



COLLEGE OF LAW AND MANAGEMENT STUDIES

SCHOOL OF LAW

**A COMPARATIVE ANALYSIS OF THE DOMESTIC REGULATORY SYSTEMS
AIMED AT ERADICATING THE PRACTICE OF MERCENARISM WITHOUT
CRIMINALISING THE LEGITIMATE PRIVATE MILITARY AND SECURITY
INDUSTRY.**

MATTHEW BLAIN KIMBLE

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Masters of Laws (LLM)

Written by

Matthew Blain Kimble

Supervised by

MRS SHANNON BOSCH

DECLARATION

This dissertation has not been previously submitted for a degree in this, or any other university, and is wholly my own original work.

Matthew Blain Kimble

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ABSTRACT

There is general consensus that mercenarism is and should remain prohibited. The difficulty that has arisen is firstly one of defining the exact nature of mercenarism, and more specifically what actions constitute mercenary actions. A further difficulty arises in that much of the legislation intended to outlaw mercenarism is impacting on the legal activity of private military and security contractors, who fall short of the definitional requirements of mercenarism. The two groups being so closely linked that they are often mistakenly conflated. There is currently a need to develop a response to the private military security industry, which is better suited to effectively regulate their activities, whilst also effectively criminalising the activities of those whose actions amount to mercenarism.

The dissertation therefore sets about analysing how these two distinct sectors: mercenaries and private military security companies, are regulated at an international and domestic level. It then uses the lessons learnt from these regulator attempts, and the various policy considerations which countries have to make, to propose a way forward in creating an effective regulatory system for mercenaries and private military companies at an international and domestic level.

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CHAPTER ONE

INTRODUCTION

Mercenaries can be traced back to ancient times when armies were comprised mainly of professional soldiers with records of the ancient Egyptian, Greek and Roman armies using mercenaries.¹ During this time in history and before the rise of the modern nation state and its ability to conscript men to create their standing armies, mercenaries were essential in any war and played an important role in the eventual development of the nation states of Europe², who strongly depended upon a class of warriors to forge and defend their nations.³ Moving forward to 1870 and the early years of the colonisation of Africa, mercenaries were once again widely used by the invading nations.⁴ There was another surge in the use of mercenaries in post-colonial Africa during the 1960s and this has continued to the modern day with continual internal conflicts and civil wars.⁵ The reasons for the resurgence of mercenaries within post-colonial Africa is based on several factors which include colonial regimes using mercenaries in order to fight off liberation movements. The downsizing and disarmament of armies following the end of the Cold War resulted in a large and ready supply of men and weapons and as the interests of Western powers shifted away from Africa the security vacuum created an ideal environment for mercenaries to thrive.⁶

Throughout this history the activities of mercenaries have always been viewed in a negative light⁷ with strong criminal undertones.⁸ In more modern times this perception has been enforced by mercenary activities resulting in a loss of human life, an adverse and substantial impact on national economies and the threat they pose to the integrity and constitutional order of countries in which they are involved.⁹ Their negative impact can briefly be categorised

¹ C Lumina, 'Counting the cost: The impact of corporate warfare on the human rights of women and children in Africa' (2008) 147 *ISS Monograph Series* 101, 102.

² The role of mercenaries in the development of the nation states of Europe in the fifteenth to seventeenth centuries will not be discussed further in the dissertation as the focus of this dissertation is that current role of mercenaries, rather than their historical role.

³ H.C Burmester, 'The recruitment and use of mercenaries in armed conflicts' Volume 72 *The American Journal of International Law* 37, 40.

⁴ S. J Ndlovu-Gatsheni and G. A Dzinesa, 'One man's volunteer is another man's mercenary? Mapping the extent of mercenarism and its impact on human security in Africa' (2008) 147 *ISS Monograph Series* 75, 79.

⁵ Note 1 above, 102.

⁶ S. J Ndlovu-Gatsheni and G. A Dzinesa, 'One man's volunteer is another man's mercenary? Mapping the extent of mercenarism and its impact on human security in Africa' (2008) 147 *ISS Monograph Series* 75, 79.

⁷ Note 3 above, 40.

⁸ M Foaleng, 'African mercenarism' (2008) 147 *ISS Monograph Series* 45, 52.

⁹ Office of the High Commissioner for Human Rights, 'The use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination' Human Rights Resolution 2005/2.

into the three areas of commercial violations, human rights and natural resources. In terms of commercial violations, these include invasions of privacy via phone tapping as well as the suppression of trade union activities.¹⁰ Human rights violations are more obvious and include attacks on civilian populations, torture, executions as well as sexual violence and human trafficking.¹¹ The natural resources of countries involved with mercenary activity are often exploited by granting mercenaries considerable mining concessions which not only affects the country's economy but also its people who are not able to benefit fully from their countries natural resources.¹²

More recently there has arisen the private military security company. These started making an appearance as early as the Vietnam War where the United States Army was utilising 80 000 private contractors at any one time.¹³ It was however in the 1990s when private military security companies really started to grow and spread into other arenas of conflict.¹⁴ Private military security companies have donned the appearance of corporate companies, with codes of practice and internal checks and balances¹⁵, in an attempt to rid themselves of the negative image associated with mercenaries.¹⁶ The role of a private military security company is generally considered to be to provide security for people as well as property, as well as providing training and tactical support. This includes providing guidance on military decisions, and involvement in non-direct operations; such as mine clearing and destruction.¹⁷ With their corporate identity and internal checks and balances private military security companies are largely considered as legitimate actors within the international arena as well as forces for potential positive change.¹⁸ Private military security companies are currently filling the gaps created by the downscaling of many militaries which occurred after the Cold War ended. States have also begun to rely on private military security companies due to their

¹⁰ J.J Messner, 'Working towards effective legislative and regulatory solutions for the private security industry in Africa' (2008) 147 *ISS Monograph Series* 145, 146.

¹¹ Note 1 above, 112.

¹² Note 10 above, 147.

¹³ Note 10 above, 147.

¹⁴ *Supra* Note 1 103.

¹⁵ K. E McCoy, 'Organisational frames for professional claims: Private military corporations and the rise of the military paraprofessional' (2012) 59 #3 *University of California Press* 322, 332-333.

¹⁶ M Foaleng, 'African mercenarism' 52.

¹⁷ S Gumedze, 'The role of the private security industry in Africa's peacekeeping missions' (2007) 4 *ACCORD* 1, 4-5.

¹⁸ S Schulz, 'The good, the bad and the unregulated: Banning mercenarism and regulating private security within Africa' (2008) 147 *ISS Monograph Series* 123, 133.

ability to perform tasks previously done by the army themselves faster and cheaper than if the states had provided these services for themselves.¹⁹

The problem that these two non-state actors create in terms of international law is that conflict has generally been understood to fall within the exclusive domain of states.²⁰ The regulation therefore, both domestic and international, which currently exists around actors involved within conflict areas has been focused not on non-state actors, but rather solely on states and state actors.²¹ With the twentieth century seeing a significant increase in the participation of non-state actors such as mercenaries and private military security companies in armed conflicts, this has challenged the traditional view of conflict around which International Humanitarian Law (IHL) and domestic regulation was initially conceptualised. Consequently the efficacy of both IHL and domestic regulation pertaining to armed conflict has been called into question.²² The reality is that existing IHL and domestic legislation is ill-equipped to monitor and control mercenaries and private military security companies.²³

The response from the international community to mercenaries and private military security companies has been solely focused on mercenaries. The response from the UN General Assembly was to categorically outlaw, as criminal, the activities of mercenaries. This was achieved by the passing of Resolution 2625 in 1970.²⁴ Seven years later the Additional Protocol I of 8 June 1977 to the Geneva Conventions of 12 August 1949 in Article 47 provided a treaty based prohibition for the actions of mercenaries, which the OAU adopted in drafting a regional Convention on the Elimination of Mercenaries in Africa of 3 July 1977.²⁵ Both the API and the OAU convention define a mercenary as any person who:

- is specially recruited locally or abroad in order to fight in an armed conflict
- does, in fact, take a direct part in the hostilities
- is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in

¹⁹ Note 10 above, 147.

²⁰ S Chesterman and C Lehnardt, 'From mercenaries to market: The rise and regulation of private military companies' (2007) Paper 55 *New York University Public Law and Legal Theory Working Papers* 1, 1.

²¹ *Ibid*, 2.

²² Note 20 above, 2.

²³ B Perrin, 'Modern warfare: Armed groups, private militaries, humanitarian organizations, and the law' (2012) *University of British Columbia Press* 1, 2.

²⁴ Declaration on principles of international law friendly relations and co-operation among states in accordance with the Charter of the United Nations U.N. Doc. A/5217 at 121 (1970).

²⁵ Note 8 above, 47.

excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that party

- is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict
- is not a member of the armed forces of a party to the conflict
- has not been sent by a state which is not a party to the conflict on official duty as a member of its armed forces

This definition is at best extremely narrow and considered ineffective²⁶ for a variety of reasons which will be explored further in a more detailed analysis in Chapter 2. Sadly the deficiencies which lie at the heart of this unworkable definition has impacted negatively upon human security²⁷, international legitimacy²⁸, as well as the ability of the international and domestic community to properly regulate conflict zones.²⁹

The conventions listed above are incapable of addressing the advent of private military security companies and their focus on mercenarism means that private military security companies are not capable of falling under the current definition of mercenaries.³⁰ The international community has not been able to develop regulations and conventions fast enough to keep up with the growth of the private security industry.³¹ There have been moves towards the creation of conventions designed to regulate private military security companies, such as the Montreux Document³², but until then the regulation of private military security companies remains an issue, dealt with almost solely by domestic legislation.

The onus placed on states by international conventions is clearly one to criminalise mercenary activity.³³ The fact that international conventions are currently silent about private military security companies coupled with the fact that states clearly have no intention of stopping their use of private military security companies, means that domestic regulation

²⁶ Note 8 above, 48.

²⁷ Note 6 above, 86.

²⁸ Note 23 above, 2.

²⁹ Note 10 above, 145.

³⁰ *Supra* Note 1 107.

³¹ Note 10 above, 148.

³² The Montreux Document 'On pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict' International Committee of the Red Cross and the Federal Department of Foreign Affairs Switzerland.

