

**The Challenges of Regulating Private Military Companies:  
Exploring the Possibilities.**

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*“Despite the growing attention paid to private PMCs, however, there has been little sustained examination of the governance of such actors. The majority of the literature tends to focus on either descriptive accounts of incidents involving PMCs or on normative arguments based on a relatively narrow human rights foundation. What has been absent is clarity about the phenomenon...” (Chesterman and Lehnardt, 2007:01)*

*“The confluence of military and business interests encompassed by the private military industry is a defining change in both warfare and politics. Privatization in the military space, as in all other realms, is not necessarily a terrible thing. It clearly carries both advantages and disadvantages. These must constantly be weighed and mitigated through effective policy and smart business sense”. Singer (2011:02)*

*“We exaggerate the military complexities of African conflicts: professional soldiers can easily bring peace to Africa” (Brooks, 2000:33)*

## Abstract

I am interested in the regulation of PMCs (private military companies). Currently there is no clear distinction between PMCs and mercenaries in the laws under which PMCs fall. At present everyone from aid organisations to private military right through to mercenaries is being regulated under the same law. Prohibiting mercenarism will have implications for PMCs but these implications are merely by-products of what the law is set up to do. Thus the literature has shown that, in fact, PMCs are not regulated as an entity per se. I am not primarily concerned with the legal issues surrounding this, i.e. the questions of how and what should be done legally. I am interested in the reason PMCs have not yet been regulated, and the issues arising from the lack of proper regulation. A key reason for the lack of proper state regulation here is simple: PMCs do not fit easily into the state centred world. They can't be confined or regulated within the borders of a country and they challenge the notion of state sovereignty in quite a fundamental way. The solution I propose to the question of regulation is not simple: plural, transnational governance. I propose that we draw on various fields of study which have explored the regulatory networks to be found between transnational entities, states and the corporate sector so as to develop regulatory models suited for PMCs.

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I became fascinated by the topics of private military companies and transnational regulation in the seminars that I attended as an honours student in Criminal Justice at the Department of Criminology at the University of Cape town. What I had not realised at the start of this minor dissertation, was that this industry had so much more to teach me. My mind's eye was caught by these undefined actors of security- some calling them superheroes and others labelling them the military deadwood that had become the dogs of war in the civil conflicts of Africa. As a South African, I have a special appreciation for the macro occurrences surrounding the development of the industry in this country. I believe that the development of the private military industry in South Africa at that specific point in time acted as a instant force of demilitarisation when this country needed it most. What this research has taught me about the development of the global industry has no doubt left me with more questions than answers, specifically with regards to the regulation of the industry. At first, I thought that one could solve these problems with the creation of a well thought trough system of governance, however, the more I learnt, the more I realised that this is in fact not the case. This minor dissertation is the result of my minds struggles with the realities of the private military industry and the possibilities of regulating this transnational market.

It has become clear to me that writing a post graduate minor dissertation is a paradox in itself. At many points in this journey I felt alone in the sea of knowledge, struggling to keep on course. Looking back on my experience I realise that there have been so many lighthouses along the way, guiding me towards my end destination. I would now like to thank my various lighthouses: firstly my supervisor Professor Elrena Van der Spuy and my co-supervisor Julie Berg for their unending support and guidance throughout this process. I have leant so much from these two outstanding academics. Secondly I would like to thank my family and friends for being my soundboards late at night when my mind could not make sense of the mountains of information that I was attempting to understand. A special thank you to my mother for assisting me with the editing process at the end. Thirdly I would like to thank the staff and students of the Department of Criminology at the University of Cape town for being so good to me over the past three years. Lastly I would like to thank God for the opportunities that life has given me that has lead to the privilege of doing my masters at the University of Cape town.





## **List of Abbreviations**

CPA: Coalition Provisional Authority

CRG: Control Risk Group

DCAF: Geneva Centre for the Democratic Control over Armed Forces

DOD: Department of Defence (US)

EO: Executive Outcomes

IPOA: International Peace Operations Association

MPRI: Military Professional Resources Incorporated

PMCs: Private military companies

PMFs: Private Military Firms

PSC: Private Security Company

RUF: Revolutionary United Front

SANDF: South African National Defence Force

UN: United Nations

UNITA: União Nacional para a Independência Total de Angola (Portuguese)

National Union for the Total Independence of Angola (English)

## **1 Introduction**

The rise of private military and security is one of the effects of the recent changes to the state centred world. It has brought with it legal, economic and strategic issues for which the modern state does not seem to have a solution. The main idea behind historical conceptions of security at the basis of our state centred world is that there is a certain set of core values that needs to be protected within the boundaries of the state (Krause and Williams, 1996: 230). This kind of conceptualisation of security assumes that there can be no security without some form of authority. It is confined by the borders of the state and thus struggles to encompass ideas about a type of security that reaches beyond the jurisdiction of the state. It is also based on the notion that the state should first and foremost be securing its own people and not be too concerned about the security of those that live and function beyond its borders.

Legal regulation has attempted to put these transnational companies in a box and regulate them accordingly, however, the success of these efforts is questionable (Maogoto, 2006:01). The private military and security industry has changed the way that security is distributed. The idea that the state should hold the monopoly over the use of force is not natural and relatively new to society (Moagoto, 2006: 01). During the Cold War the state centred world and its governments maintained a relatively stable monopoly over the use of force (Nimkar, 2009:05). After the end of the Cold War several internal conflicts arose. By this time, the superpowers withdrew from weaker states where they had been active during the Cold War period. Private military companies (PMCs) quickly became involved in the conflict and security issues of weak and failing states. These companies are not to be confused with mercenaries. PMCs, as Schreier and Caprini explain:

*"are business providers of professional services intricately linked to warfare-corporate bodies that specialize in the sale of military skills. Representing the evolution of private actors in warfare and of the mercenary trade, this new industry is different from the classical type of mercenaries. The critical factor is their modern corporate business form." (Schreier and Caprini, 2005:7)*

Some are convinced that PMCs operate in a regulatory void and others, like Dickson (2007), say that they “... *do not inhabit a complete regulatory void, but rather operate in an environment regulated by a complex array of existing international and domestic legal provisions.*” (2007: 217). Domestic regulation might have been an option for the private military market as international regulation has proven to be unsuitable for the regulation of this market and amendments in the near future are not likely because key international players have too much to gain from the current gaps in international regulatory efforts (Taulbee, 2002:17). Domestic regulation has been introduced in countries such as South Africa, Britain and the United States. PMCs have operated in more than 50 countries and on every continent except for Antarctica (Singer 2004: 03). The fact, however, that they are not regulated in every country has made domestic regulation fairly ineffective because of problems with evidence gathering, jurisdiction and a wide array of practical issues (such as the relocation of PMCs to greener pastures if their regions’ regulation became too constricting. There is no country in the world that can claim to have comprehensive legislation to regulate PMCs (DCAF, 2006:04).

Definitions as maintained by international humanitarian law are no longer sufficient as the nature of warfare and security provision has changed and is constantly evolving to include non-state actors in armed conflict and security provision. The private military industry has made it its business to profit from war. Thus this industry is like a boulder right in the middle of this most brutal form of politics (Sheenan, 2007: 212). Even though various states have used this boulder to their advantage, it does not really fit into the state centred idea of a fair war. What is more, the nature of warfare has been evolving in recent decades under the influence of globalisation which eroded the political and cultural autonomy of the state. Even though conflict now takes place on a local level, it still has global roots and is influenced by transnational corporations, non-governmental organisations, intergovernmental organisations, and the media and advocacy groups as per Shearer (2007:215).

This paper aims to understand the issues involved with the regulation of PMCs. Previous authors have focussed on the legal issues of regulating PMCs or on the social justification for or against the existence of PMCs. This minor dissertation will be focussing on the possibilities for regulation of the private military industry that

includes, but is not limited to traditional regulation as the literature has shown that legal regulation is either ineffective or not enforced properly. Chesterman and Lehnardt (2007:01) explain that we lack clarity regarding the private military industry and its actual impacts in the world. This type of clarity begins with the distinction between PMCs and mercenaries. Due to outdated ideological and moral objections, regulators and scholars alike have not taken the presence of PMCs in international security affairs seriously. This minor dissertation aims to do just that. PMCs are here to stay the rapid growth of the market should be understood rather than shunned (Avant, 2005:38). Getting rid of PMCs is no longer an option for regulators. So then, what is next? I would like to suggest that studies of the regulation of other transnational bodies be applied to the case of PMCs.

Transnational corporations have been shown to be part of complex and remarkable systems of governance that go far beyond the 'legitimate' framework of legal regulation (Backer, 2011:751). I will look at various scholarly responses to these transnational networks of governance in order to show that this perspective can offer a solution to many of the regulatory issues related to the private military industry.

This paper will focus on understanding precisely what a private military company is and how it operates. Secondly, this minor dissertation will look at why it is that we have PMCs. This means considering the various developmental trajectories of international security which have led to the rise of the industry, but also some of the macro aspects which contributed to it. Thirdly two examples of arenas where PMCs had been active will be discussed. The first case study is that of a single company, Executive Outcomes in Africa. And the second arena is a broad sketch of private military activity in Iraq and Afghanistan. Then the regulatory issues of PMCs will be explored before investigating current policy recommendations. The penultimate chapter will be focussed on scholarly responses to the regulation of transnational bodies. The concluding chapter will deal with the application of these new technologies to the regulatory issues specific to PMCs.

## **2 What is a Private Military Company?**

The first private military company was hired in 1294 B.C. to fight in the battle of Kadesh between Egypt and the Hittites (Nimkar, 2009:02). The first modern PMCs, however, appeared shortly after the Cold War (Shearer: 1998: 01). There is no legal consensus regarding the specific definition of a private military company (Schreier and Caprini, 2005: 18). Most of those that had ventured a definition of the modern day private military company have come to admit that they are chameleons in their trade with the ability to change in order to fit every contract and disappear just as fast as they came. In what follows I will look at the attributes of PMCs for which there is general consensus.

### **2.1 PMCs are Legitimate Businesses**

PMCs are registered businesses with business-like hierarchies and principles (Singer, 2011:01). PMCs have no political motivation in the conflicts in which they participate. Their participation is motivated purely by profit (DCAF, 2006:01). These companies advertise themselves, are legally registered and have a defined structure as well as a set of organisational principles which they aim to uphold (Shearer, 2007:82). Cockayne calls PMCs “military entrepreneurs” (2006:461). This is because of their business-like structure and also because of the entrepreneurial way in which they have created a market. This means, however, that the command structures in a private military company have almost no resemblance to the command structures of state militaries. Often the larger PMCs are fully-fledged transnational corporations. This means that, when judged by internal structure and ethos, PMCs resemble a transnational hotel chain more closely than they resemble a state military.

Another corporate attribute of PMCs is their reputational sensitivity. Because of the fact that these companies operate on contract basis, their reputation is of the utmost importance if they are to survive. The market is extremely competitive and PMCs are highly specialised. Their missions form part of their contracts and are thus not determined by themselves. They do, however, have to use their discretion with regards to which missions to accept and which not to, just like any other business would have to.

A big part of the success of the industry can be attributed to its business smarts. As maintained by the DCAF, PMCs offer the hiring state various financial advantages in comparison with its other options (2006:02). For example: outsourcing cuts much of the additional costs that come with employing soldiers such as pensions and medical benefits. PMCs can also be hired for a specific duty which means that they don't have to be maintained year round by the state as would be the case with public militaries. This is often a viable option as many of the military functions performed by PMCs are not needed all year round. The business of warfare could include anything from cooks and nurses to combatants and training officers. Thus it comes as no surprise that there is a magnitude of types of PMCs.

