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Criminal Responsibility of Personnel of Private Military and Security Companies Under the Uniform Code of Military Justice

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Abstract

In 2007 employees of the private military and security company (PMSC) «Blackwater» killed 17 civilians and wounded 18 civilians, firing randomly on them while guarding the US diplomatic corps in Baghdad. Later on this incident, the US Congress raised the subject of the criminal responsibility of PMSC's personnel for criminal offenses committed during an armed conflict. Despite numerous claims filed by victims in US federal courts, they managed to deflect responsibility for illegal actions.

The presence of gaps in the regulation of PMSCs and lack of control by military commanders adversely affected the credibility of the US armed forces. In this regard, the US Congress adopted amendments to The Uniform Code of Military Justice (UCMJ) expanding its jurisdiction over PMSC's personnel. This decision caused a wave of criticism because in the United States employees of PMSCs are treated as civilians, and the extension of the jurisdiction of military courts for them substantially affects their constitutional rights.

This article deals with the rules of criminal prosecution of PMSC's employees in US military courts.

Keywords: private military and security companies, The Uniform Code of Military Justice, armed conflict, the USA, criminal responsibility.

1. Introduction

Civilian contractors play a significant role in modern armed conflicts, often taking part along with the armed forces. They provide military and security services to the armed forces, including direct participation in hostilities.

Due to the growing use of PMSCs in armed conflicts and taking into account the «Blackwater» activities in Iraq between 2003 and 2005, the US Congress attempted to increase control over them by amending the UCMJ. The amendments introduced in 2006 related to the expansion of powers of military commanders in relation to PMSC employees.

The first contractor to be tried under the amended provision was charged with stabbing a co-worker and pleaded guilty on June 24, 2008 (Huskey, 2010).

2. Materials and methods

The materials include the analysis of the text of the UCMJ, and scientific, political and legal publications. The article uses a benchmarking approach of Russian and US legal doctrines.

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The research was done on the basis of general and specific scientific methods of cognition (dialectical method, analysis and synthesis, deduction and induction, comparative legal and historical-legal methods).

3. Discussion

3.1. Private military and security companies

PMSCs provide a variety of services in armed conflicts. Employees of such companies are often called «contractors», referring to their position on a federal contract with the state.

American PMSCs dominate the worldwide services market, earning between \$20 and \$100 billion a year. The entire number of contractors contracted by the US government in 2009 was 244,000. Mostly PMSCs were used in military operations in Iraq and Afghanistan. Today, PMSCs in the United States are gradually moving beyond the traditional provision of logistical support and intelligence. For a long time, logistics services have retained their popularity and relevance. The U.S. Department of Defense has introduced into contracts with companies for the supplying of transit services for food, cooking, washing, and the construction of lodging and food facilities in Iraq.

Under US domestic law, PMSC employees are civilians, as they follow the US armed forces. Nevertheless, their activity or location may entail mortal risk, even if they do not directly participate in hostilities, for example, providing communication services, transporting equipment and food. Some of their tasks under the contract are inherently close to military operations – for example, collecting and analyzing intelligence, managing weapons systems or supporting the main response forces. Such activities may entail active participation in armed conflict. That is why the US government has focused on the fact that in most cases the Ministry of Defense contractors can hardly be called civilians.

According to Department of Defense Manual No. 3-100.21, PMSC employees are not combatants, they are civilians, as they follow the US armed forces. US Department of Defense Instruction No. 3020.41 establishes a mechanism for interacting with them. PMSC employees are not in the military command chain, but are subordinate to their employers. The Manual contains rules for the planning, management and use of PMSCs in military operations. According to paragraph 1-39 of the Manual, contractors can be employed to endorse the US armed forces, including abroad. The list of services and deadlines are defined in the contract. Former US Secretary of Defense R. Gates in the Memorandum on Combating International Terrorism in connection with the increase in the number of civilian contractors working for the Department of Defense, noted that these persons should be under the control of the military commander.