³³ Declaration on principles of international law friendly relations and co-operation among states in accordance with the Charter of the United Nations U.N. Doc. A/5217 at 121 (1970).

needs to be exist in order to regulate private military security companies.³⁴ The problem that domestic legislation faces however is that insufficient accurate regulation means that a clear line cannot be drawn between the legitimate operations of private security companies and the criminal operations of mercenaries.³⁵ Overly broad regulation of mercenarism risks limiting the legitimate operations of private military security companies.³⁶ It is this balance between, on one hand criminalising the activities of mercenaries and on the other allowing for the operation of private military security companies which domestic legislation needs to find.

1.1 Research Hypothesis and Rationale

As highlighted above, whilst there is considerable agreement as to the harm posed by mercenaries, and that their activities and operations are outlawed.³⁷ There is also agreement within international and domestic arenas that the work done by private military security companies is legitimate, until such time as it falls into the realm of mercenarism.³⁸ The issue at present therefore is how to regulate mercenaries in such a way as to effectively deal with the problem, but not encroach on the work of private military security companies, whilst at the same time not granting too much leeway as to allow mercenarism to continue.

This dissertation will therefore focus on answering two questions. The first is to ask whether or not current international and domestic regulatory mechanisms are effective or at least to what degree they are effective. The second question is if they are not effective what is then the best way forward for the regulation of the private military security industry. This question will be answered by proposing a solution in the form of regulatory mechanisms which will exist at the three levels of international convention, domestic legislation and at an industry self-regulation level.

1.2 Research Framework

³⁴ L Juma, 'Mercenarism: Looking beyond the current international and regional normative regimes' (2008) 147 *ISS Monograph Series* 215.

³⁵ S Gumedze, 'Pouring old wine into new bottles? The debate around mercenaries and private military and security companies' (2008) 147 *ISS Monograph Series* 21, 22.

³⁶ Note 10 above, 145.

³⁷ United Nation's General Assembly resolution 2625 Declaration on principles of international law friendly relations and co-operation among states in accordance with the Charter of the United Nations U.N. Doc. A/5217 at 121 (1970).

³⁸ Note 35 above, 22.

1.2.1. *Literature review*

Chapter 2 will begin by reviewing existing literature so as to unpack the legal terminology but more so will look at effectiveness of international law (from both treaty and customary international law sources) in regulating mercenarism as well as will looking at international interventions aimed at regulating the private military and security industry.

1.2.2. *Domestic comparative analysis*

Chapter 3 to 5 will focus on the domestic regulation of private military security companies and mercenaries in the countries of the United States of America, the United Kingdom and South Africa. These three countries have been chosen because they represent unique responses or at least stages of response to the rise of the private military security industry. The system in the United States is widely regarded as being a model for future regulation³⁹, whilst the South African system is seen as being the harshest in the world⁴⁰ and the United Kingdom is in limbo and has yet to adopt a system of its own.⁴¹

1.2.3. *Conclusion: the way forward*

Chapter 6 will then deal with the proposed way forward, by attempting to deal with the problems identified in the previous chapters, as well as dealing with the criticisms levelled against the private military security industry but still maintaining the benefits gained from the industry.

³⁹ C Walker & D Whyte, 'Contracting out war?: Private military companies, law and regulation in the United Kingdom' (2005) 54 *International and Comparative law Quarterly* 651, 668.

⁴⁰ S Bosch & M Maritz, 'South African private security contractors active in armed conflicts: Citizenship, prosecution and the right to work' (2011) 14 *Potchefstroom Electronic Law Journal* 71, 102.

⁴¹ E Krahmann, 'Private military services in the UK and Germany; Between partnership and regulation' (2005) 14 *European Security* 277, 288.

CHAPTER TWO

LITERATURE REVIEW

This chapter will review the literature which pertains to the two primary private military security contractors which are the subject of this dissertation: mercenaries and private military security companies. This chapter will review the current attempts at regulating the activities of both mercenaries and private military security companies at an international and regional law level. In reviewing the literature this dissertation intends to arrive at an assessment as to whether these regulatory regimes are achieve their intended goals, and to what degree they can be said to be are effective and whether they have unintended repercussions on each other.

1. MERCENARIES

Mercenaries, and the relevant international conventions and protocols dealing with mercenarism, shall be discussed by firstly understanding why there exists a need to regulate mercenarism, what the current attempts at regulation are, followed by analysing their effectiveness and what therefore the current legal position regarding mercenaries is at an international level.

1.1. The Rationale Behind the Regulation of Mercenarism

Mercenaries are generally considered to be individuals, who tend to act alone and operate in countries other than their home country and are motivated by political, ideological or financial motives.¹ These individuals partake in direct conflict, either in internal or external wars and offer their experience and abilities to whoever is paying them or whichever side they align with in terms of their ideological or political views.² The problem that arises within the international law is that conflict has always been considered to be within the exclusive domain of states and that only the actions of states and state actors can be considered legitimate.³ Mercenaries who act independently and often without the authority of a state fall

¹ S Gumedze, 'Pouring wine into new bottles? The debate around mercenaries and private military and security companies' (2008) 147 *ISS Monograph Series* 21, 24-25.

² H Burmester, 'The recruitment and use of mercenaries in armed conflicts' Volume 72 *The American Journal of International Law* 37, 37-38.

³ S Chesterman and C Lehnardt, 'From mercenaries to market: The rise and regulation of private military companies' (2007) Paper 55 *New York University Public Law and Legal Theory Working Papers* 1.

outside of this domain.⁴ This means that mercenaries are not regulated and therefore not accountable for their actions. To try and deal with this several international conventions and treaties have been created to try and regulate mercenaries (these will be dealt with later in this chapter). The ultimate failure however of these conventions and treaties⁵ means that mercenaries continue to act outside of the international legal framework and without any form of accountability.⁶ This lack of accountability and effective regulation is why the international community views mercenaries to be a threat. It is this lack of accountability and effective regulation which allows for the human rights abuses that are often carried out by mercenaries to occur.⁷

The scourge of mercenarism has been most acutely felt on the African continent. This is because African states seldom have the strong state and state regulated military which are commonplace in Western countries such as the United States, Britain and France.⁸ As a result, while Western countries merely outsource certain aspects of their military to enhance cost-effectiveness, African states are forced to outsource entire functions of their statehood⁹ to fill the void left by either the entire collapse or ineffectiveness of the previous national force.¹⁰

The problem of mercenarism on the African continent is further exasperated by other dynamics which accompanied the end of the Cold War. Post Cold War the African continent faced a massive oversupply of arms as a result of Cold War powers overstocking states and rebel forces with arms to help ensure victory.¹¹ This has continued today with the incumbent leaders providing more than sufficient arms to ensure that any local insurgence can be dealt with.¹² At the end of the Cold War or when an incumbent is overthrown, these arms find their way to the black market and are often sold at below production cost.¹³ This means that mercenaries can be easily and cheaply supplied with arms and as a result this increases the

⁴ J N Maogoto, 'Private military companies and international law: Building new ladders of legal accountability and responsibility' (2010) 11 *Conflict Resolution* 99, 103.

⁵ J.J Messner, 'Working towards effective legislative and regulatory solutions for the private security industry in Africa' (2008) 147 *ISS Monograph Series* 145, 150 & 153.

⁶ B Perrin, 'Modern warfare: Armed groups, private militaries, humanitarian organizations, and the law' (2012) *University of British Columbia Press* 2.

⁷ Note 4 above, 103.

⁸ J Cilliers, 'Private security in war-torn African states' J Cilliers & P Mason (ed) *Peace, profit or plunder?: The privatisation of security in war-torn African societies* (1999) 1, 5.

⁹ Note 8 above, 5.

¹⁰ Note 8 above, 5.

¹¹ P Lock, 'Africa, military downsizing and the growth in the security industry' J Cilliers & P Mason (ed) *Peace, profit or plunder?: The privatisation of security in war-torn African societies* (1999) 11, 22.

¹² Note 11 above, 22.

¹³ *Ibid.*

ease with which mercenaries can operate and this contributes to the negative effect mercenaries have on Africa. With the withdrawal of economic superpowers at the end of the Cold War, African states were no longer able to maintain their militaries, nor were they able to ensure an organised demobilisation of these armed forces.¹⁴ The result of this is that these military forces often fragmented into autonomous groups who not only took their equipment with them, but also their training and experience.¹⁵ This lack of economic opportunity led to many military personal (including child soldiers)¹⁶ seeking an income from alternative sources. More often than not this income is gained by confiscating public and civilian property. This not only has the potential to provoke an aggressive response from the public, but also has the effect of undermining the state as the sole provider of security and its monopoly over the use of force.¹⁷ This affects not just military personal but also members of the police force and further undermines the state and its monopoly over the use of force.¹⁸ This loss of control creates an ideal environment for rebel groups to form and contract mercenaries to assist them with internal conflicts. This environment characterised by an oversupply of arms and unemployed yet experience soldiers, and the undermining of the state's monopoly on the use of force provided a fertile environment for the mercenary industry to boom on the African continent.

This peculiar susceptibility mercenarism is also coupled with the nature of conflicts within Africa, which tend to be based on deeply entrenched ethnic tensions, motivated by the suppression of minorities, and aimed at the perpetuation of dictatorial regimes, to name but a few.¹⁹ Together with a lack of strong statehood, these trends of perpetual conflicts create the ideal environment for mercenaries to operate. In some instances mercenaries were specifically employed to create internal conflicts aimed at overthrowing the incumbent, undermining the constitutional order of the state, and interfering with the ability of these people to exercise their right to self-determination.²⁰ On this basis alone mercenaries present

¹⁴ Note 11 above, 23.

¹⁵ Note 11 above, 22.

¹⁶ Note 11 above, 23.

¹⁷ Note 11 above, 22.

¹⁸ Note 11 above, 23.

¹⁹ M Malan, 'The crisis in external response' J Cilliers & P Mason (ed) *Peace, profit or plunder?: The privatisation of security in war-torn African societies* (1999) 37, 39.