There is a correlation between a PMC's clientele and its actions and its relation to its clientele can be observed as one of the market's developmental trajectories: the first type of modern private military company worked as an **independent military** which was thus not hired by its home state (Shearer, 2007:82). Executive Outcomes and Sandline International are examples of independent PMCs. There aren't many examples of this type of private military company. What set these two companies apart from the rest, is their open willingness to engage in combat. Executive Outcomes arguably attracted the most attention. Both of these prided themselves in the counter-insurgency and anti-terrorism experience that they gained through working for the apartheid government. They achieved battlefield success against UNITA in Angola and the RUF in Sierra Leone. Much controversy accompanied these two companies. In response both low profiles and to developed more diffused and secretive networks. The issue that the world had with these companies, aside from their willingness to enter into armed conflict, was that their business parameters were questionable (Shearer, 2007: 82). Their proclaimed client base included western governments and regimes friendly to the west. Sandline, however, decided to also include 'recognised liberation movements'. After Sandline and Executive Outcomes no other company successfully provided its clients with direct combatant services. Gurka Security was employed by Lonrho in Mozambique between 1990 and 1992 to perform combatant services but failed in their task as a number of their soldiers were killed by the RUF. Despite the military successes of Executive Outcomes their doors closed in 1999 due to a crumbling client base and restrictive legislation introduced by the South African government.

The second type of clientele is held by what Shearer has termed **proxy companies** (2007:83). These companies have aligned themselves with western defence interests. They do not engage directly in combat like their independent predecessors did. They rather focus on training and advisory positions. Military Professional Resources Incorporated (MPRI) is a good example of this type of company. It was one of the first companies to jump at the chance to work for the privatised-minded US Department of Defence. In fact, this seemed to become a trend for American PMCs in the late 1900s. Other companies that were hired by the US Department of Defence were Dyncorp in Kosovo and Vinell Corporation with their technological military skills base, contracted out by the US to train Saudi Arabian forces to protect US oil interests in Saudi Arabia (Shearer, 2007:84).

The third type of clientele is held by PMCs that Shearer calls **security companies** (2007:85). These are not to be confused with other types of private security companies. What sets them apart is the conflict setting in which they operate. These companies do risk assessments, fence guarding and personal protection. Even though these companies enter into more benign types of work when compared with most other types of PMCs, their services have been criticised for their political ramifications. These companies are often used in post-conflict, yet volatile, situations. Another example of their work that could be criticised is their affiliation with mines or oil companies in troubled countries. Outside investors hire PMCs to safeguard their investments, however, many civil conflicts are based on these very assets or on the effects that their mining has had on a region and its people. Thus a private military company working for such an industry will find itself right in the middle of the political conflict, even if this was not its intention.

The fourth type of clientele base explored by Shearer (2007:86) is held by a private military company that specialises as an **ad hoc force**. These groups tend to be assembled extremely quickly and with the sole purpose of fulfilling a contract. The right people for the job will be picked from a database and the group will usually disassemble as quickly as they came together once the task has been completed. This is the recruitment agency of PMCs that has become a trademark in civil wars of poor and failing countries.

## 2.2 PMCs Offer Professional Services

Another trademark of PMCs is the professional services with which they provide their clients with. The services offered by PMCs include: advice, training, logistical support, monitoring and demining, but are by no means limited to this. As "entrepreneurs" PMCs are adaptive to their clients' needs. Thus there is no limit to the services they can provide. They provide these services to governments, non-governmental organisations and mining companies, among others. One of the biggest clients in the industry has been the United States Defence Force that had entered into over 3000 contracts with private military firms between 1994 and 2002 (Singer, 2011:01). The total spent on PMCs in Iraq and Afghanistan between 2005 and 2010, was an estimated \$146 billion (Ralby and Tonkin, 2011: 02).

### 2.2.1 Advice

As stated by the British Green Paper on PMCs, these contracts involve anything from advice regarding planning and equipment purchasing to the restructuring of militias (2002:08). In cases where the contract specifies advisory or consultancy roles the private military company usually relies on the knowledge base of ex-soldiers in their employ (Singer, 2004:03). MPRI assisted in an advisory role for their clients the Croatian military, and aided in their mission: '*Operation Storm*'. MPRI gave tactical advice that was, as per Singer, the main component to the Croatian success. Rapport Research and Analysis provided security and risk assessments for mining companies in situations of conflict (Shearer, 1998: 24). Other companies that have provided advisory services were Sandline International, Executive Outcomes, Vinnell Corporations, Defence Systems Limited, Levdan and Saladin, to name just a few (1998:25).

### 2.2.2 Training

Up to 80% of the British Military's training is done by civilian companies, as indicated by the British Green Paper on PMCs (2002: 13). PMCs do not only train western militaries. Most often part of their duties in a war zone is to train local soldiers or Special Forces. PMCs source their employees from the cream of the world's military crop and thus have the expertise to give a client the best training



possible in their specific niche of the market. The types of training provided by PMCs are also relatively diverse. Lifeguard Security has for example trained local militia groups to protect Branch Energy's diamond mines in Sierra Leone during unstable times (Shearer, 1998:24).

### 2.2.3 Logistical Support and Arms Procurement

Logistical support includes equipment delivery, demining and humanitarian aid provision both during and post conflict (this does not include peace keeping and peace enforcing roles). There are various examples of PMCs being hired to provide logistical support for example the US government hired MPRI to help deliver humanitarian assistance in the former Soviet Union, according to the British Green Paper on PMCs (2002:08).

### 2.2.4 Monitoring and Intelligence Gathering

These services include political assessments, assessment of military joint ventures, negotiations and translation services (Shearer, 1998:26). DynnCorp and Pacific A&E are two examples of companies that the United States has recruited to monitor operations in the Balkans. Other companies performing these types of duties are Neil Young Associates, Kroll, CRG and Argen (1998:26).

### 2.2.5 Peace Keeping and Peace Enforcing

Some PMCs have started specialising in the type of security that is needed by a country in transition as previously mentioned (Pfanner 2006:450). This includes state building and humanitarian aid. Wright and Brooke looked at some areas of private military involvement in post-conflict and peace keeping scenarios. They show that it is often very difficult for states to provide the type of security that a post-conflict region needs. This is because this kind of security is somewhere between what is generally expected from the police and what is generally expected from the military. Security often contributes 90% of the problem in post-conflict situations but

merely 10% of the solution in traditional peace keeping operations taken on by other forces (Wright and Brooke, 2007:108). In most cases a region that is in such dire need of this type of security does not have the most basic structures necessary to provide it (2007:106). The modern day military of most states does not have the structures or personnel to put in place proper logistical support mechanisms in a post-conflict scenario (2007:107). There are two reasons for this: firstly, many state militaries had been downsized dramatically after the Cold War. Secondly, as a result of military downsizing, most militaries tend to focus on combatant roles rather than state building or humanitarian roles. PMCs that have specialised in fulfilling the logistical needs of countries and zones which find themselves in a scenario where they do not possess the necessary manpower or infrastructure to maintain security have been decided on as a viable option in many instances. There are various examples of PMCs that have aided in post-conflict situations in countries such as Sudan, Angola and Sierra Leone (2007:107). PMCs have also focussed on security sector reform. This class of private military company specialises in the fortification of governmental-, economic-, security- and legal sectors of post-conflict zones. In Mozambique, Nigeria and Sudan, among other regions, PMCs have aided to stabilise the region (2007: 108).

#### 2.2.6 Combat roles

Only two private military firms successfully provided their clients with offensive combatant services. These were Executive Outcomes and Sandline International (Tonkin and Ralby, 2011:03). There is no doubt that these companies were instrumental in ending the conflicts in which they were involved. Some commentators praised these companies for their involvement in conflicts that the UN and developed states' militaries could not or would not solve. Others reacted negatively to their involvement based on their fundamental beliefs that one should not profit from warfare or that one should not enter into warfare if one is not linked to the cause of it.

### 2.2.7 Tactical militarised security services

Tactical services provided in Iraq by PMCs include the protection of key areas such as the “Green Zone” in Bagdad, VIP protection and convoy escorts for various assets in transit as road side ambushes had become one of the main ways of attack for insurgents (Singer, 2004:06).

Tactical services were also provided to various mining companies in Africa. Mining still represents one of the African continent’s few areas of progress (Cilliers, 2007:05). Cash strapped African nations were forced to abolish or at least ease their foreign ownership policies in order to encourage foreign investments in the 1990s. This kind of investment, however, required a stable environment. Many of the mining companies ended up hiring PMCs to ensure the safety of their staff and of their property.

### 2.3 PMCs are linked to conflict or war

The factor that distinguishes PMCs from other non-state security providers is that their services have to do with conflict or war. The distinction between PMCs and state militaries is, however, the issue central to most of the legal debate surrounding private military. The legitimacy of PMCs in war and conflict, how the law should react to this and whether PMCS operate in a legal void or not are issues which have been debated as maintained by the British Green Paper on PMCs the differentiation between combatant and non-combatant or civilian is often a very artificial one(2002: 08). Frequently these companies are involved in high risk activities such as the transportation of militants and goods or logistical support that, in actuality, becomes part of a grey area between the militant and the civilian.

Not only are PMCs linked to warfare, they have also changed the nature of the conflicts in which they have been involved. The private military industry put a price tag on what used to be a public good, security. Schreier and Caprini (2005:05) give a practical example of this: the use of private military by one side of a civil conflict often meant that they were, at that specific time, the main supplier of arms in the region, especially if the conflict in question had been going on for a long period. This sometimes led to the other side of the conflict having no choice but to hire a private

military company themselves. The same, however, can arguably be said for the involvement of other states or non-governmental involvement in war and conflict. The most important impacts that PMCs have had on war and conflict are not the practical implications but the ideological ones. It is the blurring of the boundaries between public and private that makes the presence of these companies such a conundrum for policy makers. The fact that they are actively involved in one of the core rights or responsibilities of the state (the legitimate use of violence) has meant that the state can't seem to get a handle on their presence.

#### 2.4 Why do we have PMCs?

Modern PMCs originated because of a set of conditions in the state centred world. Their developmental trajectories were fuelled by changes in the state centred world. They have, however, never really fitted neatly into our state centred world. This is because these companies represent everything that the state centred world is not: military violence that does not answer to a government and a transnational industry of legitimate businesses that has the ability to disassemble and restructure itself in an instant. Perhaps the biggest anomaly that this industry has posed to the state centred world is its networking capabilities. PMCs source their employees from lists of the best soldiers and specialists in the world. The private sector is also years ahead of the public sector when it comes to war technology. Thus PMCs pose a serious threat to the state military. If the state does not have a military then Hobbes's Leviathan giant is defeated. According to the DCAF the market for PMCs can be attributed to a variety of gaps in the market that these companies have filled which include: compensation for the lack of national capacity, substitution for non-existent capacity in a specific area, aid military functionality in high risk areas and lastly the protection of illicit activity or overthrowing governments (2006:02).

It is important to understand why these gaps existed in the first place. Firstly the end of the Cold War signalled various political changes that had a profound impact on state security in most of the world. Secondly globalisation and technological development have changed the nature of warfare. Civil wars that are contained within state borders are more likely than wars between different nations, casualty figures have dropped remarkably and wars are most often centred on conflicts over

identity, minerals and ethical reasons rather than territorial ones (Sheenan, 2007: 212). Wars are more likely to take part within states that have significant levels of economic insecurity. There are several local tipping points when looking at the industry from a micro perspective. PMCs might have operated on almost every continent but they do not come from everywhere. The fall of apartheid in South Africa for example flooded the market with highly trained soldiers that were willing and able to act as private militants. The fall of the Soviet Union made for a high influx of arms into the international market making it easy for PMCs to arm themselves. The stronger western governments withdrew from various weaker states in the post Cold War era leaving them vulnerable to civil and regional conflict. PMCs provided the perfect solution to the conflicts in weak African states at war. The demilitarisation of the US left it in dire need of military professionals after the terror attacks. There was a huge influx of PMCs to the market after the September 11 attacks. (Isenberg, 2007:83).

#### 2.4.1 Political Developments that Altered the Nature of Warfare

Fighting for one's country has not always been the noble pursuit that it is today. It is only in the mid-nineteenth century with the rise of nationalism that fighting for financial gain rather than for one's country became frowned upon (Shearer, 1998:70; Maogato, 2006:01). Wars were interstate affairs and few outside parties became involved. By the mid-twentieth century international law prohibited mercenary activity (Maogato 2006:01). The end of the Cold War meant that the west was searching for less expensive and more effective ways of governing states. Both American presidents Bill Clinton and George W. Bush Jr. advocated for the privatisation and outsourcing of sectors of the United States' military. With the downfall of the Soviet military threat in the nineteen hundreds, both of these presidents were confident that the privatisations of certain functions of the state (including military sections) would not have an impact on the sovereignty of the state. Bush and Clinton were of the opinion that this would serve to streamline the functions of government (Maogato, 2006:04).

