of the Memorandum, after confirming their ability to use them.²⁰ The right to bear and use weapons is enshrined in a federal contract between the government and the PMSC and in a contract between the employee and the company. In this case, special permit to transport and use weapons issues to the employee.²¹

For the past two decades, the United States has issued export licenses to US private military and security companies, in accordance with the United States Arms Export Control Act and international arms transfer regulations.²² The system has been described as uneven, as the contributions of the Departments of State and Defense vary from one contract to another.

In addition, once a company has received its license, there are no other control or reporting requirements. In fact, the proposed Green Paper in the United Kingdom takes into account the American type of regulatory system, although it has pros and cons. The

emergency operations, adopted on July 22, 2009, No. 3020.50.

²⁰ Memorandum of the Congress of the United States Additional information about Blackwater USA, dated 1 October. 2007 [on-line]. [accessed 10.09.2021]. Available on Internet: URL: <http://graphics8.nytimes.com/packages/pdf/national/20071001121609.pdf>>

²¹ Army Regulation AR 715-9 Operational Contract Support Planning and Management, para. 3-3 (d). [on-line]. [accessed 10.09.2021]. Available on Internet: URL: https://armypubs.army.mil/epubs/dr_pubs/dr_a/pdf/web/arn2772_ar715-9_web_final.pdf>

²² Arms Export Control Act, 22 U.S.C. 2751-99 (2000) [on-line]. [accessed 10.09.2021]. Available on Internet: <URL: <https://uscode.house.gov/view.xhtml?path=/prelim@title22/chapter39&edition=prelim>>; Traffic in Arms Regulations, 22 C.F.R. 120-30 (2005). [on-line]. [accessed 10.09.2021]. Available on Internet: <URL: <https://www.stonybrook.edu/commcms/export-controls/Export-Control-Regulations/Federal-Regulations/ITAR.php>>

main factor in the implementation of the regulatory system is the financial support and the degree of expenses for it to work.²³

Another disadvantage of the licensing system is that some may interpret the issuance of the license as evidence of a state sanction for a particular activity of the private military company. Many authors refer to a national regulatory algorithm that involves licensing as providing a "safe harbor" for private military and security companies, insofar as licenses obtained by companies through these algorithms can be presented as proof of approval by the state.

In accordance with the United Code of Military Justice (UCMJ),²⁴ Regulation no. 5525.11 of the U. S. Department of Defense, the U.S. courts jurisdiction to prosecute extends to U.S. Department of Defense contractors and contractors of other federal agencies involved in U.S. Department of Defense missions.²⁵

UCMJ's jurisdiction has been extended to civilians hired by the US Department of Defense to work abroad. This means that if a PMSC employee commits a crime, the US Department of Defense must notify the Department of Justice and provide all the information necessary to conduct a thorough investigation.

The legal relationship of US government agencies with private military and security companies is formalized by a federal contract, which is essentially an agreement between the state and "private capital, which aims at meeting the military and civilian needs of the US government".²⁶ Parties to a federal contract do not have the right to modify or revoke contracts in the same manner as parties to commercial transactions.

The latest armed conflict in Equatorial Guinea illustrates how the United States uses the licensing system of private military companies to influence the activities of private military and security companies

operating in the United States. The United States has refused to issue a license to MPRI to operate in Equatorial Guinea because of its poor human rights record.

The US refusal to issue a license continued until the nature of the commitment included human rights training. After spending a considerable amount of money and time to obtain a license from the United States government, MPRI could now claim, with some justification, that the United States supported their intervention.

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

In accordance with the Arms Export Control Act²⁷ and the International Arms Trafficking Regulations,²⁸ the US State Department grants PMSC licenses that operate under a contract with foreign states. US PMSCs often register their business in another country, avoiding the high costs of the licensing procedure.

The US Congress has repeatedly noted that federal laws require the executive branch to report to Congress only on contracts totaling more than \$ 50 million,²⁹ which means that information about most contracts remains closed.

According to the latest estimates, 75% of the market for private military companies is in the United States and the United Kingdom. The annual growth of this segment of the world market is about 7.4%. According to various estimates, the turnover of this

²³ Green Paper, Private Military Companies: Options for Regulation, 12th February 2002 [on-line]. [accessed 10.09.2021]. Available on Internet: <URL: <https://www.globalsecurity.org/military/library/report/2002/mercenaries.pdf>>

²⁴ United Code of Military Justice, [on-line]. [accessed 10.09.2021]. Available on Internet: <URL: https://www.loc.gov/rr/frd/Military_Law/pdf/morgan.pdf>

²⁵ US Department of Defense Instruction on Criminal Jurisdiction of Civilians Employed or Following the Armed Forces Outside the United States, dated 03.03.2005 Nr. 5525

²⁶ Федорович В. А. Бочкарев О. И., Муравник В. Б. США: Военная экономика (организация и управление) Москва, Международные отношения, 2013, с. 30.

²⁷ Arms Export Control Act, 22 U.S.C. 2751-99 (2000) [on-line]. [accessed 10.09.2021]. Available on Internet: <URL: <https://uscode.house.gov/view.xhtml?path=/prelim@title22/chapter39&edition=prelim>>

²⁸ International Traffic in Arms Regulations, 22 C.F.R. 120-30 (2005). [on-line]. [accessed 10.09.2021]. Available on Internet: <URL: <https://www.stonybrook.edu/commcms/export-controls/Export-Control-Regulations/Federal-Regulations/ITAR.php>>

²⁹ Arms Export Control Act, 22 U.S.C., §2776 (2000) [on-line]. [accessed 10.09.2021]. Available on Internet: <URL: <https://uscode.house.gov/view.xhtml?path=/prelim@title22/chapter39&edition=prelim>>

industry varied in 2016 between 220 and 250 billion dollars".³⁰

In this regard, the United States should require private military and security companies in its territory to be accredited or licensed independently. A likely source of this independent accreditation would be one of the many associations of existing private military and security companies. In fact, some of the associations have already launched limited regulatory and accreditation mechanisms. So far, however, the United States has not required any of its private military contractors in Iraq to receive such accreditations.

Licensing or accreditation would help ensure the transparency of the company's activities and the contract. While the US has tried to license US-based companies, they have failed to adequately monitor these companies once the license is issued. Only an international accreditation system is able to ensure quality private military and security companies, trained to carry out security missions. Thus, the US should make a concerted effort to encourage the use of these independent international systems and use them as part of their contracts.

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

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³⁰ Небольсина М.А., Никитин А.А. Перспективы международного регулирования деятельности частных военных компаний. В: Вестник Университета, МГИМО. 2016. № 2(47), с. 146.

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