The mechanism of command and control of PMSC personnel is completely different from the mechanism of the command in the regular army. The main issues of command and control are not resolved individually and directly by the commander in the zone of armed conflict, but are regulated by the terms of the federal contract. During the performance of tasks under the contract, contractors are required to comply with all guidelines, comply with all instructions and general instructions that are given by the commander and relate to power protection, safety, health, and relations with the local population. They must also comply with US laws, state of residence, international agreements.

Despite the bans, PMSC employees defended military installations in the war zone. The US Congress pointed out that since 2005 the «Xe company» (Blackwater) employees have been involved in 200 cases of escalation of the conflict that entailed the use of firearms. Under the terms of the contract, PMSC employees do not have the right to use firearms for assault purposes, while in 80 % of cases it was used in such circumstances.

Some PMSCs conduct acts of torture of prisoners and murder of civilians abroad. The Government and the US Congress took measurements to control the activities of PMSCs and criminalized crimes committed by PMSC employees working under contract with the USA overseas. The Armed Contractor Oversight Division ([U.S. Department of Defense](#)), has investigated the cases related to the use of force by contractors in Iraq.

On June 2003 the Coalition Provisional Authority Order No. 17 ([CPA 17](#)) provided immunity for PMSCs. The Order established general provisions on immunity and the conditions under which immunity would not apply. The immunity rule states: «Contractors shall not be subject to Iraqi laws or regulations in matters relating to the terms and conditions of their Contracts, including licensing and registering employees, businesses and corporations; provided, however, that

Contractors shall comply with such applicable licensing and registration laws and regulations if engaging in business or transactions in Iraq other than Contracts. Notwithstanding any provisions in this Order, Private Security Companies and their employees operating in Iraq must comply with all CPA Orders, Regulations, Memoranda, and any implementing instructions or regulations governing the existence and activities of Private Security Companies in Iraq, including registration and licensing of weapons and firearms» (CPA 17). The norm is that the scope of immunity is wide enough, but immunity can be limited. In case of abuse of the rights granted by the contract to a contractor, immunity will not apply to him. US law has established a presumption that the provisions of the federal contract should not be read in such a way as to allow illegal activities of contractors. Moreover, immunity applies not merely to the contractor as an individual, but also to the United States.

CPA No. 17 expired on December 31, 2008, together with the expiration of the mandate established in accordance with UN Security Council Resolution № 1511 on October 16, 2003. By the end of 2008, a new agreement on the status of the US armed forces was concluded between Iraq and the US, which ratified by the Iraqi parliament. The agreement revoked the immunity. The United States has taken measures to extend the immunity to all military personnel and contractors working in Iraq, but the Iraqi government has insisted on the lifting of immunity in the light of the participation of the American company «Blackwater» in the Nisour Square massacre.

Article 12 of the Agreement reads as follows: «Iraq has priority over the exercise of jurisdiction over US private military and security companies and their employees», which are defined as «non-Iraqi individuals or companies not registered in Iraq, as well as their employees who are citizens of the United States or a third country and who deliver food on the territory of Iraq provide security either on the side of the US military or on a contract basis (subcontract to) with the US armed forces.» The exception is legal entities and individuals who are residents. Despite the annulment of the immunity, not a single lawsuit filed against American contractors who violated the law, has not been considered by Iraqi courts.

The United States Force Status Agreement is in force in Afghanistan, according to which the Government of Afghanistan recognizes the right of the United States to control US military and civilian personnel and allows the US government to exercise criminal jurisdiction over American citizens. The governments of both states confirm that these individuals cannot be transferred to an international tribunal or other institution without the appropriate consent of the US government. Thus, the Government of Afghanistan does not prosecute US troops and contractors during their stay in Afghanistan.

Employees of «Titan» and «CACI» provided translation services and interrogations to the U.S. Department of Defense in the Iraqi prison of Abu Ghraib. Iraqi citizens held there accused company employees of causing bodily harm, deprivation of food and water. According to numerous lawsuits by the victims, «Titan» and «CACI» employees turned on loud music, forced prisoners to walk naked, threatened to kill, exposed them to low temperatures, prevented sleep, forced them to testify against other prisoners, and committed abuses sexual in nature, they used an electric chair for violation of the regime and forbade religious worship. Based on an investigation by the U.S. military intelligence team regarding incidents at Abu Ghraib prison, a Fay Report was prepared that concluded that the use of PMSC personnel during interrogations and prison guards led to numerous problems.