Another effect of the end of the Cold War was the withdrawal of, among others, the US government's involvement in African affairs. Direct foreign involvement had

been shaping African political affairs throughout the Cold War era (Lock, 1999: 14). This, together with the reshaping of African state-to-state affairs due to the effects of globalisation, left weak African states in political and security crisis. Various transnational corporations acquired a great deal of power due to the absence of the superpowers. Foreign aid is a perfect example of this state of affairs. It was becoming privatised rapidly.

The rise and prosperity of PMCs has become part of a positive reinforcing system, as their availability and capacity have made for the gradual decrease in state military's range of capabilities while at the same time the initial downsizing of state militaries remains one of the contributing factors that led to the birth of the private military industry as we know it today (Moagoto, 2006:6).

War in the 'modern' era was simply two states that sought to resolve issues in their international relations. After the end of the Cold War these large scale conflicts had, to a large extent, disappeared (Shearer, 2007: 212). It had been replaced with new threats to the state. This includes threats such as terrorism and insurgencies which meant that most wars had become confined within the borders of the state.

#### 2.4.2 Globalisation and technological development

Technological advances in the military sector created yet another open door for PMCs. Most modern militaries do not develop their own information systems and are thus dependent on civilian contractors to do this for them. Globalisation has introduced an era of unparalleled communication capabilities. This meant that technological advancements in military research were becoming more readily available to civilians. Most often, PMCs found it easier to keep up to date with advances in technology as much of the military technology was now being produced by the private sector (Nimkar, 2009: 05). This might be because this market, much like many other transnational trades, has used globalisation to its benefit. PMCs seem to have perfected the notion of shared securitization. PMCs operate across borders in what Abrahamsen and Williams have called Global Security Assemblages (2009:03). These assemblages are new types of relationships between the public and the private that challenge conventional ideas about jurisdiction and state sanctioned power. The

international arms trade is a practical example of how these assemblages work. It developed from a growing number of connections in international trade markets and technological advances that made international trade faster and easier. This meant that it was now easier for PMCs to engage in conflicts and it also made this more profitable for them as they no longer relied on the local arms trade in the zones where they were active (Schreier and Caprini, 2005: 05).

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### **3 The Arenas of PMCs**

In this section I will look at two arenas where PMCs have been active, in order to give some context to the discussions above. I will briefly describe the role of PMCs in each practical case and then look at the issues that arose from their involvement in each case. This chapter won't be a comprehensive sketch of each arena of conflict, but rather a snapshot of the private military involvement and what prominent scholars have learnt from it. The reason for these accounts relates to the final aim of this minor dissertation: to understand what regulation needs to look like for the private military market, and then to theoretically explore the notion of pluralised governance as applied to other transnational bodies, for the private military industry.

I will first discuss the activities of Executive Outcomes, the father of modern day PMCs, and then the activities of PMCs in Iraq and Afghanistan. The reason for looking specifically at Executive Outcomes first is that they appeared at what can only be described as the perfect point in time and space where the political, the financial and the legal structures in the world allowed PMCs to make their *début*. PMCs had been active before this but none like Executive Outcomes and no other had generated as much international debate and interest. There is also a critical distinction to be made between the types of security outsourced by the west versus the type of security outsourced by weak (African) states, unlike the powerful west, African nations have turned to PMCs as a last resort in most cases. This has meant that they were forced to outsource their core functions as opposed to using military contractors for their less covert operations such as training and advice (Cilliers, 1999:04). This means that there is an important difference to be observed between the issues that states such as the US experienced with the use of PMCs and the issues that weak or failing states have experienced. Lastly the case of Executive Outcomes demonstrates three important aspects of the industry that should inform decisions regarding governance: PMCs are able to enter into combatant roles, even though this is not the case with the modern private military sector, however, should regulation not get a firmer grasp on prohibiting this, they might very well do this again in future. Future regulatory structures should perhaps also look at the types of conflict that afforded companies such as Executive Outcomes an entry point into the market as different types of conflict call for different levels of PMC involvement. This case can also demonstrate the effects of current day regulatory efforts on the industry, if



compared with modern day PMC activity. The creation of legislation, was a chief factor in ending the life of Executive Outcomes. One should, however, be cautious of identifying casual relations where there might be none. The regulatory structures imposing on PMCs might not be the only factor influencing their trade.

The reason for looking at Iraq and Afghanistan is simply that it is the best modern example of private military activity and consequently the best example of modern private military issues. As the industry is constantly evolving, it is important to get the most up to date account of issues that the private military market is posing to regulators.

### 3.1 Executive Outcomes: the Military Machine.

#### 3.1.1 Background

Executive Outcomes was formed in 1989 and started out providing the South African Defence Force of that time with special training (Dokudo, 2007:58). The strong arm of the apartheid regime became a problem when apartheid came to an end. This left South Africa with 3500 special force soldiers, roughly 40 000 soldiers and a permanent cadre of about 120 000 that had been enforcing the regime and counteracting the African National Congress. The new regime started with the demilitarisation of South Africa and, due to the political changes, various 'old wood' of the previous regime simply did not fit into the picture of a democratic defence force. The shift in the military and police forces of South Africa meant that a magnitude of skilled men were now without work (Pech, 1999:81). Executive Outcomes was the first to have their pick of the best of the best from the apartheid regime. They chose their men from Koevoet Counterinsurgency (a former police unit), 32 Battalion, 1-5 Special Forces Reconnaissance regiments, 44 Parachute Brigade and from all of the other high ranking special units that apartheid had to offer. The end of Executive Outcomes's work for the apartheid government came in 1992. During their work for the old South African government they developed a good relationship with the mining sector including Anglo Gold and De Beers. In

1991 the company was hired by the diamond mining giant De Beers to assist in the security of their mines.

They were later contracted by an Angolan oil company to assist in protecting their premises against the rebel unit UNITA. Eben Barlow, the head of Executive Outcomes (EO), was hired to protect oil convoys (Pech, 1999:85). What sounded like a simple operation ran into some complications that left three EO soldiers dead and several wounded. Many of the soldiers terminated their contracts in Angola which left EO extremely vulnerable to the UNITA forces which were rapidly infiltrating the area. Barlow and his men stayed on for two months and secured the oil fleets worth millions of dollars. This victory meant that Barlow was now in charge of the newest military machine and his company had everybody talking. They had, overnight, become the military machine that everyone wanted.

In 1993 Barlow again signed on with Anthony Buckingham, the senior board advisor for the North American oil companies and executive and chief of Heritage Oil and Gas in London (the hiring oil company in Angola). This time EO teamed up with an infamous mercenary, Simon Mann and, if this wasn't bad enough, they worked closely with their former enemy UNITA to get the Lusaka Peace Accord signed in 1994 (Pech, 1999:86). This signalled EO's golden years. The company branched out and signed big contracts with clients including the Angolan government, Sierra Leone and Papua New Guinea. They were also contracted to various mines and oil companies all over the world from Mozambique to the Bahamas. The company branched out and absorbed various other civilian companies and, at its peak, formed part of a web of 18 South African companies that had footholds all over the globe. After the fall of apartheid EO started to experience several problems: the new government had proposed legislation that would seriously hamper their activities and they had cash flow problems as a result of their work in Sierra Leone.

In 1996 they moved their main operational force to Sierra Leone where Buckingham had secured a promising deal with the Sierra Leonean military to drive the RUF rebels from the diamond mines. They succeeded in this task by early 1997. The company was later forced to dissolve by the legislation created by the South African government.

### 3.1.2 Types of Involvement

Executive Outcomes provided “*clandestine warfare, combat, air patrol, armoured warfare, basic and advanced battle handling, and sniper training*” in Sierra Leone and Angola (Dokubo, 2007:58). This, however, was no secret. The company prided itself in its more than 5000 man years of experience and its superb battle skills. More specifically EO provided offensive combat operations for governments, training for defence force personnel, training for other government bodies including police forces, customs and immigration personnel and training for politically-allied paramilitary units (Pech, 1999:105). They also provided security and training for various non-governmental organisations including mines and oil companies.

### 3.1.3 Outcome of Involvement

They operated with fewer laws regulating their corporate conquests which made it easy for them to expand rapidly during a time of civil conflict in many African countries. Much of the world view them negatively despite their positive execution of contracts that led to the (albeit temporary) halts in several conflicts. The reason for this is simple: it became clear that their effects disappeared as quickly as it came, as soon as their money ran out. This left the region in which they were active back at square one.

Executive Outcomes was not the only private military company involved in African conflicts. They were not even the only private military company involved in Sierra Leone. They were, however, the company that took the biggest risks and seemed to reap the biggest rewards. EO`s involvement led to various success stories, yet there are not many cases where the peace that they had forced in a region lasted.

They did, according to Pech (1999:91), facilitate the granting of some of the world`s richest diamond concessions valued at an estimated 3 billion USD. Conflicts in Africa, however, have been mainly centred on their resource curse and the involvement of PMCs in this complex political playing field has no doubt changed the face of these conflicts. The question of whether their involvement was desirable or not has led to debates that have not rested, to this day. The answer simply depends on whom the question is posed to. The presence of EO hampered the efforts of the

Sierra Leonean Government and the Angolan Government in securing financial aid from international bodies such as World Bank (Pech, 1999:92). Africans often criticise the west for intervening in issues they do not understand. To this end Barlow gave a good justification for the presence of EO in so many African conflicts:

*“I saw active service in conventional, clandestine and covert units of the South African Defence Force. I founded the Private Military Company (PMC) Executive Outcomes in 1989 and was its chairman until I left in 1997. Until its closure in 1998, EO operated primarily in Africa helping African governments that had been abandoned by the West and were facing threats from insurgencies, terrorism and organised crime. The company also operated in South America and the Far East. I believe that only Africans (Black and White) can truly solve Africa’s problems”* (Barlow, 2008)

#### 3.1.4 Regulatory Issues

The regulatory issues in the golden years of EO were few and far between. South Africa had just entered into a phase of post-conflict transition themselves. In effect, EO removed from the country hundreds of apartheid’s ‘soldiers’, whose presence might have disrupted the transition, (O’Brien, 2008:60). The contracts that they accepted were never in conflict with the international relations and interests of the country (neither during nor after apartheid). South Africa, however, had to regulate their private military industry. Thus they created legislation banning what they called ‘mercenarism’, and regulating all other facets of non-state security exports. In doing so they attempted to have complete control over all exports of non-state security. One of the biggest reasons why EO eventually closed was the restricting nature of this legislation.

## 3.2 Afghanistan and Iraq: the Most Recent Examples

### 3.2.1 Background

In March of 2010 Hammes reported that contract workers represented 50% of the US Department of Defence workforce in Iraq and 59% in Afghanistan (2010: 01). The ration of contractor to US soldier in Vietnam was 1 to 55. One reason for this was the nature of the conflict in these settings. As indicated by Hammes, the US was following an invasion policy that entailed the smallest amount of force possible when invading Iraq. In traditional interstate wars this was never the case. This meant that after the removal of Saddam Hussein there was a need for non-combatant military personnel to attend to the immediate security and logistical needs of the region. The downsizing of the military in the 1990s meant that the US Department of Defence needed to bring in the help of the private sector (2010: 02). Singer had very accurately relabelled the US coalition in Iraq from a “*coalition of the willing*” (as labelled by President Bush) to the “*coalition of the billing*.” More than 60 PMCs employed more than 20 000 personnel in Iraq (Singer, 2004:04). This did not include the private contractors that were performing infrastructure reconstructive services or oil related services

As of 2011 there were 90339 contracted personnel in Afghanistan and 99800 uniformed personnel representing the US Department of Defence (Schwartz and Swain, 2011:09). Approximately 51% of the contractors active in Afghanistan were local nationals (Schwartz and Swain, 2011:10). In fact, the US Department of Defence pursued a local’s first policy in Afghanistan. This came with its own issues (2011:12). Often this caused friction among the US and the locals for various reasons such as the hired parties not being from the region where they were stationed or the hired party being in fact a negative character in society (part of a gang or a syndicate) that had escaped screening processes. These contractors, however, assisted in the execution of various tasks that the US defence force simply could not attend to including the large number of translators. Another critical advantage of the Afghan contractors was that they made the supply lines through Pakistan possible. The roads to the neighbouring country had become a gantlet of Taliban and rebel groups and the police who charged for the use of the roads. Without the mix of personal

connections and local negotiation skills of the Afghan contractors, this corridor would have been impossible to access (Hammes, 2010: 04).