²⁰ Y Sandoz, 'Private security and international law' in J Cilliers & P Mason (ed) *Peace, profit or plunder?: The privatisation of security in war-torn African societies* (1999) 201, 210.

a significant threat to young states²¹ and their ability to make their own political and social decisions.²²

The United Nations is primarily concerned with maintaining international peace and security.²³ The fact that mercenaries are individuals which are not acting under the authority of a state means that their involvement in conflict is not only a threat to international peace and security but also to International Humanitarian Law as they are not accountable for their actions and do not have to abide by international rules of conflict. The threat posed by mercenaries to international peace and security, as well as their tendency to violate human rights²⁴, commit war crimes and impact on the sovereignty and political independence of states²⁵ is sufficient to place a duty on the United Nations to regulate mercenarism.²⁶

Within the African context the maintenance of regional security is also the responsibility of the African Union.²⁷ Recognising the problems and challenges listed above it can be argued that the biggest responsibility of African states and the African Union is the protection of its citizens.²⁸ The African Union is also duty bound by the African Charter on Human and People's Rights to promote and protect the citizens of Africa and their human rights.²⁹ It has already been noted at length that mercenarism impacts negatively upon human rights and that this is especially true within the continent of Africa. In addition to what has already been mentioned the threat of mercenarism is especially worrisome within Africa where the bargaining strength of African states is much weaker than the more powerful Western private firms, who are therefore able to conduct business on their terms and employ whatever people they wish, even if those people are mercenaries. This means that an extra duty rests on the African Union in order to assist in this regard.³⁰ Given the particular magnitude of the

²¹ Note 4 above, 103.

²² M-F Major, 'Mercenaries and international Law' (1992) 22 *Georgia Journal of International and Comparative Law* 103, 177.

²³ S Gumede, 'The African Union and the responsibility to protect' (2010) 10 *African Human Rights Journal* 146.

²⁴ Including the right to life, physical integrity and the enjoyment and security of property (M-F Major, 'Mercenaries and international Law' 103).

²⁵ Note 22 above, 103.

²⁶ E L Gaston, 'Mercenarism 2.0? The rise of the modern private security industry and its implications for the international humanitarian law enforcement' 221, 234.

²⁷ Note 23 above, 146.

²⁸ Note 23 above, 137.

²⁹ Note 23 above, 147.

³⁰ J Isima, 'Regulating the private security sector: An imperative for security sector governance in Africa' (2007) 5 *Journal of Security Sector Management* 2.

problem on the African continent the African Union is also duty bound to step in to stamp out the scourge of mercenarism.

This chapter will now discuss the attempts made by these two bodies to regulate mercenarism.

1.2. Current International and Regional Attempts at the Regulation of Mercenarism

There are currently three main conventions dealing with mercenarism at an international and regional level. These are the 1977 Additional Protocol I to the Geneva Conventions of 1949 (article 47), the United Nations International Convention Against the Recruitment, Use, Financing and Training of mercenaries of 1989 and the OAU/AU Convention on the Elimination of Mercenaries in Africa of 1977. These three pieces of international and regional law will be discussed in turn before ultimately concluding what the current position of mercenarism at an international level is.

1.2.1. Additional Protocol I of Article 47 1977

The initial definition of a belligerent can be traced back to the International Declaration Concerning the Laws and Customs of War, which was adopted in 1874.³¹ Belligerents were defined in Article 9:

‘The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

1. That they be commanded by a person responsible for his subordinates;
2. That they have a fixed distinctive emblem recognizable at a distance;
3. That they carry arms openly; and
4. That they conduct their operations in accordance with the laws and customs of war.

In countries where militia constitute the army, or form part of it, they are included under the denomination 'army'.³²

Whilst certain changes were made to this definition over time, so as to keep up with changes in warfare, the definition remained largely the same and was used as the basis for The Hague

³¹ R Morgan; ‘Professional military firms under International law’ (2009) 9 *Chi J. Int’l L.* 217.

³² Project of an International Declaration concerning the Laws and Customs of War. Brussels, 27 August 1874. Article 9

Regulations (1907) and the Third Geneva Convention (1949). This definition made no mention of the notion of a mercenary in its definition of what constituted a belligerent.³³

When mercenaries emerged in the theatre of armed conflicts the definition pertaining of who constituted a belligerent was not able to cater for this new non-state actor.³⁴ At the time the former Soviet Union had proposed and did use a definition of a mercenary which very broadly defined them according to their desire for private gain.³⁵ During the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts from 1947 to 1977,³⁶ there were attempts to arrive at a definition of a mercenary. Whilst the old Russian definition was criticised for being extremely unclear and vague, the definition which came out of the Conference and was codified in Additional Protocol I suffered from the opposite flaw – it was said to be too exacting.³⁷ Nevertheless, Additional Protocol I was the first real attempt to define this non-state actor which did not fit into the then current understanding of what a belligerent was.

Additional Protocol I states:

- (1) A mercenary shall not have the right to be a combatant or a prisoner of war,
- (2) A mercenary is any person who:
 - 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
 - c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that party
 - d) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict
 - e) is not a member of the armed forces of a party to the conflict
 - f) has not been sent by a state which is not a party to the conflict on official duty as a member of its armed forces

³³ Note 31 above, 217.

³⁴ Note 31 above, 217.

³⁵ Note 31 above, 220.

³⁶ Note 22 above, 108.

³⁷ Note 31 above, 220.

The biggest criticism levelled at this definition is that it is far too narrow, to the point of being unworkable³⁸ and potentially creates as more problems than it solves.³⁹ In addition to the various sections making the definition narrow, the fact that the definition comprises of six cumulative elements make proving all six elements extremely difficult, if not impossible.⁴⁰ The reason for the extremely narrow definition was due to an inability to reach an agreement between African states, who wanted a broad definition of a mercenary, and Western states, who sought a narrow definition (as they were the largest supplier of mercenaries).⁴¹

A second general criticism levelled at the definition is that it does not outlaw the activity of mercenarism, but rather denies a mercenary the status of prisoner-of-war should they be captured.⁴² This does not create a crime, but rather creates a disincentive for people considering mercenarism as an employment opportunity. The net effect of this definitional dilemma is that if a mercenary is not caught during a conflict they cannot be convicted for their mercenary behaviour.⁴³ The negative consequence only arises in the instances where mercenaries fall into enemy hands during a conflict.

Each aspect of the definition is also the subject of much critique:

Article 47(2)(b) requires that a person must take direct part in the hostilities. The effect is that a person only becomes a mercenary according to the definition if they actually participate in the hostilities. This exempts those who provide military and tactical advice who are therefore under this definition merely considered civilians.⁴⁴

Article 47 (2)(c) speaks to money being the basic motivation in a person's decision to enlist. The requirement that there must be material compensation which is substantially in excess of that paid to combatants of similar rank.⁴⁵ The problem that arises in trying to determine what motivation drove a person to enlist is problematic and potentially unworkable⁴⁶, especially

³⁸ Note 26 above, 232.

³⁹ Note 22 above, 110.

⁴⁰ Note 26 above, 233.

⁴¹ Note 22 above, 109.

⁴² Note 26 above, 232.

⁴³ Note 20 above, 208.

⁴⁴ Note 22 above, 110-111.

⁴⁵ Note 22 above, 111.

⁴⁶ Note 22 above, 113.

considering that even if all other five requirements in the definition were met a person would merely have to claim some motivation other than a monetary motivation in order to avoid falling within the scope of the definition.⁴⁷ There also poses a problem for ideological and religious mercenaries who are motivated by reasons other than material compensation.⁴⁸

Article 47 (2)(d) does not allow individuals who are nationals of either party involved in a conflict to be considered mercenaries. The problem with this is that it has the potential of arbitrarily exempting citizens from the belligerent parties from falling within the definition of a mercenary.⁴⁹ In the African context where borders are extremely porous and many people have multiple citizenships this problem is particularly acute.⁵⁰

Article 47(2)(e) is also problematic in that it does not stipulate how long a person is required to be with the armed forces in order to not be considered a mercenary. Without a period of time being mentioned there is nothing to stop the armed forces of a country from incorporating mercenaries into their forces purely for the duration of the conflict and thereby thwarting the definition.⁵¹

In short article 47 of the Additional Protocol I does not act as a useful definition for identifying and regulating the activities of mercenaries, as it is too narrow, practically unworkable and permits many individuals whose actions we would ordinarily consider to amount to mercenarism from escaping from the ambit of the definition.

1.2.2. *The OAU/AU Convention on the Elimination of Mercenarism in Africa 1977*

The OAU/AU Anti-mercenary Convention (hereafter the OAU Convention) was recognised as a significant step in 1977 as it was the first convention dedicated entirely to attempting to deal with the problem of mercenarism. As such it was the first international instrument which was applicable to all territories of States' party to the OAU Convention, which placed obligations on these States party to the OAU Convention to adopt domestic law regarding

⁴⁷ Note 26 above, 233.

⁴⁸ Samuel Gama *Mercenarism and the curbing of mercenary activity in Africa, 1990 to 2006: Selected case studies* (unpublished Masters of Security Studies, University of Pretoria, 2008) 25.

⁴⁹ Note 22 above, 112.

⁵⁰ M Foaleng, 'African mercenarism' (2008) 147 *ISS Monograph Series* 45, 48.

⁵¹ Note 22 above, 113.

mercenarism.⁵² The OAU Convention is also unique in that it is the first and only legal instrument in Africa which deals exclusively with the enormous threat posed by mercenaries⁵³, which is surprising given the fact that the problem of mercenaries is especially worrisome within the African context. The OAU Convention declared that the actions of mercenaries constituted general crimes against the peace and security of Africa. At the time it was the first and only international convention to codify mercenarism as a crime.⁵⁴

The OAU Convention mimicked the definition provided by Additional Protocol I article 47, with the only change: subsection (c) was amended to read⁵⁵: A mercenary

(c) must be motivated to take part in the hostilities essentially by the desire for private gain and in fact is promised by or on behalf of a party to the conflict material compensation.

Unfortunately the same problem which plagued the definition found in article 47 of the Additional Protocol I also plagued the OAU Convention, in that all six elements need to be proved in order for a person to be considered a mercenary and this, as has been noted, proves to be unworkable.⁵⁶ Despite the strong stance which the OAU Convention appears to adopt it does not actually ban the hire or employment of mercenaries in all instances.⁵⁷ The OAU Convention was drafted so as to allow African Governments to hire non-nationals as long as they were used to protect themselves from rebel groups within their borders.⁵⁸ So for example countries such as Angola and Zaire were allowed to hire mercenaries to deal with their rebel groups, but the South African government was prevented from hiring mercenaries to deal with the Liberation movement of the ANC.⁵⁹ Additionally there was no real enforcement mechanism, instead it was left to states party to the convention to promulgate their own domestic legislation and to ensure regional compliance. This despite there being no guidelines as to how to achieve this regional compliance.⁶⁰ To a large degree these

⁵² Note 22 above, 128.

