



RESEARCH ARTICLE

Private military and security companies: legal and political ambiguities impacting the global governance of warfare in public arenas

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As public opinion in the West veers away from supporting national military interventions abroad, there has been a covert yet substantial proliferation in the use of private military and security companies (PMSCs). While such companies can offer cost effective and politically convenient solutions to counter international instability or to further foreign relations priorities, the trail of human rights abuses they leave in their wake suggests that the global governance of warfare has not advanced quickly enough to adequately monitor the increasing privatisation of warfare. In response, this article addresses the debate surrounding the use of PMSCs. The idea of legal and political ambiguities is crucial to this debate and is differentiated from ideas concerning absent regulatory mechanisms. The current regulatory environment of significance to the PMSC industry is ambiguous as a result of porous legal boundaries and incongruent policies due to competing political and judicial systems: national, regional, and international. Accordingly, it is essential to consider how ambiguities could be reduced and turned into legal certainty through both hard and soft law to prevent human rights abuses.

Keywords: private military companies; private security companies; hard and soft law; regulation; global governance

Introduction

This article addresses legal and political implications of the proliferation of private military and security companies (PMSCs) in the context of international relations and their use for security and armed conflicts by governments, international organisations, and multinational corporations in public arenas. The context concerns the transition from the colonial to the post-colonial era, and also from the Cold War to the post-Cold War era, which has resulted in today's multi-polar geopolitical reality: a reality characterised by increasingly divergent definitions of diplomacy, sovereignty, and warfare (Saner, 2015). Concomitantly, there has been a proliferation of non-state actors in important areas of international relations, including trade, communication, finance, and security (Saner & Yiu, 2003). This blurring of public-private boundaries has made it harder to ensure that international humanitarian conventions and laws, such as the Geneva conventions, the conventions on the protection of refugees, and human rights laws, are respected and implemented by the signatory governments (Saner, 2015).

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Armed conflicts, terrorism, and inter-state warfare have been increasing unabated, while international tensions are also growing in many parts of the world. Governments are increasingly bypassing democratic control, avoiding negative publicity and putting in place degrees of plausible deniability by using PMSCs to do their war-making. International organisations and multinational corporations also employ PMSCs to secure their ships and staff from pirates, rebels and terrorist groups in high risk territories. Violations of human rights by PMSC staff have occurred during the wars in Iraq, Afghanistan, Syria, Congo and other conflict zones of the world, including through the use of armed drones and related computer systems (Centre for Civilians in Conflict, 2019).

Some estimates of total annual contracts in the PMSC industry are as high as US \$100 billion (Centre for Media and Democracy, 2019). Such estimates are often dependent on a distinction being made between private military companies and private security companies (CSEND, 2018). Private military companies are more engaged in providing services to the military, but are not engaged directly in combat. Private security companies are private contractors who secure persons, buildings and other premises: for example, guarding buildings of humanitarian organisations, including the United Nations (UN) in different parts of the world.

Notwithstanding these distinctions, the classification of these companies is quite fluid since some of the companies engage in the range of activities and some have subsidiaries in different parts of the world which engage in either military or security activities. The classification is also thwarted by the lack of transparency in this sector, which makes it difficult to get detailed data on the establishment, resources and operation of these companies. Some data about Western PMSCs are available publically (Saner, 2015), but this is not so for other areas of the world.

The growth in the usage of PMSCs has far outpaced the development of regulatory structures. The evolution of defense technology suggests that the nature of PMSCs themselves may also change continually, requiring a constantly evolving and upgrading of monitoring techniques to keep abreast of the changes. In response, the discussion hereafter aims to map the current scope of the PMSC industry and its regulatory environment, and also to offer suggestions that may mitigate existing and future harms by promoting the preservation of human rights for all involved in and affected by PMSC operations.