The Pentagon had not anticipated that the US forces would stay in Iraq or Afghanistan for as long as they did. They also misjudged the number of troops that both of these regions would need. This was another reason for the number of PMCs in these regions. The official picture painted by the US Department of Defence was that PMCs in Iraq and Afghanistan were there to give their soldiers logistical support and aid in political reconstruction (peace keeping and peace enforcing) once the governments had been toppled (2010: 02). PMCs had the ability to deploy fast, reduce military casualties<sup>1</sup>, and execute tasks that the US Military simply could not carry out due to their military already being stretched thin. In short, PMCs were a quick fix for the US Department of Defence. The PMCs also provided the US with a legal way to get around the rotation laws of the US Military. Soldiers had to rotate every 6 to 12 months. Contractors were, however, willing to stay longer. This meant that, not only did the contractors save the US defence force money, but the contract personnel also became more experienced in the field than the constantly rotating US soldiers. This made for better decision making in the field and a deeper understanding of the political issues in each conflict (Hammes2010: 02).

### 3.2.2 Types of Involvement

Conachy reported that over 5000 heavily-armed private militants were active in Iraq under contracts with the United States Defence Force. A further 15 000 or so were active in logistical supportive roles (2004:01). Singer (2004) explains that private military firms in Iraq were involved in various missions including logistics and training during the build-up phase of the conflict. Private military also had a big hand in many stages of the invasion phase such as serving as B2 stealth bombers; Apache helicopter crews and patriot missile batteries (2004: 05).

They also had roles to play in security sector reform after the various coalition forces had withdrawn. One of the biggest firms active in Iraq, Halliburton, made an

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<sup>1</sup> The reduction of military casualties, however, might just have been on paper. See section 5: Regulatory Issues specific to PMCs. Since January 2010 more contractors have died in Iraq and Afghanistan than US military Soldiers. For political reasons of the US government and practical market reasons of the PMCs, these deaths were kept off the books.

estimated \$13 billion. Private military held the key to US missions in Iraq. One of the primary roles in Iraq fulfilled by PMCs such as Vinell Corporations, MPRI and a South African company, Erinys, was related to security sector reform activities that took place after the conflict. This included training for the ‘post-Saddam’ military, training for the police, and paramilitary training for peace keeping functions (Singer, 2004:05).

Some of the more controversial areas of the Iraqi conflict involved contractors such as allegations of profiteering directed at Halliburton, a US private military firm, the slaughtering of four private military officials from Blackwater at Falluja by Iraqi insurgents and lastly the controversy that exists around the happenings at Abu Ghraib prison which involved private military contractors from CACI and Titan, two companies hired as translators and interrogators in the prison.

### 3.2.3 Outcome of Involvement

The negative outcomes of private military involvement did not have anything to do with their successes and failures. As the section above has shown, PMCs were extremely effective in the tasks that they had been hired to perform. Some might even say that they saved the US Department of Defence a great number of casualties and a great deal of embarrassment. Thus many of the practical outcomes of PMCs in Iraq and Afghanistan were positive. The issues experienced, however, were mostly political. The US government had no time to anticipate the possible problems that came with hiring PMCs. They also had no time to observe that the nature of warfare had undergone an important shift. Singer made a significant observation about private military involvement in the Iraqi conflict in this regard: PMCs initially filled a gap where the superpowers of the world were not involved. In this case, private military contractors were in abundance while the world’s superpowers were involved. In fact, they were fighting alongside these superpowers. It is no secret that the US Defence Force was one of the biggest contract holders in this conflict (2004:06). Conachy seems to agree with Singer and takes this observation one step further: *“The market for these corporate guns-for-hire has been created by the unprecedented military activity undertaken by the US government over the past 13 years, and especially since the September 11, 2001 terror attacks.”* (2004:01). The

unanticipated effects of this quick fix had to do with the lack of governmental control over the private forces the US had hired (2010: 04). They could not control the quality of the forces. They also could not control the interaction of contractors with locals and various suspicions arose about contractors taking bribes from local rebel groups. The US government was, however, held accountable for all of the wrongdoings of their contractors. These factors meant that the presence of contractors had a direct impact on local power structures and the fragile political climate in each conflict.

Despite all of the negatives listed above, one of the most important outcomes of these two conflicts was that the US government (and for that matter all other governments that had demilitarised and professionalised) learnt that contractors now have an important and continuing role to play in domestic and international security (2010: 09). The most important strategic impacts of PMCs in these two arenas have been the reduction of political and economic capital necessary to commit the forces of a state to war, potentially reducing the legitimacy of counter-insurgency efforts and lastly tainting the morality of the war effort. Unfortunately the aforementioned reduction of political and economical costs of war is no longer a luxury, but has become a necessity for even the strongest of nations, if they want to enter into warfare today, regardless of the negatives that the presence of PMCs poses.

#### 3.2.4 Regulatory Issues

PMC involvement in Iraq and Afghanistan presented the regulating world with an entire new set of challenges. Challenges that are testament to the shifts that had taken place within the industry and within the hiring world. Firstly there was no way of determining whether private military were over-charging. Even though they were cheaper than state militaries, this remains a questionable aspect as there was no way of controlling the hours that they ended up billing for. Secondly contracts added ethical dilemmas because of the business-like way in which these companies operated (Singer, 2004:07). Usually the business-like structure of modern day PMCs is given as an advantage, but it seems here, in a world that is used to dealing with the hierarchal structures of state militaries, the confidentiality and contracts that come with a business didn't work in its favour. In effect these companies could choose to



abort a given mission based on safety concerns or they could suspend missions for whatever reason without the hiring state party having a say in the matter for this same concern. This, in comparison with a state militaries' chain of command, leaves the state in the dark and ultimately affects the mission's ideals.

The market related issues can simply be put as a problem with the fact that there is little control over whom they work for and who works for them (Singer, 2004:08). This issue became evident in Iraq with the 'gold rush' effect of PMCs started hiring in an irresponsible way to meet the demands of the conflict. The checks in place by the hiring parties to ensure proper screenings on the part of the private military firms were few and far between and not in the least bit effective. An interesting example that Singer makes mention of to illustrate the possible effects of this deficiency in oversight is one involving an unnamed former British soldier active in Iraq who had previously served jail time for involvements with Irish terrorists and ex-South African military officials who admitted to bombing over 60 political activists during apartheid.

The policy issues mentioned by Singer are quite alarming and unanticipated. Singer showed how we are forced to reassess the basic democratic ideals when faced with the reality of private military and the fact that they are here to stay. Singer explains: *"The use of PMFs in Iraq seems to be driven less by any supposed financial cost savings and more by political cost savings"* (2004:10). The end result of lessened transparency with regards to foreign policy is, however, still to be seen. There are also issues related to information freedom to be seen here. Public and policy debates and research related to the conflicts in which these firms are active are seriously affected by the fact that they do not grant freedom of information with regards to their corporate documents. Worse still than not knowing, would be the effects of misinformed policy and public debates on such cardinal issues (Singer, 2004: 11).

Lastly Singer mentioned legal greys relating to the outdated definitions in international humanitarian law (2004:13). A good example in Iraq is that of the Abu Graib prison. 100% of all translators and 50% of all interrogators were contract workers. There was a high rate of misconduct reported in this prison for which only state militia had been prosecuted because contract workers were seen as civilians. They were investigated, however, the United States Military found that contractors

were involved in 36% of the incidents. One should be cautious with regards to the weight one attaches to a statement such as this. If we look at what the case study has shown, we can see that, most often, the evidence found in these investigations is not solid enough to stand up in court.

These practical examples have illuminated many of the issues that the world has with PMC, however it is also important to look at the academic literature to make sure that this list is complete. In the next section I will be looking at the regulatory issues own to PMCs as discussed in the current literature. This will also give a set structure to the conversation that will make it easier to deal with these issues at the end of the minor dissertation.

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## **4 Regulatory Issues specific to PMCs**

As stated by Brauer (2008:102) the recent debates that relate to the regulation of PMCs can be divided into four different groups. The first deals with creating a useful taxonomy to describe the various kinds of modern non-state groups in the security and military sector. The second is a complex and intertwined debate that includes issues of state sovereignty, legality, legitimacy and accountability that stem from the types of actions that these companies enter into. Thirdly mentioned is a relatively new issue on the table and that is the question of PMCs as peace makers. There is much contestation about the merits of using private military as opposed to international bodies such as the UN, national militaries or non-governmental organisations. Lastly, and most importantly for this minor dissertation, there is a section of the debate centred on the possibilities regarding effective regulation, executive branch supervision and the applicability of international law. In this section I will discuss each of these areas as they all have implications for the final questions of regulation that this minor dissertation aims to address.

### **4.1 A taxonomy of non-state security providers**

It is likely that, even if there were legal consensus on what precisely it is that they are, this would entail various categories because of the wide array of activities that companies that could be called PMCs are involved in. One company could also shift within the field as PMCs often customise their activities according to their next contracts. Executive Outcomes is a good example of this. They entered into various types of contracts as shown earlier in this minor dissertation, and customised their activities to the needs of their clients each time. Thus the ideal legal (or regulatory) definition of a private military company is one that allows for the recognition of the various different types of functions that PMCs could have whilst allowing for movement across the domain of subcategories of actions and services provided by PMCs.

In addition to the creation of a legal taxonomy which recognises what PMCs do, there is a basic definitional issue that needs to be dealt with here. This is the

distinction that needs to be made between the actions of mercenaries and the actions of PMCs. The term mercenary has various negative connotations (rightfully so), but more often than not, the actions of PMCs are being regulated via the prohibition of mercenary activities and not via the regulation of activities characteristic of PMCs. There seems to be a disregard for the legitimacy of PMCs instead of a focus on the dangerous greys between private military and mercenary.

Mercenaries operate in secret whilst PMCs are registered businesses with managerial structures and corporate images to uphold (Pfanner, 2006: 446). The most important difference mentioned here, however, is the distinction between their missions. PMCs do not decide on their own missions. They are hired to complete a mission as quickly and effectively as possible and are bound by contract to do so. Mercenaries have their own reasons for their involvement in combat. When asked about the common phenomenon where PMCs are equated with mercenaries, Andrew Bearpark, the Director General of the British Association of Private Security Companies, said that this type of thinking can be ascribed to the fact that people view it as immoral to make a profit from the types of actions that private military firms perform. He also mentions that aid organisations are most often business entities and make a profit from providing aid, thus he cannot see why gaining profit from private military involvement is immoral. (Pfanner, 2006:453). PMCs can tailor make themselves to suit the needs of the client for every specific contract by hiring their soldiers and workers on contract basis. Oftentimes, PMCs have a peace keeping function and are in those instances not very far removed from profit making aid organisations. There are three widely accepted norms for defining mercenaries: They take part in a foreign conflict, they participate directly in that conflict and they get financial gain from their participation. This is not an either or list. (Shearer, 1998:68). The aspects that separate a private military company from a mercenary one is summarised as follows by him: They are corporate actors that openly defend their usefulness. They conduct themselves in a professional manner and they intentionally accept financial or legal sanctioning structures to secure their transactions (in other words they will insist on a binding contract or some similar agreement as most businesses do). Lastly they support mostly governments and avoid dealing with regimes that are viewed in a negative light by the international community (1998:69).