⁵³ S Gumedze, 'Towards the revision of the 1977 OAU/AU Convention on the Elimination of Mercenarism in Africa' 16.4 *African Security Review* ISS 22, 30.

⁵⁴ P W Singer, 'War, profits, and the vacuum of law: Privatized military firms and international law' (2004) 42 *Columbia Journal of Transnational Law* 521, 528.

⁵⁵ Note 48 above, 18.

⁵⁶ Note 53 above, 24.

⁵⁷ Note 54 above, 529.

⁵⁸ Note 54 above, 529.

⁵⁹ Note 54 above, 529.

⁶⁰ Note 22 above, 128.

obligations were largely ignored by the parties to the OAU Convention.⁶¹ The regional rather than international nature of the Convention meant that Western states, who supplied a lot of mercenaries, were not affected by the terms of the OAU Convention, this greatly undermined its efficacy as an instrument aimed at reining in the threat posed by mercenaries on the African continent.⁶²

Sadly the definitional difficulties which undermined the efficacy of article 47 of Additional Protocol I had a similar effect on the definitional criteria set out in the OAU Convention. Article 1 (a) of the definition deals with persons fighting in armed conflicts, yet the OAU Convention does not define what an armed conflict is. The OAU Convention also fails to define whether or not conflict refers to international or non-international conflict.⁶³ By adopting the definition used in Additional Protocol I and not expanding it to specifically include non-international conflicts the OAU Convention appears to only be concerned with international conflicts. This is a problem considering that most of the conflicts within Africa which involve potential mercenary activities are non-international in nature.⁶⁴

Article 1 (b) speaks to taking a direct part as well as hostilities, without providing a definition of what activities amount to direct participation in hostilities. Whilst International Humanitarian Law, such as the ICRC's Guide on Direct Participation in Hostilities does provide a somewhat contested interpretive guide on the notion of direct participation in hostilities, the international understanding of what comprises war is often different from the reality experienced within the African context. Whilst at an international level war is generally between two separate states, within Africa war is more often internal between rebel groups or in the form of a civil war. Again the lack of an effective and contextually relevant definition makes the task of correctly identifying mercenaries nearly impossible.⁶⁵

Article 1 (c) once again raises the previous difficulties alluded to in regards to proving that a mercenaries desire is based purely on material gain. Additionally there is also the question of when should the desire arise. Does the desire for material gain need to be there when they are recruited or can it come about whilst the person is involved in the conflict? The other

⁶¹ Note 54 above, 529.

⁶² Note 22 above, 128.

⁶³ API article 47 applied exclusively to conflicts of an international nature.

⁶⁴ Note 53 above, 24.

⁶⁵ Note 53 above, 25-26.

problem which further complicates matters is that the person making the offer needs to be a party to the conflict. This is easily circumvented by having an entity which is not a party to the conflict recruit mercenaries indirectly.⁶⁶ This again demonstrates the impracticalities of the definition and the ease with which mercenaries can circumvent its requirements.

Article 1 (d) which; deals with the nationality of a mercenary, also has numerous problems. States are in charge of affording citizenship and consequently they can decide whether or not to consider those employed as mercenaries or citizen of their state. If they simply afford them citizenship they are no longer considered mercenaries in terms of the OAU Convention. Similarly it is also easy for a mercenary to take up residence within territory, acquire citizenship and thereby circumvent the mercenary definition.⁶⁷

Article 1 (e) which requires that a mercenary is not a member of the armed forces party to the conflict does not define exactly what constitutes an armed force or what membership entails. It is therefore highly possible to consider membership to rebel forces as being sufficient to prevent a person being considered as a mercenary, especially when membership does not specifically require that person to form part of the traditional armed forces.⁶⁸

Finally Article 1 (f) appears to allow a mercenary to operate as a mercenary (while avoiding the repercussions attached to the definition) so long as they are sent on an official mission by another state. While this does prevent non-state actors employing the services of mercenaries, this requirement does create the double standard of allowing African governments to continue to hire mercenaries so long as they are used within the confines of an official mission. This opens up the entire OAU Convention to abuse, since even after the first five elements are met, an individual might still circumvent the definition so long as this last element is sidestepped.⁶⁹

In short, the AOU Convention suffers from many of the same problems as Additional Protocol I and is also ultimately an unworkable definition with too many possibilities for individuals to circumvent the definitional requirements and thwart the efficacy of the AOU Convention .

⁶⁶ Note 53 above, 27.

⁶⁷ Note 53 above, 28.

⁶⁸ Note 53 above, 28.

⁶⁹ Note 53 above, 29.

1.2.3. *The United Nations Convention Against the Recruitment, Use, Financing and Training of Mercenaries 1989*

In 1989 the United Nations drafted *The United Nations Convention Against the Recruitment, Use, Financing and Training of Mercenaries* (hereafter the UN Convention) in response to a recognition that the definition provided within Additional Protocol I article 47 was inadequate, restrictive and potentially unworkable. The UN Convention is a pivotal development in dealing with the issue of mercenarism in two important respects; currently it is the only international convention which deals with mercenarism⁷⁰, and more than just revoke a mercenary's right to claim prisoner-of-war status (as was the case under Additional Protocol I) the UN Convention now makes mercenarism a crime in and of itself.⁷¹

Article I of the Convention defines the term mercenary:

1. A mercenary is any person who:

- (a) Is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;
- (c) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
- (d) Is not a member of the armed forces of a party to the conflict; and
- (e) Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

2. A mercenary is also any person who, in any other situation:

- (a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:
 - (i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or
 - (ii) Undermining the territorial integrity of a State;
- (b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;
- (c) Is neither a national nor a resident of the State against which such an act is directed;

⁷⁰ Note 22 above, 114.

⁷¹ Note 22 above, 132.

- (d) Has not been sent by a State on official duty; and
- (e) Is not a member of the armed forces of the State on whose territory the act is undertaken.

Article 2 of the UN Convention expands upon the definition of a mercenary by stating that:
‘Any person who recruits, uses, finances or trains mercenaries, as defined in Article 1 of the present Convention, commits an offence for the purposes of the Convention.’

Whilst the first part of Article 1 mimics from the definition used in Additional Protocol I Article 47, the second part expands on it and in doing so better protects states against the effects of mercenary activities.⁷² The retention of the Additional Protocol I article 47 definition means that the criticisms discussed earlier with regard to the definition also remain in so far as Article 1(1) is concerned. What is especially worrying is that the concerns about motive and the requirement that mercenaries be foreigners has not been addressed by the UN Convention.⁷³ Additional concerns arise when one notes that that Article 9 of the UN Convention (which deals with jurisdiction) is not as far reaching as the jurisdiction provided to crimes such as piracy or genocide. In short in order for mercenarism to be dealt with effectively a wider concept of jurisdiction is required.⁷⁴ A further concern is that, unlike the initial drafts of the UN Convention which dealt with the treatment of both the aggrieved and offending States, the final UN Convention does not contain these articles. The effect is that there is less incentive for countries to properly deal with mercenarism as there are no potential negative consequences for them.⁷⁵ Lastly the UN Convention does not establish any form of monitoring⁷⁶ and therefore there is no way that any of the obligations imposed by the convention can be monitored and enforced.⁷⁷ In addition to this the UN Convention was slow to achieve the requisite number of signatories needed to enter into force in 2001⁷⁸ and to date it still has a relatively low level of state ratification. This has the effect of weakening the legal impact of the Convention and any good which may exist within it.⁷⁹

In short the UN Convention also suffers from the same set-backs and problems which faced both article 47 of Additional Protocol I and the OAU Convention.

⁷² Note 22 above, 115.

⁷³ Note 22 above, 116.

⁷⁴ Note 22 above, 132.

⁷⁵ Note 22 above, 133.

⁷⁶ Note 54 above, 531.

⁷⁷ Note 22 above, 133.

⁷⁸ Note 54 above, 531.

⁷⁹ Note 54 above, 531.

1.3. Conclusions Regarding the Existing Regime Aimed at the Regulation of Mercenarism

Despite African States supporting a strong stance banning mercenarism this does not have the international support it needs in order to be effective. In addition the requirements and standards of the current conventions are difficult to meet and there are no enforcement mechanisms to speak of.⁸⁰ The conclusion is that an intended ban on mercenarism at either an international or regional level is inadequate and ineffective in the current international and regional arenas of conflict.⁸¹

2. PRIVATE MILITARY SECURITY COMPANIES

The current attempts to regulate private military security companies at an international level will now be analysed and discussed. This will be done by firstly analysing the rise and evolution of private military security companies, then trying to establish what attempts are made to regulate private military security companies at international level. The duty placed on domestic actors to regulate private military security companies will then be looked at before discussing the need to balance the regulation and criminalisation of private military security companies.

2.1. The Rise and Evolution of Private Military Security Companies

During the same time that mercenaries were establishing themselves as a threat to States and human rights in the 1980's, private military security companies were beginning to organise themselves into corporate companies and beginning to focus on providing logistical support for various governments. Even in these early years however the United States and United Kingdom were not opposed to utilising these companies for military missions.⁸²

Three factors allowed for the rise of private military security companies during the 1990's and after the collapse of the Soviet Union: an increase in the number of civil conflict zones, the large scale reduction and privatisation of military forces and a large surplus of arms.⁸³ Private military security companies were able to draw together these unemployed individuals equipped with advanced levels of military expertise and begin creating corporate

⁸⁰ Note 26 above, 232.

⁸¹ Note 54 above, 531.

⁸² Note 4 above, 104.