Definitions of PMSCs

Legislation has lagged behind the development of private coercive contractors. While the Montreux Document marks an attempt to comprehensively define PMSCs (International Committee of the Red Cross, 2008), there is still no unanimously accepted legal definition of a private military company or private security company (Dogru, 2010). Existing definitions tend to classify PMSCs by their services as opposed to defining them by their characteristics. For example, the Montreux Document's definition is broad – “private business entities that provide military and/or security services, irrespective of how they describe themselves” – while being complemented by more specific guidance in a brief listing of potential PMSC services (International Committee of the Red Cross, 2008). The vagueness is understandable, as PMSCs have undergone seismic changes in their traditional structures and operational tendencies over the last 30 years. The manner in which they provide protective services and relate to contract principals has such

a continued potential for further change that it is arguably a redundant task to assign a static characteristic-based definition to them (Nimkar, 2009). It is possibly easier to define them by what they are not.

While both private military companies and private security companies offer protective services, the primary characteristic that differentiates PMSCs from traditional militaries, besides the fact that the former are not patriotically motivated, can be found in the entities to which these groups are accountable. State militaries are legally accountable to the state and society. They operate under a strict code of conduct, as described in the Geneva Convention and 1907 Hague Convention Regulations, while also being held liable under national codes of military justice and scrutinised regularly by public opinion (Dogru, 2010, p. 3). In contrast, PMSC employees report solely to the principals of their companies regardless of national or ideological background (Singer, 2007, p. 154). These private sector actors function under no consistent element of loyalty or commitment to a cause which has long embroidered the military profession with respect and prestige (Dogru, 2010, p. 5). This complicates the question of to whom they are accountable, and raises important issues concerning the regulatory mechanisms potentially available to control PMSCs.

Private military companies and private security companies focus on different fields of operation. The former offer services such as military base-guarding and explosive ordnance disposal, while the latter deal mostly in security consulting and investigative services (Krahmann & Abzhaparova, 2010, p. 6). Some scholars prefer to split the industry into three sectors in order to include non-lethal service providers (Dogru, 2010, p. 6). By contrast, others make a sound case against the compartmentalisation of the private military industry, and instead suggest using individual contracts as units of analysis as the services provided for by the companies regularly overlap (Avant, 2005, p. 17). Hereafter, PMSC is used to discuss the private military and security industry as a whole, with distinctions only being made between the companies involved when specific circumstances require.

Usage of PMSCs internationally

Usage of PMSCs by states

According to the Geneva based International Centre for the Democratic Control of Armed Forces, a wide variety of states regularly employ the use of PMSCs, including those that are extremely wealthy and militarily capable, as well as others that are unstable with weaker national armies (Schreier & Caparini, 2005, p. 19). Highly developed states in Europe and North America have seen their expertise in constructing sophisticated heavy artillery and arsenal render them incapable of fighting low intensity wars (Schreier & Caparini, 2005, p. 91) that do not always involve conventional warfare and military opponents (Hong, 2000). In the Global South, the need for states to combat internal threats such as terrorism, secessionism and drug trafficking, while struggling to raise the capital and public morale to grow an army, also makes the procurement of PMSC contractors attractive.

Usage of PMSCs by international organisations

International organisations, both military-oriented and non-military-oriented, employ PMSCs under various contracts. The UN, for example, employs the services of private

security companies on a regular basis to offer logistical advice, intelligence services, and organisational consulting to its committees (Østensen, 2011). As the demand for UN support has expanded worldwide and is now involving increasingly complex operations, the UN has experienced the need to call in experts from a range of fields and a whole spectrum of entities which offer needed security services. Viewing the situation broadly, it has utilised the skills of private security companies in humanitarian operations, peace-keeping operations, political missions, and general security. This option has become more attractive following international controversies that have often accompanied the deployment of national troops in foreign countries, even with a UN mandate.