The chief South African law regulating PMCs is the Prohibition of Mercenary activity and Regulation of Certain Activities in a Country of Armed Conflict Act 27 of 2006 (hereafter referred to as the Mercenary Law) It is a prime example of the way that private military is mistakenly boxed with mercenaries. This law regulates the actions of just about all actors in armed conflict situations, and is designed to work alongside the Private Security Industry Regulatory Act. This means that an enormous group (basically all non-state security service providers) is boxed into one big category and then regulated under a law with the term ‘mercenary’ in its title. International Humanitarian law does not explicitly address private military firms, much the same as most international law on the matter. The Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts defines a mercenary as: “(a) is specially recruited locally or abroad in order to fight in an armed conflict; (b) does, in fact, take a direct part in the hostilities;...”

Another example of transnational legal definition can be found in the 1977 OAU Convention for the Elimination of Mercenarism. This convention defines mercenarism as follows<sup>2</sup>: “*The crime of mercenarism is committed by the individual, group or association, representatives of a State and the State itself with the aim of opposing by armed violence a process of self determination or the territorial integrity of another state...*” (Gumedze, 2008:12).

One can clearly not rely on legal differentiation in definitions to understand the difference between mercenaries and PMCs and there is a serious need for the re-evaluation of both the way that all non-state exports of security is boxed into one category by law and the confusion between PMCs and mercenaries.

#### 4.2 Sovereignty and legitimacy issues

Part of the reason why PMCs are so difficult to regulate, as previously explained, is the fact that their very existence challenges the foundations of the state. The extent to which the challenge takes place is a disputed matter and so are the effects of this on

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<sup>2</sup> This piece of legal apparatus’s flaws, however, goes well beyond its outdated definitions. Only 28 of the 53 member states to the convention have actually ratified this convention. South Africa is not one of them.

the state, as we have come to know it. One key issue in this regard is the fact that the transnational nature of the market has not allowed for many controls over who is authorized to work for PMCs and for whom the companies in turn can work (Singer, 2004:08). This issue has a strong relation to ethical issues regarding the use of PMCs. It is, however, not the aim of this minor dissertation to prove the morality of these companies or how they should be utilised. This minor dissertation aims to understand the regulatory issues of PMCs, and poses a reaction to this, based on various views of pluralised governance. Thus the mention of this issue relates to it as an obstacle for regulation rather than an ethical debate about the existence and use of PMCs.

Some authors perceive PMCs as being in a regulatory void (Nimkar:2009 ; Conachy:2004). The United Nations and various countries do not even formally recognise the existence of PMCs as their regulation is directly aimed at mercenaries (Nimkar, 2009:15). The US and the UK at least acknowledge some of the challenges that PMCs pose to the state centred world. A key issue when it comes to PMCs and legal regulation is the lack of transparency that might be experienced when opting for a private military company rather than a state military. This is because PMCs do not have the same institutional structure as state militaries and are also not linked to the state in the same way that state militaries are. Even when hired by a state, their actions will be enforced through a contractual agreement that leaves a door open for non-disclosure and internal decisions that affect their actions in conflict and the way that they represent their clients. South Africa for example has one of the most advanced regulatory frameworks aimed at dealing with private military activity. There is, however, a serious incapacity with regards to enforcing the legislation (Bester & Ntoubani, 2009:03).

Globalisation has brought with it countless shifts in the way that most industries are run and PMCs have been no exception. They have clearly become part of what Abrahamsen and Williams have labelled a *Security Assemblage*. In an interview with Schouten (2011:07) Abrahamsen explains that *Security Assemblages* is a term that denotes the collective of a pluralisation of security forms. This can be found in most settings today. Security is no longer seen as only the business of the state and it is becoming more shared and less bound by jurisdictions. This mix and spider web of relationships can neither be predicted nor theorised about priori. This is because

these relationships are too complex to fit into a single narrative and are unique for every assemblage.

#### 4.3 Private military as peace makers

Few would argue with the statement that Executive Outcomes or Sandline International had the necessary power and skill to stop conflict and end a war. These two companies have in fact made that argument themselves (Shearer, 1998: 75). The issue here is, however, not centred on their capabilities but rather their interference in the politics of war. If a ceasefire is brought on by a force that is not party to the conflict or has nothing more to gain than a fee at the end of the day, it means that 'peace' was accomplished without the necessary debate and bargaining. This makes for unresolved issues that threaten to erupt again between the main parties involved. Bludgeoning their client's opposition into signing a peace agreement, will result in an unstable form of peace that goes against what most academic studies of conflict resolution suggest. This line of argument would say that other third parties need to act as mediators between the opposing sides in a conflict and that PMCs are not able to do so, simply because this would be unprofessional and unprofitable. This would be going against their client's wishes. The other side of the debate was given by Waddington at a conference on this very issue held by the ISS (2011:04). Those that advocate for the avoidance of PMCs in all humanitarian aid actions are doing so from a naive ideological standpoint that all PMCs are bad and that their profit motive makes it impossible for them to do humanitarian work. Most of the objections to the use of PMCs as peace keepers or peace enforcers are based on the nature of warfare but, as Iraq and Afghanistan have shown, this is changing fast. Which brings us back to the question of regulation: how does one regulate a market that is changing and evolving at the speed of light?

#### 4.4 The prospects for legislative and market oversight

The current level of oversight enjoyed by the private military industry is one of the major concerns that needs to be dealt with. Issues in this regard can be tied to three interlinked aspects. Firstly, the nature of the market does not allow for the same type

of democratic oversight that one might expect from a state military. Secondly, legislation, both national and international, has left loopholes and blind spots for legislative oversight. Lastly, many have suggested that one of the key reasons behind the lack of market or legal reform is the motive of states that use PMCs to do their dirty work. Each of these will be discussed in more detail below.

#### 4.4.1 Nature of the market

The example of private military activity in Iraq and Afghanistan has clearly demonstrated this aspect. The issues related to mixing corporate business structures (and the lack of transparency that goes with that) with the traditional command structures of state militaries have been problematic as this meddles with the ethos and accepted practices of war. It has proven to interfere with the political relations and International Humanitarian legal guidelines for war. The Iraq and Afghanistan examples have, however, also clearly demonstrated that the nature of warfare has shifted to include PMCs despite their negative effects on the accepted practices of war.

#### 4.4.2 Legislative issues (legal regulation)

Various authors have questioned the application of law regarding PMCs because of the transnational nature of their actions (Liu:2010; Mwirigi:2010; Zinger: 2004; Ralby and Tonkin: 2011). A wide variety of laws apply to PMCs, but very few have been created specifically for the purpose of regulating PMCs. Most of the legislation applying to PMCs was created with the aim of combating mercenarism. A study of regulation as it applies to PMCs can be done from an international perspective or from a national or regional perspective. Each account will be different from the next. As this minor dissertation has shown, the development of the market is due to a mixture of occurrences nationally, internationally and trans-nationally. It is also due to the entrepreneurial forefathers of the industry that saw a gap in the market and filled it. Just as the accounts of the development of the private military industry differ, so too does the legislation under which they fall. Tracking all of the political forces that went into the creation of each piece of legislation would be an interesting



journey, but one for a legal scholar to pursue. Below I will give a summation of the types of legislation that apply to PMCs and the issues that arise from this.

According to the DCAF, there is one important law regulating PMCs from the US (2006:05). This is the Arms Export Control Act of 1986. This Act regulates the export of security services much like the export of goods would be regulated. It regulates to whom the services are exported, but not the ways in which they are used. Companies from the US that provide military services are also required to obtain a licence. There is a limit to the effectiveness of this licence, however, as there is no formal oversight over the licence companies once they have received their licences and oversight provisions are not made unless contracts exceed 50 USD million (in such cases congressional notification is required).

South Africa passed the Foreign Military Assistance Act of 1998 to regulate the export of security services (DCAF, 2006:05). The National Arms Control Committee chairs the certification of military assistance which is allowed under approval of the committee for each and every contract. Mercenary activity is not allowed. Mercenary activity is seen as the participation in armed conflict for financial gain. The Foreign Military Assistance Act was proven to be unconstitutional for various reasons and had to be rethought and replaced by the South African government. An effect of the Foreign Military Assistance Act was that Executive Outcomes closed its doors. This might have been one of the main motivations behind the legislation but this might have been a mistake since the larger companies in the market were the ones known for contributing at least to some level of self-regulation due to public awareness and international reputation. The heavy-handed approach to regulation that South Africa adopted resulted in the exodus of companies such as EO or in them breaking up into smaller concerns with roots elsewhere. This, ironically, made it even more difficult for the government to keep track of the private military industry (O'Brien, 2000: 60).

Due to the issues with the Foreign Military Assistance Act, a new law was created: the Prohibition of Mercenary Activity and Regulation of Certain Activities in an Area of Armed Conflict Act. The major difference between South African legislation and US legislation is the international jurisdiction of the South African law though this has proven to cause more issues than it has solved. Due to the difficulties of

gathering evidence abroad and due to the issues with transparency which PMCs pose to the state, most prosecutions under South African laws of PMCs have ended in plea bargains. Even in the case where a coup in Equatorial Guinea was intercepted successfully, prosecution under South African law had very little effect. One of the major issues with the South African legislation is that it covers such a vast and vague group of security actors that it is difficult to view it as anything other than a political tool, which goes against the democratic principles of the country.

International law and regional treaties apply to PMCs, yet there are very few instances where these legal mechanisms have been applied in practice. The 1989 U.N Convention of Mercenaries governs in aggravated cases such as where attempts have been found at overthrowing a government, for instance. (Avant, 2004: 24). The United Nations working group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right to self-determination was established in 2005. The Coalition Provisional Authority (CPA), the US body that governed Iraq in June 2004, stipulated that contractors should be accountable to their home countries and not Iraqi law. Human rights law generally pertains only to states and thus has little impact on the legal responsibilities of contractors (Avant, 2004: 25). Just as in South African national legislation, international law also focuses on the regulation and prohibition of mercenaries and only by default regulates PMCs. If one wants to understand how private military is dealt with by international legal structures, there are, as De Nevers argues three things to be explored (2009:174): Firstly one should understand the distinction between classifications under international humanitarian law. Secondly one should understand who they work for. Lastly one should understand what it is that they do. The second aspect relates to which international body of law is applicable to which actors as not all countries prescribe to all bodies of international law. The first and last of the three points are important to understand, not because of the lack of regulation, but because of the effects of the loopholes of the regulation for the PMCs which end up not being protected by these regulations. In terms of international humanitarian law someone can either be classified as a combatant, a person accompanying armed forces or as a civilian. No one falls outside of the law. Persons accompanying armed forces, however, don't wear uniforms, they don't take part in active combat and they aren't allowed to be armed at all. Civilians don't enjoy prisoner of war status when

captured because civilians aren't allowed to be armed either. PMCs can thus only fall under either of these two classifications, but do not really fit into either. Another issue with international humanitarian law is that it applies only to international conflicts and not civil wars. Seeing that it is most often civil wars that PMCs from South Africa take part in, it is not hard to see why here too, PMCs aren't really regulated by the law. International law, however, does not create any legal obstacles for states that want to support yet regulate PMCs (Bosch and Maritz, 2011:77).

#### 4.4.3 State abuse

The secrecy surrounding the operations of PMCs can hide certain crucial bits of information such as the real cost of war (both the fiscal cost and the cost in lives) (Conochy, 2004:02). The White House easily obscured the actual numbers in this regard with relation to illegal operations performed in Iraq. This is due to the fact that only the companies themselves can reveal information such as this, and often choose not to, as that would make for negative publicity and a bad reputation in the market could come of it. Singer also makes mention of the fact that the private military industry opens doors for seeking public policy via private means. This takes away the democratic public oversight that the citizens of a democracy should (ideologically) enjoy over its state's international relations and the 'public good' security (2004: 10). If this was not convincing enough, Conochy goes on to explain the possibility of more abuses of state power in this regard:

*“The occupation of Iraq involves a systematic campaign of murder and reprisals against growing Iraqi resistance. Mercenaries provide the Bush administration with a supply of hired killers to carry out the dirtiest aspects of colonial repression- from torture to provocations and assassination- which it would prefer the military was not directly involved in.” (2004:2)*

## 5.5 Current Policy Recommendations

Singer has looked at the role of the private military industry in Iraq to see what we can learn from this recent conflict. He concluded a paper that he wrote for the *Geneva Centre for Democratic control over Armed Forces* (2004) with four policy responses which he deems necessary. Firstly he advocates for transparency (2004:17). As stated by Singer too many of the figures that are used with regards to PMCs are estimates or base line predictions. As mentioned earlier, the numbers of casualties as well as the financial figures are often never known. This type of secrecy leads to state abuses of firms and also firms abusing their contracts with states.