⁸³ Note 4 above, 100.

companies.⁸⁴ Private military security companies have found a market in providing military forces for weak third world countries who lack the infrastructure and ability to create their own military forces, and in first world countries who are seeking to privatise certain sectors and tasks which previously were within the exclusive realm of the military.⁸⁵ The growth in private military companies has been staggering.⁸⁶ In the first Gulf War there was one contractor per 50 to 100 soldiers. At the start of 2011 the United States Department of Defence reported that the ratio in Afghanistan was 84 contractors per 100 soldiers and in Iraq the ratio was 129 contractors per 100 soldiers.⁸⁷

There has also been an evolution in the short history of private military security companies from companies who operated as covert mercenaries⁸⁸ to companies who wish to create a corporate and legitimate image for themselves.⁸⁹ So for example private military security companies were often initially employed by exploration companies order to directly influence the change of political power in weak Western and Central Africa countries so that the corporate powers could gain access to the important mineral and energy resources of these weak African States.⁹⁰ These exploration companies would then sell these resources off to corporate entities, which having stayed out of the conflict, would be able to maintain a good public image. The private military security company would then be able to gain on going employment from the corporate employer by providing them with security.⁹¹

One of the most notorious private military security companies which was active in the African continent at the time was Executive Outcomes. Executive Outcomes started as a front company for the South African National Defence Force, but later become part of a consortium of many affiliated companies from across the globe. This consortium was made up of between thirty to fifty various security and mineral companies.⁹² Executive Outcomes

⁸⁴ Note 4 above, 106.

⁸⁵ Note 4 above, 107.

⁸⁶ J L Gomez del Prado, 'Private military and security Companies and the UN working group on the use of mercenaries' (2009) 13 *Journal of Conflict & Security Law* 429, 436.

⁸⁷ J C Hansen, 'Rethinking the regulation of private military and security companies un international humanitarian law' (2012) 35 *Fordham International Law Journal* 698, 702.

⁸⁸ Note 8 above, 3.

⁸⁹ K. E McCoy, 'Organisational frames for professional claims: Private military corporations and the rise of the military paraprofessional' (2012) 59 #3 *University of California Press* 322, 332-333.

⁹⁰ K Pech, 'Executive Outcomes – A corporate conquest' J Cilliers & P Mason (ed) *Peace, profit or plunder?: The privatisation of security in war-torn African societies* (1999) 81, 82.

⁹¹ Note 90 above, 83.

⁹² Note 90 above, 84.

deployed fighting battalions as well as heavy armour in various conflict regions⁹³ including Sierra Leone in 1993 where Executive Outcomes supported the Sierra Leone government in their fight against the Revolutionary United Front.⁹⁴ Executive Outcomes and its affiliated companies ran operations in Ethiopia, Angola, Zambia, Ghana, Algeria, Ivory Coast, Rwanda, Uganda, Croatia, Indonesia, and many other countries.⁹⁵

In more recent years private military security companies have developed business models and internal checks and balances⁹⁶ in an attempt to legitimise and corporatize their image. Their new corporate identity has allowed them to gain implicit and explicit legitimacy⁹⁷ in order to construct a respectable and professional image for themselves.⁹⁸ They have attempted to move away from and disassociate themselves from previous private military security companies, with their mercenary affiliations, and have honed their image to attract customers and also appease their critics.⁹⁹ Private military security companies generally promote themselves as assistants to the military, acting in support of and not in the place of soldiers¹⁰⁰. In her article McCoy argues that there are three ways in which organisations promote themselves as professional institutes;

- (1) by providing a stage or setting that makes professional claims credible;
- (2) by supplying a rationale that makes professional practice acceptable; and
- (3) by extending guarantees that professional promises will be institutionalised and upheld.¹⁰¹

The first two aspects are catered for by the private military security companies who form professional groups and companies¹⁰², highlighting the good work that they do and the important role they play in acting defensively¹⁰³ to ensuring human rights and providing stability within regions.¹⁰⁴ The third way; the creation of guarantees, has been achieved to some degree by companies establishing internal checks and balances and criteria aimed at

⁹³ Note 90 above, 103.

⁹⁴ Note 26 above, 225-226.

⁹⁵ Note 26 above, 226.

⁹⁶ Note 89 above, 332-333.

⁹⁷ Note 4 above, 100.

⁹⁸ Note 89 above, 332.

⁹⁹ Note 89 above, 334.

¹⁰⁰ Note 89 above, 332.

¹⁰¹ Note 89 above, 338.

¹⁰² Note 89 above, 330.

¹⁰³ Note 89 above, 332.

¹⁰⁴ Note 89 above, 332.

holding themselves accountable¹⁰⁵ for their actions. These internal processes however lack the objectivity and authority of regulations passed by states and has therefore not been a particular success.¹⁰⁶ This presents a perfect opportunity for states as well as regional bodies to step in and provide the necessary authority to create regulations and standards by which these companies can hold themselves to account.¹⁰⁷ Even without reference to the article by McCoy there have been arguments put forward about the need to create a set of standards for private military security companies.¹⁰⁸ It is this evolution from covert to corporate which has allowed to private military security companies to regain legitimacy and has at the same time started a trend of self-regulation.

2.2. International attempts at Regulating the Private Military Security Industry

Both the OAU Convention and the UN Convention were drafted before the emergence of private military security companies and therefore neither of them specifically caters for private military security companies.¹⁰⁹ Similarly the myriad of conventions which constitute International Humanitarian Law also do not cater specifically for private military security contractors. Nevertheless in situations of armed conflict International Humanitarian Law is the existing legal regime which determined the status individuals working for private military security companies.¹¹⁰ The four most likely classifications for private military security companies are: armed civilians (Articles 50 and 51 of Protocol I), mercenaries (Article 47 of Protocol I), accompanying supply contractors (Article 4A of the Third Geneva Convention), or members of the armed forces or militias (Article 4A(1) and (2) of the Third Geneva Convention and Article 43 of Protocol I).¹¹¹ Each of these will now be discussed in turn.

2.2.1. Private military security companies as armed civilians?

Article 50 of Protocol I defines a civilian as being any person who does not belong to one of the other categories of persons referred to in Article 4A(1) (Armed Forces), 4A(2) (Militias and members of other volunteer corps), 4A(3) (the armed forces of a party not recognised by

¹⁰⁵ Note 54 above, 545

¹⁰⁶ K E McCoy, 'Organisational frames for professional claims: Private military corporations and the rise of the military paraprofessional' 337.

¹⁰⁷ Note 1 above, 37.

¹⁰⁸ S Shulz, 'The good, the bad and the unregulated: Banning mercenarism and regulating private security activity in Africa' (2008) 147 *ISS Monograph Series* 123, 133.

¹⁰⁹ P W Singer, 'War, profits, and the vacuum of law: Privatized military firms and international law' 531; S Gumedze, 'Towards the revision of the 1977 OAU/AU Convention on the Elimination of Mercenarism in Africa' 24

¹¹⁰ Note 31 above, 217-218.

¹¹¹ Note 31 above, 218.

the detaining power) and 4A(6) (*Levies en masse* and inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist without having to time to form into regular armed units). The most likely category that may apply to PMSC is that of *levee en masse*.¹¹² That said article 51(3) states, '[c]ivilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.' It would therefore appear that civilians taking up arms after occupation would no longer enjoy protection under the Convention and therefore would not be entitled to prisoner-of-war status, whilst those that took them up before would. Given this fact it is unlikely that the personnel of private military security companies would fulfil this 'pre-occupation' requirement as there is nothing spontaneous about their decision to take up arms. Under this section then personnel of private military security companies would not be considered part of the International Humanitarian Law understanding of the *levee en masse*.¹¹³

2.2.2. *Private military security companies as mercenaries?*

Just as the definitions of what constitutes a mercenary are unworkable when applied to those who could potentially be classified as mercenaries, the definition is similarly far too narrow to deal with the personnel of private military security companies. One of the major problems is the requirement that mercenaries must not be a national of one of the parties involved in the conflict. This would exclude a whole host of private military security companies and their personnel as, especially since the United States and United Kingdom, states hire private military security companies from within their own state, thereby exempting them from the definitional requirements of mercenarism.¹¹⁴ Another obstacle to assigning mercenary status to private military security companies is that most private military security companies are logistical or support orientated and do not engage in direct participation. These companies therefore have nothing to do with direct conflict and in fact only a minority have any involvement in direct conflict.¹¹⁵ A third problem is the requirement of substantial more pay than those in the armed forces, whilst this may be possible with third world countries, in first world countries, where soldiers earn decent salaries this is much more difficult to establish.¹¹⁶ It is therefore highly unlikely, especially considering that private military security companies

¹¹² Note 31 above, 218.

¹¹³ Note 31 above, 219.

¹¹⁴ Note 31 above, 221.

¹¹⁵ Note 31 above, 222.

¹¹⁶ Note 31 above, 223.

were not considered during the drafting of the existing treaty definitions for mercenarism¹¹⁷, that members of private military security companies would be considered mercenaries under international law.¹¹⁸ All current attempts at regulating private military security companies are stuck in the mind-set of mercenaries and therefore, due to the differences between these two groups and the lack of modern attempts specifically catered for private military security companies personnel of private military security companies could not be considered mercenaries under International Humanitarian Law.¹¹⁹

2.2.3. *Private military security companies as persons accompanying the armed forces?*

This classification is based on the agency relationship that often exists between people in conflict zones and states, such as war correspondents or unarmed advisors. If this person is not involved in direct combat situations then they will be considered civilians.¹²⁰ These people have the possibility of having prisoner-of-war status so long as they are duly authorised by the state.¹²¹ This takes the form of an identification card, although it has been noted that this is not an essential requirement.¹²² Whilst at first this appears to suit personnel of private military security companies the problem arises that the personnel of private military security companies often carry arms and therefore their direct participation in conflict means that they are not able to enjoy such protection.¹²³ This means that personnel of private military security companies cannot be considered as persons accompanying the armed forces.

2.2.4. *Private military security companies as combatants under authority of a party to the conflict?*

There are several categories under this classification (including armed forces and militia)¹²⁴ but suffice to say that the common requirement across all these subcategories is that the individuals must be subordinate to a superior who is responsible for ensuring that the rules of war are obeyed. So as long as this structure exists then personnel of private military security

¹¹⁷ Note 53 above, 24.

¹¹⁸ Note 4 above, 102.

¹¹⁹ L. Juma, 'Mercenarism: Looking beyond the current international and regional normative regimes' (2008) 147 *ISS Monograph Series* 197, 198.

¹²⁰ S. Bosch, 'Private security contractors and state responsibility; Are states exempt from responsibility for violations of humanitarian law perpetrated by private security companies?' (2008) 41 *CILSA* 353, 363.

¹²¹ Note 31 above, 224.

¹²² Note 120 above, 363 & 364.

¹²³ Note 120 above, 364.