The ability of the UN to call in consultants or military personnel with local knowledge of a specific field of operations has given UN personnel nuanced strategic insights, while also being a beneficial development for key UN member states like the US. The low visibility protects member states like the US from accusations of neo-colonial policing of the global community. Examples of UN involvement with the aid of private security companies include its peacekeeping efforts in East Timor that were supplemented by private helicopters and satellite network communications, and its mission in the Democratic Republic of Congo which was supported by private armed security and logistical support companies (Østensen, 2011, p. 16).

The North Atlantic Treaty Organisation (NATO) and the Organisation for Security and Co-operation in Europe (OSCE) openly use PMSCs. Many member states are signatories to the Montreux Document which recommends a set of best practices for state use of PMSCs (International Committee of the Red Cross, n.d.). While NATO and OSCE are able to adapt the Montreux Document and apply it to their specific dealings with PMSCs, no similar document exists for non-state actors who also use PMSCs.

NATO has performed military interventions with the use of PMSCs quite regularly since the 1990s intervention in the Balkans. A significant feature of the NATO case is that PMSCs have had mixed effects on the political relations between member states. As a result of divergent viewpoints regarding the overall role of NATO in global governance, many member states are reluctant to intervene militarily in disputes (Mosquera & Chalanouli, 2012, p. 52). The possibility of deploying private military companies in lieu of national troops has often made negotiations simpler (De Nevers, 2007, p. 49). It was frequently used as a tactic by American President, George W. Bush, which became a substitute for real dialogue on NATO's role following the post-Cold War period (Mosquera & Chalanouli, 2012, p. 53).

Usage of PMSCs by multinational corporations

Multinational corporations with strategic interests in developing countries often hire private security companies to provide specialised security for their staff, customers and property. Nestlé, Shell, and the French petroleum giant Total are all known to use such companies to guard their interests in developing countries in which it would otherwise be unprofitable to operate (Percy, 2012). Ambiguities arise when a multinational corporation is situated in a state so volatile that its security personnel are required to deal regularly with heavily armed intruders. This is often the case in oppressive or repressive states, as well as in regions with a high risk of hostage taking, piracy and terrorist attacks. In such cases, not only does it become unclear whether or not the private security companies are engaged in irregular combat or act merely as security service providers. It is also ambiguous whether or not they have civilian status and, if so, which laws govern them.

These issues become even more complex when a multinational corporation is a publically-owned enterprise and very closely tied to a state. Examples of this are in the South African mining industry, in which a government department is responsible for overseeing investments in state-owned enterprises on behalf of political shareholders. Where private security guards are employed to protect mining infrastructure from vandalism and destruction, it is unclear where the burden of responsibility falls in terms of monitoring the conduct of the guards. The fact that public police officers and private security officials are both armed and have some overlapping activities makes it hard to distinguish between public and private policing. A consequence of this is that it is harder to tell if the private security companies involved are acting within their operational limits or illegitimately enjoying some of the privileges of state officials.

Despite this, the case for using PMSCs in commercial settings remains strong because sites of natural mineral extraction are often privy to violent political clashes or opportunistic theft. For example, the expansion of foreign investment in the Nigerian oil industry led to a large influx of wealthy oil merchants from the late 1960s through to current times. This has given rise to a wave of terrorist attacks, including kidnappings and pipeline explosions by local rebel groups demanding shares of the profits that the foreign businessmen are taking from their territory (Associated Press, 2014). Currently, Nigeria is awash with British and American PMSC personnel monitoring oil and gas reserves especially in the Niger Delta region (Abrahamsen & Williams, 2005). One report is that Shell had spent US\$383 million on Nigerian security personnel alone and US\$75 million specifically on contracts with PMSC and individuals offering specialised expertise; so that, if Shell were a state, it would have had the third largest security expenditure in Africa, after the South African and Nigerian governments (Hirsch & Vidal, 2012).