Secondly he advocates for an improvement in oversight capacity in outsourcing processes (2004:18). Here Singer suggests that sound economical principles be applied when outsourcing. One only outsources when it saves money or raises quality. This also means proper tendering and the stimulation of healthy market competition. A big part of this is effective oversight on the ground once the contract has been signed. The structure of the contract needs to be considered carefully here. Because of the sensitive nature of the business, there is a lot of space for abuses and “cost plus” situations if there are not proper mechanisms for oversight in place.

Thirdly he advocates for a standardisation of outsourcing practices (2004:18). The military needs to determine exactly which roles they see fit for PMCs to undertake in a conflict situation.

Finally Singer advocates for proper legal accountability (2004: 21). This means that loopholes in existing laws need to be identified and dealt with. By this he does not mean that PMCs should be granted a legal free pass in war. If the gaps in the law are, however, not filled the issues won't stop coming as it this industry appears to be growing at a staggering rate. It is to be expected that many PMCs will resist and claim that market forces and self-regulation are enough to keep them in check, however, these methods of regulation have proven to be insufficient. What is more, industry self-regulation lacks capacity where there exists no chance of punishment for the individual on the ground that chooses to disobey contracts or laws.

Bearpark and Schulz have suggested that national governments should be the ones to regulate PMCs (2007:244). They recognise that there is no best practice guideline to follow currently, however, they insist that national legislation will be the easiest to

enforce and the most comprehensive. Their first guideline for regulation is that one needs to take into account the complex nature of the industry. By this they mean the broad range of activities that PMCs enter into. They suggest creating standard operating procedures and rules for the use of force rather than regulating in accordance with function. This would, for example, dictate how a private militant is to conduct him- or herself in a conflict situation while armed. This would also include standards such as training and qualifications standards necessary for becoming a private militant. Other areas that Bearpark and Schulz suggest to be developed are contract conformity in terms of national and international law and legitimacy issues with regards to foreign policy goals (2007: 245). One last important suggestion from them is that the industry needs to be part of the development of regulation.

Hedahl, a former Major in the US Air Force, has perceived the current regulatory mechanisms in place for PMCs as extremely inadequate (2012:175). He feels that a mere enhancement in oversight cannot possibly fix what is wrong here. What the market needs is to be effectively regulated is a shift in the way we understand the public private relationship in this market. He suggests the following three changes in order to achieve better accountability (Hedahl, 2012:187): Firstly he suggests a clear delineation of who should be held responsible for the wrongdoings of PMCs. Secondly he suggests that PMCs be accountable to 'legitimate authorities'. He sees the police and the military as legitimate authorities. Lastly, he suggests changes to the way in which the government provides oversight to all outsourced duties.

In conclusion there is clearly still strong pressure on states to regulate the non-state security industry. Pressure for state to regulate can be ascribed to various factors (2006:278): information failures related to the use of private security, high market turnovers making self- and market regulation less effective and the fact that security is still viewed as a 'public good'. One of the main issues related to public regulation of the private security market is that it presupposes a shared goal held by the market and thus oversimplifies the complex entity that is the private security market which, at the end of the day, results in partial regulation and hampered market growth. This can be related to the oversimplification of definitions of non-state security actors causing a misinterpretation of what it is that they can do and how specialized they

usually are. There is a clear realisation in the private security literature that the best way forward is shared governance or hybrid regulation (Zedner, 2006; Abrahamsen and Williams, 2008). This is, however, not a conclusion drawn across the board. In fact, it seems that this is another example of the academic and the practical being worlds apart. There are, however, three overarching recommendations for the regulation of PMCs. They are the need for transparency, contractual reform and accountability measures linked to some form of legitimate authority.

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## **5 Towards the Regulation of Transnational Entities**

Some of the academics discussed in this section have focussed specifically on security, the way its delivery and how its regulatory structures have evolved over recent years. In such instances there is an obvious line to be drawn to the rest of this paper, but some of the theory mentioned here was written with something other than physical security in mind. In some cases the focus has been on the evolution of financial markets or on how the structures within government have changed. The reason for the inclusion of such a diverse group of discussions is that they all look at how the world has reacted to the post Cold War changes which also, to a certain extent, have shaped the evolution of PMCs. Another reason for looking at this particular group of authors for guidance is that their perspectives are not state centred. The way the world is changing has, to a large extent, been perceived from the point of view of the state. When thinking about 'globalisation' with a statist mind set, one would expect the world to become one big global village, with one centred government. This could have happened, but in reality it did not. Instead, what happened was the formation of complex intertwined networks, within which the state is no longer at the head, but rather just another segment of the spider's web. All of the authors in this section have a certain understanding of this spider's web, and it is the aim of this minor dissertation to use these insights to support an argument for a new transnational form of regulation for PMCs that might come to terms with the regulatory issues discussed in the previous section.

The criminological literature on the subject of transnational entities is a good place to start this chapter as it does not venture too far from the focus of the rest of the paper. The focus here is on the way security is being governed. The nodal governance perspective does not rest on understandings of globalisation as it relates to international relations or legal perspectives. It rather relates to a way of observing governance, a tool of analysis. A nodal governance approach can observe both a macro and a micro analysis of security. An analysis from a nodal governance perspective aims to reveal underlying structures of governance that might have been ignored. In Shearing and Wood's book *Imagining Security* a new understanding of the way security is being delivered and governed is discussed. *Nodal governance* is messy and unplanned:

*“What one has in practice is not a single mode of governance, but a complex of hybrid arrangements and practices in which different mentalities of governance as well as very different sets of institutional arrangements coexist.” (2007: 21).*

Looking at the governance of security from a nodal perspective can inform innovations in security design and in so doing both alter existing nodes and nodal relationships, and form new nodes, strengthening the governance network. From this *nodal governance perspective* one will find a diffusion of the various mentalities across various nodes. There are often dominant ideologies to be found in a specific node (such as punishment mentality in criminal justice) Ideological transfer is, however, becoming more and more common and the sharing or transference of mentalities is forming new types of alliances between different nodes. This in turn is producing novel ways of thinking and doing (2007:34). Nodal governance might be an extremely valuable for examining the current regulating forces at play in the private military market. It's a good starting point for understanding the complexities that come with a transnational market. The table below is a summation of the other academic perspectives that will be discussed in this chapter.

Table 1 The governance of transnational entities.

<b>Title</b>	<b>Academic school of thought</b>	<b>Main tenets</b>	<b>Implications for PMCs</b>
Transnational Corporate Governance	Law	The influence of transnational corporations can be translated from soft law into hard law. This is also an exploration of how various forms of regulation co-exist	An understanding of the fact that multinational corporations have an effect on shaping regulation and it can identify why new forms of governance have started emerging.
Decentred Regulation	Philosophy of Law	An analysis of regulation with a broad understanding of those things that regulate. An analysis that is actively not centred on the state.	A method of analysis through which a holistic picture about the industry's regulation can be obtained. It includes almost everything that has been considered by other forms of analysis with the same focus. The active disengagement with the state might, however, make it a biased route to follow.
Transnational Governmental Regulation	Political Science	Trans-governmental networks can and do function without a central bureaucracy that governs them. This means that new networks of governance have emerged	This form of analysis has highlighted some of the issues that result if the state becomes involved in trans-governmental networks (be they purely state networks or between state and the private sector). These types of issues need to be understood and addressed in order to create successful regulation.



## 5.1 Transnational Corporate Governance and Decentred Regulation: the Legal Perspective

The bipolar hierarchy of the state centred world where the public regulates and the private is regulated has undergone significant shifts in the last decade. Transnational corporations have gained power in the international arena and have proven that their influence can be translated from soft law into state legislation. This, once again, does not signal the demise of the state but rather a shift in regulatory structures. Legal academic literature regarding the regulation of transnational entities has focussed on the amalgamation between 'soft law' and traditional legal regulation (hard law). It looks at how traditional regulation co-exists with new forms of governance and the objections of these new forms of governance to the established ideas of traditional law. It also focuses on the effects of powerful multinational corporations on regulation. The last important focal point of the legal literature is how traditional legal terms such as 'jurisdiction' have been challenged and changed by these new forms of governance.

Trubek and Trubek focus on how new forms of governance have interacted with traditional legal regulation (2007: 01). New methods of governance originated because of the fact that traditional methods of regulation were at times lacking in the type command structure or control system necessary in the globalised twenty first century. They increase flexibility, foster experimentation, accommodate multi-level regulation and improve participation. They often co-exist with traditional regulation resulting in both a successful hybrid and a real transformation in law or a rival relationship might exist between the two. In other cases they might exist parallel to, but unaffected by each other (2007: 01).

Trubeck and Trubeck have shown that there are three types of relationships that traditional legal regulation and new forms of governance might have with one another if they come into contact: complementarily (when two systems work toward the same goal) ,rivalry ( when two systems compete for dominance) or transformation (when systems merge into a hybrid).

Complementarily is where both systems exist in the same policy sphere and they promote the same general goals. Often this happens in cases where various solutions are needed for a complex issue. Examples of domains where this type of co-existence can be found would be the social fabric of communities and the health sector (2007: 08). Rivalry is where the new has become an alternative for the old. This often leads to them becoming rivals. This might also be found in places where regulatory alternatives were needed and created but old systems were left in place as well (2007: 09).

Transformation is the most interesting of the three types of relationships as both the new and the old are transformed by their co-existence into something different, a hybrid of the two systems. The formation of the hybrid, as opposed to each system acting independently can be attributed to various different scenarios. Trubeck and Trubeck give three examples: firstly the law might change in its approach toward being more directed at problem solving and conflict resolution and thus accept the work of a new form of regulation that suggests these principles instead of immediate prosecutorial action (2007: 10). Another example is when new governance has solved a problem and legal regulation simply provides a safety net, especially in cases where the new governance system promotes collective problem solving. Lastly law might provide general norms and new governance is used to make these norms concrete. The final outcome of two regulatory systems in a single domain, however, will sooner or later be displacement or integration.

The first factor that helps the successful integration of two systems is the inclusion of key stakeholders in the new hybrid. Secondly, there needs to be a genuine interest in the shared goals from both sides otherwise integration is sure to fail and, lastly, the hybrid cannot be a salient form of deregulation. Legal regulation has to be the default position of the system (2007: 25). One system might surpass the other due to its cost effectiveness as new systems of governance have proven to be cheaper than legal regulation. The other reason why integration fails is that all key players in the domain are not included in the final hybrid (2007:25).

This school of thought also looks at the development of new types of governance but the questions asked here are: 'Why wasn't legal regulation enough?' and 'How do

non-state and legal regulation co-exist?’ These are important questions to ask in the quest for a functioning regulatory system for the private military industry. This is because it is not only the non-state that has changed. In fact, the changes in the private sector can be linked in most instances to the changes in the public sector. It is important to note that even this school of thought, that could be critiqued as being state-centred, has concluded that the best possible outcome for the co-existence of new and traditional systems of regulation is ‘integration’ as opposed to displacement.

Black writes about decentred analyses and looks at what this would mean for the concept of ‘regulation’. When using “decentred” she refers to an analysis that is not centred on the state as primary or only regulator (2002:01).

*“Regulation is the sustained and focussed attempt to alter the behaviour of others according to the defined standards or purposes with the purposes of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard setting, information gathering, and behavioural modification.”* (Black, 2002: 20).