¹²⁴ Note 31 above, 227.

companies are protected, the problem that arises is that this is seldom the case in practice and very few states are willing to take on this responsibility for private military security companies¹²⁵ or bring them under their command structure.¹²⁶

2.2.5. *Private military security companies as ordinary civilians?*

There exists a fundamental distinction within International Humanitarian Law between combatants and civilians. This is firstly to protect civilians and secondly to enforce the understanding that only combatants have the right to engage in direct conflict.¹²⁷ From the analysis above it is clear that personnel of private military security companies do not fit comfortably into any classification which leaves them by default within the category of civilians. There is a general international trend to consider members of private military security companies are being classified as civilians.¹²⁸ The body tasked with drafting a Convention on Private Military Security Companies has also tended towards regarding their personnel as civilians.¹²⁹ This is on the understanding that the majority of private military security companies do not engage in direct conflict and are almost never incorporated into the armed forces¹³⁰, a notion which is further advanced by the decision to ban private military security companies from taking part in direct conflict under the draft convention.¹³¹

Whilst there appear to be arguments that most private military security contractors could be classified as civilians, there is not one classification which fits these contractors perfectly. It is also clear that private military security companies could not be considered to fall with the ambit of the definition of a mercenary as found in various international conventions and treaties.¹³² There is however a recent document which speaks to the issue of private military security companies called the Montreux Document which purports to provide some answers on the issue of classifying private military security companies.

¹²⁵ Note 31 above, 228.

¹²⁶ Note 31 above, 228.

¹²⁷ Note 87 above, 704.

¹²⁸ Note 87 above, 712.

¹²⁹ Note 87 above, 710.

¹³⁰ Note 87 above, 712.

¹³¹ Note 87 above, 711.

¹³² Note 26 above, 233.

2.2.6. *The Montreux Document*

The Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict (the Montreux Document) provides the clearest statement to date of the relationship between private military security company and states, detailing not only legal norms, but also business, regulatory and administrative practices.¹³³ It is an initiative of the International Committee of the Red Cross in conjunction with various governments. The Document draws on international and regional conventions, treaties and customs as well as domestic regulations and legislation.¹³⁴ The Montreux Document is significant for four reasons.

Firstly the Montreux Document represents an acknowledgment by a variety of states that International Humanitarian Law and human rights are applicable to the laws governing conflict zones. This is especially important for example in the case of the United States, whose recent actions in Iraq and Afghanistan have caused some uncertainty in this regard; especially their actions to invade without United Nations authority and their lack of regard for the jurisdiction of either international or local courts.¹³⁵

Secondly the first part of the Montreux Document reinforces current international law and custom surrounding the relationship between private military security companies and the state. The Montreux Document is an acknowledgement by states that private military security companies do not operate in a legal vacuum and that states are responsible for their actions.¹³⁶

Thirdly the Montreux document identifies the common ground between states with regards to states obligations of the regulation of the extraterritorial conduct of businesses.¹³⁷ The Montreux Document (in Part Two) sets up standards of regulation and good practice which can be implemented and expanded on at a domestic level by states.¹³⁸

¹³³ J Cockayne, 'Regulating private military and security companies: The content, negotiation, weaknesses and promise of the Montreux document' (2008) 13 *Journal of Conflict and Security Law*. 401, 402.

¹³⁴ Note 133 above, 402.

¹³⁵ Note 133 above, 403.

¹³⁶ Note 133 above, 403.

¹³⁷ Note 133 above, 403.

¹³⁸ Note 133 above, 404.

Finally the Montreux Document reveals the tension which exists between state driven regulation and industry driven regulation of private military security companies.¹³⁹

In the first part of the document we find a collection of current international laws and norms regarding private military security companies and is relatively narrow in scope. The second part has a much broader scope and deals with issues of good practice and ideas of regulation and monitoring of private military security companies. Whilst Part One is considered law and therefore must be enforced and followed, Part Two is more a suggested code of practice and provides suggestions as to how states can ensure good practice and accountability, it is however ultimately up to the state to decide how to implement this at a domestic level.¹⁴⁰

The Montreux document also clarifies the position of personnel of private military security companies under International Humanitarian Law.¹⁴¹ The default position will be that they are presumed to be civilians and that only if they are formally incorporated into the armed forces as well as meet the other requirements under Article 4A(2) or if they act as a rebel soldier in a non-international conflict will they be considered combatants. This will however always have to be determined on a case by case analysis, although the vast majority of private military security company personnel are most likely to be considered civilians.¹⁴²

There are however several concerns regarding the Montreux Document. Some of the main concerns are that it does not always provide a lot of clarity¹⁴³, some of the obligations are broad ones which could allow for too much room for states and private military security companies alike to manoeuvre. This occurs by the Montreux Document not definitively defining what obligations they have and what they are accountable for. There is also a lot more work which needs to be done on the exact nature of the obligations and duties between states and private military security companies.¹⁴⁴ Another concern is that without sufficient monitoring and follow up mechanisms¹⁴⁵ the Montreux Document might just be used by states to appear as if they are correctly regulating their relationships with private military security companies, whilst they are actually continuing as before, without any true

¹³⁹ Note 133 above, 404.

¹⁴⁰ Note 133 above, 405.

¹⁴¹ See Comment 36 of the Montreux Document.

¹⁴² Note 87 above, 710.

¹⁴³ Note 133 above, 411.

¹⁴⁴ Note 133 above, 427.

¹⁴⁵ Note 86 above, 445.

implementation or enforcement.¹⁴⁶ There was also concern over the unfair bargaining power held by the western states over other nations, such as Iraq and Afghanistan during the discussions which ultimately created the Montreux Document.¹⁴⁷ The results of this can be seen in the heavier burden which is placed on Territorial States rather than Home and Contracting States.¹⁴⁸ This is seen throughout the document.¹⁴⁹ Lastly the Montreux Document also gives private military security companies legitimacy, this despite the fact that currently they are unregulated and unmonitored. Without any interim procedures in place this is considered a premature move.¹⁵⁰

In conclusion the Montreux Document represents the first document purely focused on private military security companies and despite its faults and the concerns which have been raised, it does at least clarify the position of private military security companies and their personnel within international humanitarian law.

2.2.7. *The International Code of Conduct for Private Security Service Providers*

The same concerns regarding a lack of international law regulating the activities of the private military security industry which resulted in the drafting of the Montreux Document were also the impetus behind the drafting of the International Code of Conduct for Private Security Service Providers.¹⁵¹ The Montreux Document, as already discussed, focusses on reinforcing and reaffirming international obligations as well as creating a set of good practice standards designed for the private military security industry. The Montreux Document is also designed to be binding on states and ultimately be used as a framework for domestic regulation.¹⁵² The International Code of Conduct for Private Security Service Providers on the other hand is a multi-stakeholder initiative designed to establish principles for the private military security industry which can ultimately be translated into industry standards against which private military security companies can be held accountable.¹⁵³ For example the International Code of Conduct for Private Security Service Providers establishes principles

¹⁴⁶ Note 133 above, 428.

¹⁴⁷ Note 86 above, 443.

¹⁴⁸ Note 86 above, 446.

¹⁴⁹ Good Practice 2 and 10 of the Montreux Document as examples.

¹⁵⁰ Note 86 above, 444.

¹⁵¹ N White, 'The privatisation of military and security functions and human rights: Comments on the UN working group's draft convention' (2011) 11 *Human Rights Law Review* 133, 133.

¹⁵² Note 151 above, 134.

¹⁵³ D Wallace, 'International code of conduct for private security service providers' (2011) 50 *American Society of International Law* 81, 90.

regarding how private military security companies conduct themselves and speaks to the use of force, the detention of individuals as well as prohibition of torture and sexual exploitation to mention but a few. The code also seeks to establish standards for the private military security industry in terms of good business practices.¹⁵⁴ Finally the International Code of Conduct for Private Security Service Providers mandates the establishment of voluntary independent and external mechanisms to ensure effective governance and oversight of the principles established by the code.¹⁵⁵ Unlike the Montreux Document, the code is a document between private military security companies and not states.¹⁵⁶

The International Code of Conduct for Private Security Service Providers was launched in 2009 following on from the Montreux Document, and was promoted by the Swiss as well as the United Kingdom and the United States.¹⁵⁷ The code which was finished in 2010 pulled together various actors including governments, private military security companies as well as members of civil society.¹⁵⁸ The main concerns which the code set to address were the lack of accountability and apparent impunity in terms of domestic and international law being experienced by the private military security industry at large.¹⁵⁹ This code has sought to solve this by establishing principles for the private military security industry as well as an oversight mechanism.¹⁶⁰

Whilst many questions still remain about how the International Code of Conduct for Private Security Service Providers will operate, and how effective it will be in practice, the code is regarded as a step in the right direction.¹⁶¹ Furthermore the code is seen as innovative in that it is not a traditional state-to-state agreement, but rather represents a public-private partnership which better accommodates this unique and growing industry.¹⁶² To date the code has been signed by well over 500 private military security companies, and this in and of itself

¹⁵⁴ Note 153 above, 90.

¹⁵⁵ J L Gomez del Prado, 'A United Nations instrument to regulate and monitor private military and security contractors' (2011) 1 *Notre Dame Journal of International, Comparative, and Human Rights Law* 1, 31.

¹⁵⁶ J Crook, 'Contemporary practice of the United States relating to international law' (2013) 107 *American Society of International Law* 207, 213.

¹⁵⁷ Note 155 above, 31.

¹⁵⁸ Note 156 above, 213.

¹⁵⁹ Note 153 above, 89&90.

¹⁶⁰ Note 155 above, 32.

¹⁶¹ Note 153 above, 90.

¹⁶² Note 156 above, 213.

seems to indicate a positive reaction to the International Code of Conduct for Private Security Service Providers.¹⁶³

2.3. The Duty on Domestic Actors to Regulate Private Military Security Companies

The rights and duties which exist between states and personnel of their military forces are clear and established. However the rights and duties which exist between and state and personnel of private military security companies are not as well defined and established. One of the key concerns is that whilst the essential element of command and control is clear with a state's military force, it is not clear with private military security companies where their personnel answer to the company rather than to the state. This has the potential to create confusion and uncertainty in conflict zones.¹⁶⁴ States appear to have a duty to regulate and control private military security companies as it is a long established tradition that states have the monopoly of military forces and violence, if there is no regulation then this monopoly is lost.¹⁶⁵ The responsibility of states in terms of private military security companies currently will be examined before analysing why it is in the best interest of a state to regulate this industry.