A further complication involves PMSCs becoming stakeholders in multinational corporations they are actually protecting; thus, blurring the lines of their own operational objectivity (Selber & Jobarteh, 2002, p. 91). This has proven problematic especially for the African mining industry, and has opened up the potential for PMSCs to prolong a conflict or promulgate harmful labour norms due to their financial interest in the natural resources under contest. For example, in Sierra Leone, while Executive Outcomes (EO, a South African military company) was instrumental in providing peace to the region, its payment in partial ownership of the country's natural resources inverted its contractual and financial interests (Selber & Jobarteh, 2002, p. 92). While EO was not facilitating a diamond trade that funded a highly unethical movement, the existence of millions of mine workers under the age of 16 made EO complicit in the use of child labour and, consequently, instrumental in the proliferation of Sierra Leone's "blood diamonds" (Fofana, 2003).

French PMSCs have also found themselves in unseemly waters due to their contracts with Areva, the multinational French uranium giant that supplies France's unrivalled demand for nuclear power. While the need to deploy private security companies to the unstable sites of uranium ore is understandable in countries like Niger, the return of a highly militarised French presence is uncomfortably reminiscent of the colonial era (Friends of the Earth Australia, 2013). By turning to foreign security companies and not employing Niger's army, PMSCs working for a multinational such as Areva are complicit in the stunting of Niger's military development.

Ambiguities surrounding the use of PMSCs

Having illustrated the reality of PMSCs offering their services to a wide range of client organisations, it is important to assess the legal and political environments in which they operate. Private military companies operating in various geographic locations and political climates have been caught up in highly publicised cases of human rights abuses, financial dishonesty, and allegations of exacerbating political conflicts. In order to conjecture realistic methods of improving the social and human rights record of PMSCs, it would be helpful to have a legal framework within which PMSCs could be held accountable.

Legal ambiguity is typically caused by imprecise legislative language that obfuscates legal accountability. It is substantively different from an absence of general regulation. The term regulation does not inherently imply a monitoring regime with legal ramifications in cases of non-compliance, including the imposition of sanctions as an element of hard law. This is relevant in assessing the legal environments regarding PMSCs in a range of settings. Thus, when the press departments of states, international organisations and multinational corporations conflate soft law regulation with hard law, concerned parties are misled about the extent of accountability that oversees the PMSC industry. This can lead to the diminishing of political will for legal reform that could embed private military companies within a strong regulatory system.

Public discourse surrounding the PMSC industry mainly centres on limitations in government regulation. The essential debate is more than about whether governments have too much freedom to use PMSCs in legitimate and illegitimate ways. Nearly every significant multinational corporation and international body has something to gain from outsourcing protection: thus, the regulation of the PMSC industry is more than a governmental issue. In order for claims in favour of a present regulatory environment to be compelling, it must be clear that regulation exists for bodies that are used by states and non-states alike.

While there are ambiguities in the frameworks of national regulation governing the operations and contracts of PMSCs around the world, there is no vacuum in international law concerning whether PMSC employees should be prosecuted for crimes committed abroad. It is made explicitly clear in international humanitarian law and repeated in the Montreux Document that the state where a PMSC is registered is responsible for trying criminal and civilian charges (Chatham House, 2005; International Committee of the Red Cross, 2008). The fact that there is still a high degree of criminality and low levels of accountability within the PMSC industry despite functioning legal regulations on an international level suggests that international law may not (yet) be an effective tool to regulate PMSCs.

Possible ways of solving issues caused by the ambiguities in PMSC regulation

As the discussion of the regulatory environment implies, there is an incongruous system of hard and soft laws that can actively work against one another and create an unclear picture of what exactly is acceptable for the commercial activities of PMSCs. With conflicting definitions of mercenaries and PMSCs in combination with states that can provide an easy route to bypass legislation, even promising regulatory schemes are unable to make the desired impact on the fast-growing private military and security industry.