For Black there are five essential parts to a decentred analysis: Complexity, interdependencies, fragmentation, un-governability and a firm rejection of the notion of a clear distinction between the public and the private (2002:03). Complexity here refers to both causal complexities and complex relations between actors or systems in society that cause or underpin a certain issue. Fragmentation again here refers to three things: the ways in which knowledge, power and control have each been fragmented. Knowledge fragmentation can be seen in instances where the industry that is to be regulated knows more about itself than the regulating party (the government in most instances). The fragmentation of power and control is derived from the work of Foucault. The state is not the only regulator. On the contrary, regulation is dispersed between various actors in society (Black, 2002:04). The fragmentation of society relates to the un-governability thereof. Actors will act the way they do in the absence of intervention. One must comprehend that regulation in a centred analysis means to act upon an action. This assumes that this action which is being acted upon is a stationary concept. A system or a group will act and develop with and without and around regulation. This is not to say that formal regulation has

no effect but rather that the outcome may be unpredictable depending on the degrees of fragmentation between the regulator and the regulated.

A decentred definition of regulation works in the following way: It firstly doesn't assume the need for a regulator in order for a regulation to properly regulate. Secondly, decentred regulation carefully weaves between being over-inclusive and under-inclusive. It distinguishes regulation from other systems of control and does not call all systems of control, regulation. It does, for instance, NOT view culture or other forms of social interaction as regulation. A decentred analysis does realise that social and other interactions might have an impact on how systems of regulation operate. They are not themselves regulation. Thus it has limits to what it views as regulation. These limits can be summarised in saying that it sees regulation as an intentional and systematic attempt at problem solving (Black, 2002:20). Thirdly, a decentred analysis of regulation does not assume the involvement of the state. Lastly, it does not assume that there is a particular issue that 'regulation' is there to address (such as the welfare state or risk concerns).

The way a decentralised analysis would examine fragmentation in the industry which resulted in regulatory structures might be an important point of enquiry: The fragmentation of knowledge is clear from the lack of action taken toward regulating specifically PMCs. The fragmentation of power in the security industry is one of the main reasons why weak and failing African states had to use PMCs such as Sandline International and Executive Outcomes. As shown earlier in this minor dissertation, the withdrawal of aid by stronger nations forced countries such as Sierra Leone to make use of the private sector to ensure the safety of mines and later bring an end to conflict. The literature on decentred analysis of regulation has also shown that the degree of unpredictability of the effectiveness of legal regulation is linked to social fragmentation. This is because legal regulation is a reaction to a problem. If the problem changes, but the reaction is stationary (like a law) then the outcome will be unpredictable. Currently PMCs are not stationary entities. The industry is developing and changing all the time.

## 5.2 Trans-governmental networks and trans-governmental regulation: the Political science perspective

Trans-governmental relations include: contracts; coalitions and all interactions across state boundaries that are not controlled by a specific state body (Slaughter, 2004: 350). Political scientists have considered governmental and trans-governmental networks and the type of governance that these networks attract. They are interested in the way these networks function without the centralised bureaucracy that comes with formal international institutions. They are also interested in the dichotomies that these new networks have created and whether they favour the rich and powerful. Lastly they deal with the accountability issues surrounding trans-governmental regulation especially in so far as it involves governmental officials operating 'beyond the state'.

Scholte looks at the variety of non statist regulation forms that are to be found today. This can be found at provincial, municipal, regional, national and global level and can be between two or more of the list above (2004:3). Scholte has identified four main characteristics of modern states that enable them to support these new types of multi-layered regulation.

1. Reorientations of states to see to global and national constituents (Scholte, 2004: 11)

The bipolar line of defence between the inside and the outside of state jurisdiction has become more complex. States have become the site of competition between national and transnational key players. The clientele of government has become more than just its citizens and its local industries. Key players now include transitional social movements, industries and policy makers.

2. Pressures on state welfarism (Scholte, 2004:13)

Globalisation has had complex effects on the 'welfare state'. This is connected to the macroeconomic conditions and global political stance of each country. In most cases state welfarism's decline has been motivated by a need to be globally competitive and thus have lower taxation and less costly social protection schemes. In some cases, though, the effects of globalisation have been quite the opposite.

3. Changes in the nature of warfare (Scholte, 2004:16).

The changes in the nature of warfare can be attributed mainly to the shifts in the reasons for warfare. Conventional territorial conquests have declined as war by land or sea is not effective in gaining control of global consumer markets and trans-world production chains. Territorial warfare still occurs where governments attempt to access natural resources or overthrow regimes that do not coincide with international interests. National armies have, however, become poor tools in comparison to the 'super territorial phenomenon' (Scholte, 2004:17). What is more, globalisation and global reputation mean that states now have more reason to avoid interstate conflict. Globalisation, however, seems to have encouraged inward warfare based on the suppression of sub-national ethnic strivings or religious movements, which are the effects of globalisation. In other cases states have reacted with armed force to ensure the position of transitional investors or the interests of local elite that hold power in terms of international politics and global economics. Globalisation has also introduced new types of weapons and technology and new terrains for warfare (such as the internet). In sum, one cannot say that globalisation has led to the post-military state. It has, however, changed the game completely. The 'war on terror' and transitional interests has to a sectarian extent remilitarised states.

4. Increased trans-state connections in the regulatory process (Scholte, 2004:18)

Globalisation has affected the way in which states act collectively. International law has become sophisticated and wider in application. Informal regulatory methods have also grown in recent years. Information sharing and policy co-ordination often happens without formal treaties or states. These changes to the regulatory structures of the state and the private have led to multilayered public and private governance structures fuelled by transitional issues such as HIV/AIDS, refugee movements, climate change and trans-world markets that cannot be effectively regulated by one state (Scholte, 2004:28).

Global governance does, however, not show any signs of leading to a 'global government' (2004:33). Transnational governance networks are too complex and interdependent to be restructured into a single structure representing the Westphalian-style state. As mentioned, the interconnections between governments are not the only regulating forces today. There are various forms of privatised transnational governance structures that have arisen to fill the regulatory gap left by

government and inter-government structures. The transformation that national and international regulatory regimes have undergone in recent years may be massive, but it has still left various gaps.

There are various types of transitional privatised governance, some of which overlap with public forms of governance. I will now discuss the four types that are most applicable to this minor dissertation: Self regulation and codes of conduct, Binding multilateral treaties and multi-stake holder regulation, Social regulation of the market and, lastly, Co-regulation.

Self-regulation is when the industry develops its own codes of conduct and regulatory structures without the help of government (Haufler, 2003:238). These systems are mostly based on voluntary participation with their set standards and procedures often framed as codes of conduct which are standards but are not legally enforceable. Both self-regulation and multi-stakeholder regulation have expanded dramatically in recent years (2003:239). One example of self-regulation is 'industry associations' (Richmond-Barak, 2011:1067). This is where several competing corporations with similar interests and issues group together as an association. In the security industry this would typically be made up of a mix of private military and private security companies. The aim of these associations is to share interests, discuss problems, enhance transparency and accountability and lastly, but most importantly, to develop structures for their members through whom they can act ahead of government and so avoid large penalties and the stigma that comes with being rapped over the knuckles by the state. As a result they can avoid laws being tightened and penalties being raised for the whole industry. Thus these structures regulate as well as seek more ideal contracting environments for their members. Two industry associations took part in the discussions that led to the adoption of the Montreal document. The most important industry association to date is arguably the *International Peace Operations Association (IPOA)* founded in 2000 (Richmond-Barak, 2011:1068). Among its members are some of the world's biggest private military firms such as DynCorp and MRI. IPOA has developed a code of conduct for its members in conflict and post-conflict scenarios with an emphasis on Human Rights Law and International Humanitarian Law. The code stresses its proper conduct principles and urges its members to specify rules of engagement and have

that comply with International Humanitarian Law. This code also calls for methods of reporting to be set up within the structures of its member corporations. The IPOA then provides good oversight and a non-biased body which can conduct research into allegations with their disciplinary panel.

Another example of self-regulation is codes of conduct that a company can set up for itself. Generally speaking, these codes contain ethical and legal standards though they are not legally enforceable. They usually go beyond what the law prescribes. They most often have cross territorial judicial applicability but, unfortunately, are usually half-heartedly enforced. Both the number of companies and the stringency of these codes, however, have increased substantially over the past few years (Richmond-Barak, 2011:1073).

A binding multilateral treaty is an agreement by which a number of countries agree on a set of minimum guiding standards for private military. This could include, among other aspects, the following (Nimkar, 2009:16): an agreement regarding compliance with the standards of international humanitarian law, some kind of industry-defined code of conduct and standards to determine conflict interest. The first multi-stakeholder regulatory framework was developed in 2000 (Richmond-Barak, 2011:1060). This was a hybrid structure of standard setting between states, non-governmental organisations, and several companies of interest (mostly oil and gas companies). This structure was called the *Voluntary Principles* and it set standards about the agreements between its members on specific issues of war. This agreement document advised on contract for hiring and hired parties (Richmond-Barak, 2011:1060).

A second example is the *Montreux Document on Pertinent Legal Obligations and Good Practice for States Related to Operations of Private Military and Security Companies* adopted in 2008. It defines PMCs as companies that provide military and/or security services irrespective of how they define themselves (Richmond-Barak, 2011:1063). This document is also not legally binding but it goes quite far to show what collaborative efforts between the public and the private can do. The Montreux document is unique in various senses: it prescribes codes of best practice that were well researched by all involved, for all involved. The prescriptions are for home states, territorial states (those states where the conflict takes place), and all



other states and for the contractors involved. It is also unique in its broad acceptance from actors such as the United Nations, various states and the industry at large (Richmond-Barak, 2011: 1064). This document, however, places great responsibility on the shoulders of the states involved with regards to monitoring and enforcing of the codes. In fact, it advocates for a monitoring authority such as that found in South Africa and this minor dissertation has shown that that is not a sufficient or even half way effective regulatory structure to rely on. With the onus of responsibility resting squarely on the shoulders of contracting states it becomes easy to see why this document is so widely accepted, but also why it is flawed. This form of regulation shows the industry's willingness (demand) to be regulated though it is a viable option only if certain key countries buy into such an agreement. Unfortunately loopholes will still exist even if this is in place as a private military firm that does not keep to the standards of such an agreement could simply up and move to a country that does not adhere to the standards.

Social regulation of the market is where social advocacy group's couple with key players in the private sector to set in place certain guidelines on a specific issue that is in need of regulation (Haufler, 2003: 237).

This originated as a response to situations where state regulation was found to be insufficient or ineffective. The systems put in place will typically consist of codes of conduct and standards of public reporting that would force the increase of certificate regimes as it would control the market of a specific issue. These systems are usually designed to support both public and private involvement but do not depend on the public sector for its success as it tackles the actual market in which the group needing regulation functions (Haufler, 2003:237). This type of regulation works specifically well where the borders between the public and the private are broken and where the conventional idea of state borders is challenged, such as in the case of private militaries. This could be seen to be a sort of regulatory pluralism (Grabosky, 2012:02). This concept is derived from 'legal pluralism'. Grabosky recognises that the regulatory space is a contested one and that relational interfaces between parties within this space are complex and ever shifting.

Co-regulation involves the implementation of various bodies of legislation and regulation, typically state-centred and self-regulation, in order to properly regulate a specific industry or society (Martinez et. al. 2007:302). The main aim of co-

regulation is to combine the predictable and binding nature of legislation with the flexible nature of self-regulation. Thus an essential element here is co-operation between the public and the private sector. The result is typically agreements, various conversations and an open channel of communication. A key element here is to firstly establish the differences in motives of the public and the private sphere in order to reach agreements with regards to regulation. Co-regulation is often used in cases where there is a specific sector that seeks regulation and the regulation to be designed is not to be applicable to the general public. A co-regulatory framework sets standards, sets forth processes of implementation, is easily enforceable and usually monitors quite well.

There are three different types of trans-governmental regulatory networks recognised by Slaughter: Those networks of national regulators that develop within the boundaries of recognised international organisations, those networks that develop among state heads and, lastly, networks of national regulators that develop outside any formal framework (2004: 355). All three of these networks face different accountability problems. Networks of national regulators that develop within the boundaries of recognised international organisations face the biggest issues with re-legitimisation in domestic eyes. Networks that develop among state heads often face issues related to the fact that their existence is not based on national legislation, but rather an executive treaty. Thus the movements by such networks might be regarded as undemocratic. Networks of national regulators that develop outside any formal framework often raise the concern that state regulators might practice beyond their jurisdiction to ensure the safety of the bureaucracy.