Currently there is no international convention or treaty dealing specifically with the relationship between private military security companies and states. There are however several doctrines, including the Geneva Convention, dealing with the relationship between a state and a non-state body who is carrying out state functions. Worth noting are the Articles on Responsibility of States for Internationally Wrongful Acts (ASR) which have been used by the International Court of Justice and whilst not technically forming a binding treaty carry substantial weight and form a key part of customary international law on this subject of state responsibility.¹⁶⁶ These doctrines are based on the understanding within international law that breaches of international law committed by non-state actors, acting as organs of the state will amount to state responsibility. This understanding also extends to privately performed acts.¹⁶⁷ At the cornerstone of international law however is the understanding that the duty to protect

¹⁶³ Note 156 above, 213.

¹⁶⁴ Note 4 above, 107.

¹⁶⁵ Note 4 above, 106.

¹⁶⁶ Note 120 above, 371.

¹⁶⁷ Note 4 above, 108.

and preserve human rights rests with states and that this is an obligation which states cannot sidestep.¹⁶⁸ There are several relationships which give rise to state responsibility.

When the conduct is committed by recognised organs or agents of a state then it is clear that responsibility attaches itself to the state. This is in terms of Article 4 of ASR which allows for responsibility to be attached even in the case of apparent official capacity to act as an organ or agent of the state, but not in the case where the act was a purely individual and private act.¹⁶⁹ This would only apply to a private military security company if they were fully incorporated into the armed forces of a state and this is unlikely considering the nature of private military security companies.¹⁷⁰

The actions of non-state actors who have been authorised to act on behalf of a state can also give rise to state responsibility; this is dealt with in terms of Article 5 of ASR.¹⁷¹ These de facto agents are private persons or companies which have a connection with the state which allows for liability to be imputed to the state. This liability is imputed despite the fact that the action being taken is being taken by a private person or company. This doctrine recognises that a state can breach its international law obligations through a range of actors and not just actors which are obviously organs of the state.¹⁷² If such a connection existed between a private military security company and a state it would be clear that the state would be responsible for the actions of that private military security company and its personnel. The problem which arises is what action constitutes a state action or function. It has been argued that if there is an international obligation on a state to perform a certain action or function, that that state cannot get itself out of that obligation by hiring a private company and that such a function is a function of that state.¹⁷³ This problem is also dealt with by the concept of delegation can be found in the International Law Commission's Articles on State Responsibility. Here a state is found to have delegated its responsibilities to a private person or company if the nature of the task being carried out by that private entity can be considered a public and therefore government task. It is clear that most of the tasks carried out by private

¹⁶⁸ C Lumina, 'Counting the cost: The impact of corporate warfare on the human rights of women and children in Africa' (2008) 147 *ISS Monograph Series* 101, 110.

¹⁶⁹ Note 120 above, 373.

¹⁷⁰ Note 4 above, 107.

¹⁷¹ Note 120 above, 374.

¹⁷² Note 4 above, 109-110.

¹⁷³ Note 120 above, 374.

military security companies are in fact public and therefore governmental in nature.¹⁷⁴ In support of this are the 2001 International Law Commission commentaries which noted that private persons or companies which engage in military activities or services that are sponsored by a government can only be considered as agents of that government.¹⁷⁵

The above responsibility is extended, in Article 6 of ASR, to a second state which is utilising the first state's organs. So that a state hiring a private military security company from one state to perform a function of their state would be liable for the actions of the private military security company and not that companies state of origin.¹⁷⁶ This means that the actions of private military security companies can be attached to their state of origin or the state utilising their services so long as they have the state's authority to conduct their actions and they are carrying out a function or duty of the state.

It should also be noted that in terms of Article 7 of ASR that responsibility can still be attached to a state even if a private military security company exceeded their authority and acted beyond the ambit of their duty, so long as they are acting whilst 'cloaked with governmental authority'.¹⁷⁷

Article 8 of ASR also holds state responsible where non-state actors are acting under state instructions or control. This Article appears to make provision for private military security companies by including actors which are not formally incorporated into the armed forces of a state.¹⁷⁸ The key question here is what is considered control and more importantly sufficient control for the purposes of imputing responsibility onto a state. This question has been discussed and answer by two cases. The United States case of *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua. v. U.S.)* 1984 I.C.J. Judgment of November 26 required that there be effective control whilst in *Prosecutor v. Dusko Tadic (Appeal Judgement)*, *International Criminal Tribunal for the former Yugoslavia (ICTY)*, 15 July 1999 also place a responsibility on the Tadic government for the actions of private

¹⁷⁴Note 4 above, 110.

¹⁷⁵Note 4 above, 111 :

Report of the International Law Commission to the General Assembly on the Work of its Fifty-third Session, U.N. GAOR, 56th Sess., Supp. No. 10, U.N. Doc. A/56/10 (2001), reprinted in [2001] 2 Y.B. Int'l L. Comm'n 42, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

¹⁷⁶Note 120 above, 375.

¹⁷⁷Note 120 above, 375.

¹⁷⁸Note 120 above, 376.

companies so long there was overall control between the state and the private company or person.¹⁷⁹ These decisions indicate, besides what constitutes control, that it is in the best interests of states to regulate and clarify the rights and duties of these private companies especially if they could potentially be held responsible for their actions.¹⁸⁰

Responsibility can also be attributed to a state even when the individual or company does not act with the orders of a state or under its control. Article 9 of ASR holds states accountable for the actions of an individual where they perform what could be considered a public function in the absence of an official authority.¹⁸¹ The actions of an unauthorised individual can also be attributed to a state if, in terms of Article 11 of ASR, the state ‘identifies with the conduct in question and makes it its own’.¹⁸² In both instances it is clear that the conduct of private military security companies, although most commonly authorised, can still be attributed to a state in terms of these two articles.

The arguments above also find support from various international bodies and treaties. The Humans Rights Commission has held that on a number of occasions that a state is still responsible despite some of its functions being delegated to other private persons and companies.¹⁸³ This statement is given support by the Committee against Torture and Article 16 of the Convention against Torture which holds a state responsible for the actions of all of its organs including those which are private so long as they are acting in an official capacity.¹⁸⁴ The understanding that a private company or person which is acting on behalf of a State will accrue liability for the State and therefore falls under the responsibility of the State is again endorsed by the draft articles on state responsibility drawn up by the United Nations International Law Commission.¹⁸⁵ The draft articles go on to state that this is especially the case where the private person’s or companies headquarters are in the territory

¹⁷⁹ Note 31 above, 232-233.

¹⁸⁰ Note 31 above, 235.

¹⁸¹ Note 120 above, 378.

¹⁸² Note 120 above, 379.

¹⁸³ Note 4 above, 114:

¹⁸⁴ Note 4 above, 115:

Office of the High Commissioner for Human Rights, Comm. Against Torture, Concluding Observations of the Committee Against Torture: Israel, 257, U.N. GAOR, 52nd Sess., Supp. No. 44, U.N. Doc. A/52/44 (May 9, 1997).

¹⁸⁵ Note 20 above, 212.

of the state hiring them, as the state then has the ability to regulate and play a decisive role in for example the issuing of a licence to regulate.¹⁸⁶

In light of the responsibility that states do have for the actions of private persons and companies acting in their capacity, as private military security companies clearly do, there is a clear responsibility on governments to ensure that these relationships are properly regulated. The Private Military Security Company Draft Convention does in fact go the extra step of making this regulation a duty on states. This especially to ensure that private military security companies respect human rights and International Humanitarian Law. Currently the Open-Ended Intergovernmental Working Group has been tasked by the Human Rights Council, in terms of Resolution 15/26, to look into the possibility of expanding upon this Draft Convention.¹⁸⁷

In addition to the duty created by international conventions and treaties there are also several policy considerations that highlight why states would want to and need to create regulation for private military security companies at a domestic level. Private military security companies have the ability to play a pivotal role in maintaining peace and protecting human rights, especially within Africa.¹⁸⁸ The role of private military security companies often means providing security for people as well as property, and in essence upholding and ensuring basic human rights. They have also been involved in operations such as peace keeping and mine clearing and destruction.¹⁸⁹ In light of this it is in the best interests of states to provide a system of regulation at a domestic level that allows for private military security companies to exist and continue their work, so as to prevent any negative impact on peace and stability within the African region.¹⁹⁰ The loss of a peace keeping force would ultimately impact negatively upon all states within that region.¹⁹¹ In addition to this and owing to the fact that states have over the past several centuries had the monopoly on power within their country and regions, states would want to regulate any other actors which could also

¹⁸⁶ Note 20 above, 213.

¹⁸⁷ Note 87 above, 711.

¹⁸⁸ F Mathieu and N Dearden. 'Corporate mercenaries: The threat of private military and security companies' (2007) 34 *Review of African Political Economy* 744, 751.

¹⁸⁹ S Gumede, 'The role of the private security industry in Africa's peacekeeping missions' (2007) 4 *ACCORD* 4-5.

¹⁹⁰ F Mathieu and N Dearden. 'Corporate mercenaries: The threat of private military and security companies' 751.

¹⁹¹ JJ Messner, 'Working towards effective legislative and regulatory solutions for the private security industry in Africa' (2008) 147 *ISS Monograph Series* 145, 150.

potentially hold some power over their own territory and/or region.¹⁹² The private military security industry also has the potential to affect the balance of power and stability within a region and therefore states would want to be able to control the effects of this.¹⁹³ Private security companies could potentially affect the reputation of a state, as has been noted with Executive Outcomes and the negative perception it created for South Africa¹⁹⁴, and this would motivate states to regulate the activities of these companies.¹⁹⁵ It can be seen therefore that the control that states gain over the impact that private military security companies can have on a region by the regulation of their activities is of great benefit to them.

To conclude whilst there is only a definite duty placed on states to regulate private military security companies in the Private Military Security Company Draft Convention, it is also clear that they are potentially responsible for the actions of private military security companies. This in addition to the policy concerns raised above make for an extremely compelling case as to why states should regulate private military security companies and their activities at a domestic level.