Iraqi nationals detained at the Abu Ghraib military prison Haidar Mushin Saleh and others filed a lawsuit against «Titan» and «CACI» in the United States Court of Appeals for the District of Columbia Circuit. The district judge concluded that Titan's employees were «fully integrated into [their] military units» (Saleh et al. v. Titan Corporation & CACI International). Although «CACI» employees were also integrated with military personnel and were within the chain of command. «CACI» said that it did not adequately protect the federal interest implicated by combatant activities. «Titan» and «CACI» can be considered as state actors and they enjoy the sovereign immunity.

Other charges against PMSCs and their personnel were related to criminal negligence. An example was given of cases of injury to health of servicemen as a result of traffic accidents caused by the fault of PMSC employees, as well as cases of injuries when working with equipment that was serviced by company employees. PMSC employees themselves charged their colleagues with fraud and criminal negligence.

In the USA, the following can be applied to PMSCs and their employees who have perpetrated a criminal offense: Special Maritime Territorial Jurisdiction ([SMTJ](#)), Military Extraterritorial Jurisdiction ([MEJA](#)), War Crimes Act 1996, Uniform Code of Military Justice ([UCMJ](#)).

3.2. The Uniform Code of Military Justice before 2006

As early as 1866 the Supreme Court of the USA in the «*Milligan*» case concluded that in exceptional cases civilians could be convicted by a military court ([Ex parte Milligan, 1866](#)). It is observed that civil proceedings are preferable to military proceedings, and military jurisdiction over civilians should be circumscribed to the situation of military operations. In addition, military jurisdiction «to be exercised in time of foreign war without the boundaries of the United States, or in time of rebellion or civil war within states or districts occupied by rebels treated as belligerents; ... distinguished as military government, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander under the direction of the President, with the express or implied sanction of Congress» ([Underhill, 1924: 159](#)).

The UCMJ was adopted in 1950 and applied to soldiers as well as civilians accompanying the armed forces only in time of war. Later the US Congress introduced an amendment altering the words «in time of war» to «in time of declared war» ([Pearlman, 2016: 3](#)). For purposes of Art. 2a(10), «time of war» means a war formally declared by Congress ([United States v. Avarete, 41 C.M.R. 363](#)).

The UCMJ provides for three types of courts-martial: summary, special and general courts-martial. Unlike their civilian counterparts, military courts are differentiated mainly by the severity of the sentences they are authorized to impose. Summary courts-martial, which are composed of a single officer who needs not be a military judge, may impose sentences of confinement that cannot exceed thirty days, along with a reduction in rank and forfeiture of pay. Special courts-martial are additionally empowered to impose sentences that include confinement for a period of up to one year and a bad conduct discharge. A bad-conduct discharge is an unfavorable characterization of service, which can impinge upon veterans benefits to which the service member would have otherwise been entitled. A general court-martial can impose any sentence authorized up to and including death. In addition, it is the only type of court-martial that can impose a dishonorable discharge upon enlisted personnel and its legal equivalent for officers, a dismissal.

The military justice system has been updated and revised several times since 1951. In the Military Justice Act of 1968, Congress amended the UCMJ to require military judges. In 1984 the Federal Rules of Evidence were repurposed with very few adjustments as the Military Rules of Evidence and mandated for courts martial.

3.3. Amendments

The active participation of PMSCs in armed conflicts employed by the US Department of Defense led to the creation of a special regulatory framework governing their activities ([Memorandum, 2007](#)). In accordance with the US Department of Defense Instruction № 3020.41 employees of PMSCs are civilians accompanying the armed forces ([DoD Instruction, 20.12.2011](#)). Thus, they are not allowed to take direct participation in hostilities.

The consequences of the use of firearms against civilians, torture of prisoners and other crimes committed by personnel of PMSCs during their participation in military operations in Iraq and Afghanistan have a wide resonance.