### 5.3 Conclusion

This chapter focussed on the various enquiries that have delved into one or more aspects of the regulation of transnational corporations. The result of most of these enquiries has been the development of a tool for the analysis and improvement of the regulation of this new type of corporation (among other things). From this chapter it should become clear that the path toward creating successful regulation for private military companies would no doubt be a complex one. It would, most possibly, involve a process of trial and error, and once established, the regulatory mechanisms will probably need constant tweaking as the private military industry is developing

and changing all the time. This chapter has, however, shown that there have been serious strides in understanding the new types of relationships that come with transnational entities such as PMCs. Nodal governance seems to be the easiest fit for an analysis of the regulatory possibilities for PMCs as it is developed from a physical security perspective, although it might be argued that nodal governance theory is biased as it seems to favour the non-state in its application.

Transnational corporate governance is the other side of the coin. The important insight that legal scholars have given us into the interactions between non-traditional forms of governance (soft law) and traditional legal regulation is critical for anticipating the point at which the state meets the rest. As mentioned the state is here to stay, thus it's fair to say that the governance of a transnational market will necessitate the success of the partnership between the state and the rest.

A decentred analysis of regulation offers a holistic view of the factors that can regulate. It is similar to nodal governance in the wide array of things that it views as governing structures (much like the nodes in nodal governance). A decentred analysis would be another excellent analytical tool for establishing a holistic understanding of the industry. The firm rejection of the distinction between the public and the private sector might, however, be a mistake. This assumes that these historically separate spheres have now either amalgamated or one has replaced the other, which is not the case. Yes, there are greys between the two, but both the public and the private sector exist and are here to stay. Lastly, political scientists studying transnational governments and networks have made a valuable contribution in terms of mapping the changes in the public sector, much like those studying transnational corporate governance. This school of thought also concluded that a mixture of industry key players rather than a homogenous group makes up the most successful regulatory team for transnational corporations.

The concluding chapter of this minor dissertation will be a discussion of how these scholarly inputs into the governance of transnational entities, and the knowledge gained throughout the paper, can answer the questions posed in chapter 4.

## **6 Conclusion: Possibilities for the Regulation of PMCs**

Historically, criminology has understood security in the same way as the state. In so far as terms such as justice, punishment and crime remain of central significance and as long as they have their generally accepted meanings, the political horizons of the field of criminology is certainly narrow (Hogg, 2002: 192). A few radicals have imagined a world where self- regulation could transform society and its boundaries, but their opinions fell upon deaf ears until the terror attacks of 9/11 (Hog, 2002: 212). This tipping point brought with it global terror, transitional crime and the world refugee problem (or at least these new labels). This showed the state-centred world that its sovereignty, which had been so firmly rooted in exclusionary nationalism, was most likely defeated.

The novel divisions and new disorders of the 21<sup>st</sup> century are placing the classical state-centred framework, where disorder is observed within a state and conflict between states, under stress. Like Shearing and Wood (2007), Hogg (2002) also turns to the work of Foucault with this conundrum. Foucault cautions that one should avoid the adoption of a grand narrative or projects that claim to have global relevance (2002:212). The restructuring of the state and how it relates to other institutions is proof that development has splintered off into various directions. The implications for the state as regulator have been confusion and uncertainty. This might be because we do not understand the complexity of new transnational networks and cross border linkages. The statist world still assumes that it has a duty to its citizens to regulate and safeguard their lives, rights and property, which might be the case. The most important shift observed by those that study this spider web of networks, in my opinion, has been that the state has not remained as set in its jurisdictional confinement as it used to be. The changing nature of war; the interaction with the private sector and transnational statist bodies are sure proof of this change. The regulatory responses of the state should thus be based on the changes that it (and the rest of the world) has undergone. This means that the regulation of PMCs is not only a state issue. For the state, it also means that its reactions should not necessarily be based on the protection of its jurisdiction against the outside world because this is simply not the reality of the world today.

The state-centred perspective of understanding PMCs (and all non-state security providers for that matter) is of special reference for this minor dissertation. Looking at something from the point of view of the state, sets it in a certain light. It is positioned on a hierarchy of importance as it relates to the state. It also means that the ways in which it contradicts the classic role of the state, causes PMCs to be portrayed in a negative light. None of these understandings are wrong, rather they are only correct from a state-centred perspective.

In this section I will attempt to deal with each of the regulatory issues based on the academic responses to the regulation of transnational entities. In sum, the main issues with the regulation of PMCs are: the lack of definitional clarity for non-state security providers, sovereignty and legitimacy issues, the interference of PMCs with the politics of war in their role as peace makers and the fact that various stumbling blocks are retarding the development of regulatory mechanisms. These stumbling blocks include the nature of the market, blind spots and loopholes in traditional legislation that are disregarded and the abuse of PMCs by states.

#### 6.1 Taxonomy of non-state security providers

The regulatory issues related to the definition of PMCs are correlated to three interlinked factors: firstly the actions of PMCs are not easy to define because there is such a vast number of activities that they partake in. What is more, the traditional binary distinction between the state and the non-state has meant that all non-state security actors get boxed together from a state-centred perspective. Secondly, it is challenging to approach the definition of PMCs as there is no set definition for a private military company in law. This is linked to the issues discussed above.

Thirdly, the confusion between PMCs and mercenaries is an abundant concern as most laws that regulate PMCs do so via the regulation of mercenaries. It is clear that standing definitions and perceptions of PMCs are based on their relation to the state.

PMCs can also be viewed as transnational entities and be regulated accordingly. For example a taxonomy structured on the nodal governance perspective would mean that the private military industry is viewed as a possible node of security governance. One would also then recognise that there are in fact several nodes that govern this industry including states, other transnational industries and non-governmental organisations such as aid organisations and local private security. A nodal

governance perspective would attempt to understand the various mentalities in the industry, the technologies, the resources and the institutional design would be taken into account. A decentred analysis of PMCs might also be useful in developing a definition. This type of analysis has a determined rejection of the divide between public and private and it focuses on understanding the interdependencies of a market, the complexities, the fragmentation and the un-governability.

In studies of transnational governance in general, the transfer of knowledge and policy has been a prominent theme. In cases where nodes have co-existed, their competition has been said to result in either one set of governance principles being displaced or (best case scenario) they amalgamate to form a hybrid form of governance to take the best from both worlds. This means definitional clarity will most likely take some time to be achieved. A legal definition might be (and probably should be) set, but it is only through normal co-existence that transformation or integration will happen.

## 6.2 Interference with the politics of war

The issue here has not been a lack of capability to end conflict, but rather the broader political implications linked to PMCs being involved in warfare. The objections in this category are linked to 'moral' concerns based on an idea of the way that the world should be. To be more precise, it is the legacy of the statist heydays. War used to be between states without outside involvement. Those fighting in wars were part of a state military and fighting for any other reason (especially personal financial gain) was wrong as it defied the state's claim to legitimate violence. Today, war has become more inward focussed as opposed to outward territorial conquests. War has changed so dramatically that the outdated objections to the involvement of PMCs hold no legitimacy.

If this argument is not convincing enough, however, this minor dissertation has proven two crucial things: firstly that the type of private military activity that Executive Outcomes and Sandline International specialised in (active combat) is for the biggest part extinct. Active PMCs have been said to occupy a grey area between combatant and non-combatant but they cannot be seen as 'hired militia' anymore.

Secondly, regardless of all of the negative that comes with the involvement of PMCs in conflict, they are here to stay. State militaries are stretched thin and PMCs are willing and able to fill the gaps. What is more, from a transnational regulatory point of view, the ethical issues here will 'sort themselves out'. If they carry enough weight (which is doubtful ) this will be translated into regulation eventually.

### 6.3 Sovereignty and Legitimacy

The issues with state sovereignty being challenged and illegitimate use of violence is an extension of their interference with the politics of war being objected to. Here, however, two important additional issues became clear: the state can't seem to control PMCs, firstly because of the nature of the market which allows for transparency issues and, secondly, the expectations of chain of command that the state enjoyed with their own militaries which is not the case with the corporately structured PMCs. I have already addressed the issue of outdated moral objections above and this minor dissertation has clearly shown that the state is not losing power ,but rather gaining ground in today's transnational interconnected world. The study of transnational governmental networks alone has started to show the complexity involved in transnational governance. Today, even when looking at it from the state's point of view, governance is no longer the simple public controls the private; inside versus outside task. Today's state has a wide array of 'clients' other than its citizens. The state's choices are influenced by key stakeholders in significant markets and trans-governmental institutions. A lot of what the state does is influenced by the need for good international relations because of the fact that states are so interdependent. These interdependencies dictate a large part of the national markets and even human rights within a state. Controlling transnational industries from a state's perspective, is an impossible task as state-centred legal regulation is caught between the borders of a state and in cases of private military involvements in conflicts the law has been shown to fall short, even if it does attempt to have transnational application over its citizens.

#### 6.4 Factors retarding the prospects for regulatory oversight

What does all of this mean for the regulation of PMCs and the issues with transparency that we can't seem to find a remedy for? I believe that the answer lies in understanding the shifts in the market as well as the shifts in states' structures. Most of the recommended regulatory changes reviewed here suggested amendments to statist legal regulation. I disagree with this. This minor dissertation has clearly shown that the state's control over PMCs is not sufficient to control this transnational market. What is more, the state simply does not have the toolbox to properly understand PMCs as, from the state's vantage point, these companies are placed in a box and are inevitably perceived as undesirable. The way that the state-centred world understands security and politics has been challenged by PMCs.

Thus I would recommend that the best way to approach the regulatory issues of PMCs is from a nodal/ transnational/ decentred point of view. By this I mean it needs to be looked at from no specific point of view. The state-centred point of view has highlighted how a specific vantage point can hamper the development of successful regulation due its convictions.

There is, however, a special issue with this approach to regulation. Most of the standpoints discussed in the previous section have come to the conclusion that this type of governance can, in most cases, not be created. It forms itself. What then can be done to promote a stronger trans-national regulatory structure? I want to suggest that the initial response should be self-regulation of the market that includes enough role players to have a stronghold over the rest. With the corporate structure of PMCs, social regulation of the market will no doubt have an effect on PMCs but it has not proven to be strong enough. After the self-regulating structure has been implemented, the market will enter a period of co-existence with national and transnational regulation. It is possible that this stage of co-existence is already in effect, however, this means that the regulation of the market is in a dangerous rut. There are self-regulating structures in place at the moment as most big firms have codes of conduct in place. There are even a few structures that act as self- regulation for more than one company, but there are no structures in place that effectively have an impact on the entire market or at least a large portion thereof. If the market is already in a stage of competitive co-existence then it means that all nodes are



effectively failing at their task, and no one is leading the race. Thus back to my suggestion of a macro self-regulatory structure for the market. After a period of co-existence displacement or integration will take place which will hopefully leave the market with a comprehensive regulatory system. There is thus a lot that needs to take place before the private military industry can properly be regulated. One important shift (however, not the most important) is that states need to get on board with regulating different types of private security actors, and in so doing, recognise PMCs as something other than mercenaries. The nature of the market has made it easy for states and companies alike to get away with indiscretions in the past. Thus a transnational governance structure will necessitate the punishing arm of the state as a safety net.

The UN Human Rights Council has started discussions in an open-ended intergovernmental group in which options for the regulation of PMCs (and private security companies) is considered by its member states (Minty, 2012: 01). Although no actual legislation has resulted from these meetings up to now, this has been the first attempt of its type to consider the challenges faced in regulating the private military industry as a separate entity and not a sub-terrain of something else. The first session was held in 2011 and the second late in 2012. Unfortunately, the UN does not plan on having another session in the near future. These two sessions of five working days each resulted in 3 main concluding recommendations: continued discussions that include key players in the field and not only state parties, closer consideration of the human rights aspects for accountability issues, definitional issues and legislative issues and lastly, they aim to consider the possibility of an international regulatory framework which includes elaborating on aspects that could be a legally binding instrument that can provide oversight and regulation to private military companies (2012:17) . This is an important step toward the creation of proper regulation for PMC and a milestone has been reached here with discussions around the inclusion of key players outside of the public sector in the regulatory process.

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