Currently, the regulatory suggestions have been disproportionately focused on whether international or national laws are the most likely to have a positive impact. While each clearly has its own merits, such a discussion is not always constructive. An appreciation is necessary of the limitations of each, leading to the pursuit of a multi-directional approach that utilises national, supranational and international legal tools along with non-legal finance and market driven pressures. International laws are vague, broad, easy to bypass and difficult to negotiate and create in the first place. Domestic laws rely on political will and stringent enforcement to be any more than window dressing. Supranational controls as of yet do not exist and may involve separate difficulties. A legal combination that showcases the strengths of these three kinds of laws, while compensating for the limitations of each, is a more nuanced and sophisticated way to approach the regulation of such a sensitive industry.

All the while, the secret ingredient that has ensured private bodies comply with legal expectations (especially those that concern safeguarding human rights) is a business-driven pressure to attract investors. In the same way that the anti-apartheid movement was supported with the help of economic boycotts and today's Green Movement is able to exert pressure by calling for divestment in companies with large carbon footprints, the private military and security industry needs to avoid transgressing laws and regulations which could curtail its access to lucrative contracts. While improving their image to attract investors, PMSCs have to anticipate possible business constraints resulting from the violation of laws and regulations that could hinder their access to clients; hence the need of the industry to improve its image to ensure continued access to clients by avoiding a concerted outcry.

A typical avenue of inquiry that offers a possible solution to these ambiguities is the strengthening of domestic laws. Generally, there are two kinds of states: those with relevant PMSC legislation and those without it. According to one report, only 40 of the 193 UN member states have any kind of PMSC regulation (United Nations Human Rights Office of the High Commissioner, n.d.). Key contracting and host states such as the US and Iraq fortunately do feature among the 40; however, countless others, particularly politically unstable nations like Colombia and Somalia, have limited or weak national frameworks to regulate their private military and security industries (United Nations Human Rights Office of the High Commissioner, n.d.).

While the danger this poses to local PMSC employees and civilians living in areas where they operate are intuitive, it is important to remember that regulation-free zones in the developed world serve as loophole states that enable PMSCs in the few countries with PMSC monitoring schemes to operate without oversight. As the conduct of the Northbridge Services Group illustrates, it is legally and financially attractive for PMSCs unwilling to be constrained by stringent domestic laws to incorporate their companies in more legally lenient states and operate from there; thus, the Northbridge Services Group was incorporated in the Dominican Republic but has commercial offices in the UK, US and Ukraine (Grenfell & James, 2008). Combat Support Associates has a suspicious subsidiary company registered in the Cayman Islands as CSA Limited (Observer-Reporter, 2008); and countless other high profile PMSCs either register themselves in countries with little regulation or, more intelligently, create ambiguous or unthreateningly named subsidiary companies in legally neutral areas. This enables PMSCs to dodge restrictive legislation but still receive government contracts in whichever developed country their commercial headquarters might be based.

In cases where there is neither the political will nor institutional resources to create PMSC regulation, it is necessary to turn to supranational or international laws and conventions to push for domestic regulation, which poses a separate set of challenges and barriers. Accordingly, in countries that do have PMSC regulation but still suffer from considerable levels of misconduct, the problems that need solving are twofold: weak laws and weak law enforcement

Conclusion

The private military and security industry has become an important part of the international economy; but, contrary to the impression created by tabloid newspapers and other media outlets, this is not necessarily a bad thing. Notwithstanding this, it is important that regulation is developed that can dynamically grow with the expansion of this industry. It is also important to appreciate that there is no single, ideal regulatory avenue for policy-makers. While contemporary debate surrounding solutions to this regulatory problem are based on whether national or international law is the best method, private military companies and those that enter into contracts with them are able to cherry-pick the guidelines and legislation they follow and, thus, render existing regulatory tools ineffective.

Policy-makers should, instead, embrace the added strengths of policing private military and security companies with a web of complementary instruments comprising hard and soft law mechanisms and by utilising pressurising mechanisms from the finance sector. Even the passage of the most wide-ranging legislation has usually not been enough to change damaging social and political norms. While a multi-directional approach can be difficult to conceive, map-out and coordinate, it is nevertheless the only tried and tested approach confirmed through history that leads to real change.

Disclosure statement

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