In 2005 the US Congress amended the Military Extraterritorial Jurisdiction Act (MEJA). According to the amendment the MEJA applies to employees of PMSCs employed by the US Department of Defense in a situation of committing a crime abroad. Due to the problems with collecting evidence in a foreign country where an armed conflict is taking place, this legislative initiative did not lead to effective administration of justice for employees of PMSCs, who committed crimes. In addition, often employees of PMSCs avoided criminal liability because of an agreement on the status of the armed forces concluded by the US government with the host state, under which they enjoyed exemption from criminal prosecution. In order to eliminate the gaps, in 2006, the US Congress expanded the application of the UCMJ to employees of PMSCs contracted by the US Department of Defense.

Before the amendment the UCMJ was applied only to soldiers and civilians accompanying the armed forces in time of declared war. The new provision changed the paragraph a (10) of

Article 2 to read: «In time of declared war or a contingency operation, persons serving with or accompanying an armed force in the field.»

The term «contingency operation» means a military operation that —

«(A) is designated by the Secretary of Defense as an operation in which members of the armed forces are or may become involved in military actions, operations, or hostilities against an enemy of the United States or against an opposing military force; or

(B) results in the call or order to, or retention on, active duty of members of the uniformed services under section 712 of title 14, or any other provision of law during a war or during a national emergency declared by the President or Congress.»

By virtue of the amendment, it became possible to bring employees of PMSCs contracted with the US Department of Defense to criminal responsibility.

As P. Singer was saying about new provision: «It gives officers in the field a new tool, that they have asked for a long time, to actually do something about contractor crimes. It also takes away an excuse that is often made to Congress as to why action is not have been taken against a contractor crime, i.e. that military has no authority over such civilians or only has a “coordinating” relationship with contractors in the field» ([Isenberg, 2010](#)).

3.4. Criminal responsibility under the UCMJ

In accordance with the UCMJ, a person can be brought to criminal responsibility by a military court. The UCMJ distinguishes three links of US military courts: a general, special, and disciplinary military court. General courts-martial consider criminal cases according to the UCMJ, including capital cases. Criminal prosecution for crimes such as murder, assault is also carried out against civilians, but the UCMJ stipulates the punishment for committing such crimes that are not peculiar to civilians: 10 US Code § 904 - Art 104 Aiding the enemy ([Art. 104 UCMJ](#)), 10 US Code § 915 – Art. 115 Malingering ([Art. 115 UCMJ](#)).

The application of the UCMJ to civilians accompanying the armed forces was justified by the US Supreme Court in the «United States v. Rubinstein» ([United States v. Rubinstein, 1948](#)). The manager of the club in the US air base near Tokyo Mr. Rubinstein was recognized as a civilian who performed his services in accordance with the US military legislation. The US Supreme Court said that his activity was «directly connected with or dependent upon, the activities of the armed forces or their personnel» rather than an incidental to such activities.

At the same 1957 the US Supreme Court awarded the opposite judgment in «Reid v. Covert» pointing out that it was illegal to bring civilians to the criminal responsibility of a military court ([Reid v. Covert, 1957](#)). The application of military legislation to them violates the constitutional rights provided by the Fifth ([Amendment V](#)) and Sixth Amendments ([Amendment VI](#)) to the US Constitution.

The Fifth Amendment of the US Constitution mandates a pre-trial grand jury investigation in federal criminal suits, but does not afford the same blanket safeguard in military proceedings. The Fifth Amendment provides that «no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger» ([Amendment V](#)). The Sixth Amendment states that contractor «shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence» ([Amendment VI](#)).

Meanwhile, the application of the UCMJ to employees of PMSCs participating in military operations of the US Department of Defense is justified by the fact that they provide services that are essentially similar to military activities. In order to strengthen control and discipline on the staff of PMSCs the provisions of the UCMJ apply to them as to military personnel.

As noted the UCMJ applies to employees of PMSCs if they participate in a contingency operation, but the very term «contingency operation» can be interpreted broadly because there are no specific criteria to qualify the situation as such. Such ambiguity leads to violation of the constitutional rights of employees of PMSCs.

The UCMJ was applied to an employee of PMSC once in the «US v. Alaa Muhammad Ali» ([United States v. Mr. Alaa Mohammad Ali, 2012](#)). Being a citizen of Iraq, he was hired to provide

translation services to the US Department of Defense ([Hammond, 2008: 33](#)). Executing the contract, he committed an armed attack against his colleague and was sentenced by the US military court to five months in prison.

In such cases as the use of torture against prisoners in Abu Ghraib, murder of civilians in Iraq by the «Blackwater», the UCMJ was not applied, because the PMSCs were employed by the U.S. Department of State and the CIA, not by the U.S. Department of Defense.

Experts of the UN Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of people to self-determination found the amendments made by the US Congress to the UCMJ contradicting to the US Constitution ([Report of the Working Group, 2012](#)). In this regard, they expressed doubts about the effectiveness of bringing PMSC to court-martial.

Chapman K. supposed that the UCMJ can be effectively applied to contractors: «In order to be placed firmly within the constitutional guidelines set forth by the Supreme Court, several restrictions on the application of the UCMJ should be implemented:

- (1) the application of the UCMJ should be limited to quasi-military PMCs;
- (2) the applicable provisions of the UCMJ should be limited to those with civilian analogues and
- (3) the government should begin to incorporate these changes and acknowledgments of them in the contracts signed by the providing firms and the individual PMCs.

With these limitations, military prosecutors will be able to wield the tool provided by Congress and bring the Untouchables within the grasp of criminal law» ([Chapman, 2010: 1074](#)).

Pearlman A. said that the amendments to the UCMJ will allow to prosecute PMSC employees working for the US Department of Defense abroad. However, he believes that exercise of court-martial jurisdiction over them concurrent jurisdiction with MEJA ([Pearlman, 2016: 11](#)).

The Russian head of the garrison military court V. Sivov notes that the UCMJ contains «undefined sanctions, providing for the imposition of punishment at the discretion of a military court» ([Sivov, 2011](#)). In addition, the author notes the possibility of applying the criminal law by analogy. As an example, he explains article 134 of the UCMJ, according to which a military court is entitled to consider a case involving «all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces» ([Art. 134 UCMJ](#)).

On March 10, 2008, Secretary of Defense issued guidance on UCMJ jurisdiction over contractor personnel and other civilians supporting contingency operations ([Guidance](#)). The clause requires all contractor personnel not only to comply with U.S. laws and host country laws, but also orders, directives, and instructions issued by combatant commanders relating to force protection, security, health, safety, and relations with local nationals. The clause specifically states that contractor personnel are subject to the UCMJ. Although only the contracting officer has the actual authority to change a contract, contractor personnel have a legal obligation to follow the directives of military commanders when they are accompanying armed forces. In this regard, the US Secretary of Defense said that the UCMJ would apply in case of «military necessity» and «alleged misconduct that may jeopardize good order and discipline or discredit the armed forces and thereby have a potential adverse effect on military operations» ([US Defense Secretary, 2008](#)).

In 2016, Congress passed a new Military Justice Act ([MJA](#)), calling for a review and reorganization of the UCMJ. The MJA made important structural changes that align the court-martial process more closely with those of federal district courts. For example, military judges have the authority to act on cases before referral to a court-martial.

4. Results

The amendments were supposed to allow constitutionally exercising judicial jurisdiction over contractors from the US Department of Defense involved in armed conflicts abroad, simultaneously with the federal criminal authority under MEJA. There are, however, a few problems associated with the application of the UCMJ to civilian contractors.

5. Conclusion

The application of the UCMJ can be effective in cases where PMSC employees provide paramilitary services similar to military activities. In such a situation, it is possible to take into account the specifics of the activities of PMSC in armed conflicts. In cases where the US Department

of Defense has contracted with PMSC to provide logistical services, such as cooking, cleaning, the UCMJ should not be applied. In addition, the possibility of applying the UCMJ should be provided in a federal contract, which is concluded by the US Department of Defense with a PMSC.

The studying of US criminal law on this issue makes it possible to assess legal consequences for the citizens of the Russian Federation in the case of their employment under a contract with American PMSCs. In addition, the State Duma of the Russian Federation is considering the issue of the prospects for legalizing the activities of national PMSCs. So that the studying of the foreign experience of the United States, as a state with the most developed special regulatory framework on this issue, seems necessary for effective regulation in Russia.

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