2.4. The Need to Find a Balance Between the Regulation and Criminalisation of Private Military Security Companies

The Montreux Document, the International Code of Conduct for Private Security Service Providers and the Private Military Security Company Draft Convention, are a clear indication that at an international level there is a move to regulate private military security companies. The same move has been made by countries at a domestic level such as the United States and the United Kingdom.¹⁹⁶ On the other end of the spectrum there are also calls to ban the industry entirely; such a stance can be seen in the South African domestic framework.¹⁹⁷ The next few chapters will analyse domestic attempts at the regulation of private military security companies in determining, from a domestic perspective what route presents itself as the best way forward. Whether regulation or criminalisation of private military security companies is what domestic legislation should be aiming for.

¹⁹² Note 191 above, 148.

¹⁹³ Note 191 above, 148.

¹⁹⁴ Note 8 above, 3.

¹⁹⁵ Note 191 above, 148.

¹⁹⁶ Note 54 above, 544.

¹⁹⁷ Note 191 above, 151.

CHAPTER THREE

THE UNITED STATES

This dissertation will now turn to various domestic systems of law to determine how mercenaries and private military security companies are regulated. In doing so these next few chapters hope to provide insight into any trends within domestic legal systems and how effective domestic law has been in dealing with mercenaries and private military security companies. This chapter in particular will focus on the United States by first discussing the history of mercenaries and private military security companies within the United States and what role they play in the modern United States. The chapter will then discuss each piece of law in turn and how each deals with mercenaries and private military security companies.

1. THE DEVELOPMENT OF THE USE OF MERCENARIES AND PRIVATE MILITARY SECURITY COMPANIES IN THE UNITED STATES

The United States army has been using the services of mercenaries since the American Revolution. In 1775 when George Washington was facing severe shortages of men due to a lack of enrolments as well as the enlistments of a large number of his men ending¹, he turned to hiring Hessian² mercenaries, both foreign and local, in order to subsidise his troops numbers. The shortage of soldiers was a constant problem during the American War of Independence, and so the practice of hiring mercenaries became an accepted practice of Congress.³ The practice of hiring mercenaries was one also used by the English during the revolution. Striking an even more common resemblance with modern private military security company hiring was that Congress hired specific European military officers in order to fill gaps in the army which required expert knowledge.⁴ This foreshadows the present day use of modern private military security companies for their specific expertise and knowledge.

In more modern times private military security companies have begun to flourish again thanks to the surplus of trained military individuals created by the ending of the Cold War and the desire of states to reduce the cost of their militaries and improve the efficiency of

¹ M Underwood, 'Jealousies of a standing army: The use of mercenaries in the American Revolution and its implications for congress's role in regulating private military firms' (2012) 106 *Northwestern University Law Review* 317, 324.

² A Hessian is an inhabitant of the German state of Hesse.

³ Note 1 above, 324.

⁴ Note 1 above, 325.

their military programs.⁵ Private military security companies have been contracted by the US on the battlefield in Bosnia and during Operation Desert Storm. During these and similar operations however the role played by private military security companies was marginal, with at most nine thousand private military security company personnel being deployed.⁶

1.1. The Logistics Civil Augmentation Program

This rather modest deployment of private military security contractors changed with the creation of the Logistics Civil Augmentation Program (LOGCAP) in 1985. LOGCAP is an on-going program which is designed to allow the United States to hire civilian contractors, as they are referred to, to perform specific military services during times of war/armed conflict. This is done so as to alleviate pressure on the United States military and allow the military to redeploy their forces more effectively.⁷ LOGCAP was originally designed to allow for the fast and effective deployment of specialised individuals within the United States armed forces, as soon as they were required. This was done by having civilian contractors undergo training with either the military or private military security companies, who then keep a database of these specialised individuals who can be called upon and deployed. For the United States this meant that it did not have to train reserve personnel during peacetime, which is a costly exercise, yet is still had the advantage of having a supply of specialised individuals who could be called upon at any time.⁸ Prior to the establishment of LOGCAP, the ratio of United States troops to private military security personnel was 1:50 (during the Gulf War), since LOGCAP and during the Iraq conflict it has risen to 1:10.⁹ The reason for the increase of this ratio is two-fold. Firstly, following the terrorist attacks of 11 September 2001, the United States reassessed its international security threats and sought to increase its international presence. Secondly, and counter to this trend, there has been a move to lower the number of United States troops involved in these conflict areas for a variety of reasons including public pressure.¹⁰ It can also be argued that without the use of private military security companies that the United States would not be able to maintain its military presence outside of the United States and this would severely impact upon its ability to implement its

⁵ Note 1 above, 333.

⁶ M Cancian, 'Contractors: The new element of military force structure' (2008) *Parameters* 61, 66.

⁷ *Ibid.*

⁸ Note 6 above, 66.

⁹ C Holmqvist, 'Private security companies: The case for regulation' (2005) Policy paper 9 *Stockholm International Peace Research Institute* 1, 23.

¹⁰ *Ibid.*

current foreign policy.¹¹ The use of private military security companies also allows the United States it to redeploy its resources into armaments as well as allowing it to stream its logistics department and supply lines.¹² Consequently, the United States has become one of the largest users of private military security companies in the world, spending over US\$300 billion between 1994 and 2002 and entering into over three thousand contracts with private military security companies during that time. Moreover these private military security companies provide not only most the logistical needs of the United States armed forces, but they also train nearly all of their reserve officers.¹³

Since LOGCAP was originally introduced the number of tasks which could outsources under the LOGCAP program has increased to allow for more private military security company involvement. The result of this change has meant that the current system of United States legislation and regulation dealing with the outsourcing of military tasks to private military security companies is at times ambiguous and even contradictory. These controversies will be discussed further in the following paragraphs.

1.2. Congressional vs Executive Control Over Private Military Security Companies

Currently all power over the military rests with Congress. This was established after the American Revolution in order to appease fears that existed at the time that a large army controlled by the Executive posed a potential danger to the freedoms and liberties of the American people.¹⁴ The only power granted to the Executive, is that the appointment of various positions within the armed forces must have the Executive's approval. The only limit placed on Congress is that money cannot be appropriated for the raising of an army for a period greater than two years. This lack of restrictions means that Congress is able to raise and maintain an army during peace time.¹⁵ Evidence of this can be found in the promulgation of legislation such as LOGCAP, which allows, for example, for the training of an army during peacetimes. Congress also has the power to create rules and regulations for the armed forces of the United States, and dictate how the armed forces operate and who is employed

¹¹ Note 1 above, 334.

¹² D Brooks, 'Messiahs or mercenaries? The future of international private military services' (2007) 7 *International Peacekeeping* 129, 137.

¹³ P W Singer, 'War, profits, and the vacuum of law: Privatized military firms and international law' (2004) 42 *Columbia Journal of Transnational Law* 521, 522.

¹⁴ Note 1 above, 331.

¹⁵ Note 1 above, 331.

within its chain of command. Whilst Congress has the power to extend its authority over private military security companies, it has as of yet chosen not to exercise this power.¹⁶

Whilst Congress deals specifically with the raising of the armed forces, it is mainly the Executive branch which establishes and maintains contractual relationships with private military security companies. The office of the Assistant Deputy Undersecretary of Defense is responsible for all contractual oversight within the Department of Defense. Where contracts are formed with the Departments of Commerce, Interior or the State Department then these contracts are overseen independently by officials within those government departments.¹⁷ In terms of regulation of the internal workings of private military security companies the United States is lacking any form of regulation, although there have been failed attempts by Congress in 2005 to impose training requirements and background checks.¹⁸

A report by the Armed Services Committee (Inquiry into the Role and Oversight of Private Security Contractors in Afghanistan) revealed that private military security companies operate without sufficient government oversight. The report also highlights that a lack of accountability from the private military security companies means potential danger for civilians, members of the armed forces as well as a potential to undermine the mission itself. There is also a lack of adequate training which also adds to the risk factor.¹⁹ Despite the lack of congressional oversight, the United States Army Regulations stipulate that contractors are allowed to perform potentially any function other than an inherently government function which are defined as, ‘necessary for the sustainment of combat operations, that are performed under combat conditions or in otherwise uncontrolled situations, and that require direct control by the military command structure and military training for their proper execution’.²⁰ Moreover, failure to abide by this may mean that PMSC lose the ability to claim their non-combatant status as the regulations lists them as civilians accompanying the force.²¹

¹⁶ Note 1 above, 332.

¹⁷ Note 1 above, 334.

¹⁸ F Schreier & M Caparini, ‘Privatising security: Law, practice and governance of private military and security companies’ (2005) Occasional Paper 6 *Geneva Centre for the Democratic Control of Armed Forces* 1, 106.

¹⁹ J L Gomez del Prado, ‘A United Nations instrument to regulate and monitor private military and security contractors’ (2011) 1 *Notre Dame Journal of International, Comparative, and Human Rights Law* 1, 27.

²⁰ *US Department of the Army, AR 715-9: Contractors Accompanying the Force*, 21 Aldri van Jaarsveld *Private military companies as “new peacemakers” in Africa: Is regulation sufficient?* (unpublished Masters of Arts (International Studies, University of Stellenbosch, 2007) 28.

²¹ Note 20 above, 28.

Having analysed the history and development of the relationship between the United States and mercenaries and more recently private military security companies this dissertation will now focus on analysing each piece of legislation dealing with mercenaries and private military security companies independently. Legislation dealing with mercenaries will be analysed first before legislation dealing with private military security companies.

2. DOMESTIC LEGISLATION OF THE UNITED STATES

2.1. Legislation Relating to Mercenaries

Attempts aimed more specifically at outlawing mercenaries include the United States Federal Statute which; ‘prohibits United States citizens from enlisting or from recruiting others from within the United States to serve a foreign government or party to a conflict with a foreign government with which the United States is at peace.’²² There is very little legislation with regards to mercenaries in particular, save for the Foreign Relations Act and the Neutrality Act.

2.1.1. The Foreign Relations Act

The Foreign Relations Act of 1988 places a prohibition on any citizen of the United States who accepts an offer to serve ‘a foreign prince, State, colony, district, or people, in war, against any prince, State, colony, district, or people, with whom the United States is at peace’. Sections 959 and 960 preclude a United States citizen from traveling and serving as a mercenary for a foreign state whilst the United States is at peace with that state. However, as the case of the *United States v Elliott*²³ illustrates, the difficulty arises in determining whether or not a state of peace exists. In this case citizens who blew up a Zambian bridge were found to have contravened the Foreign Relations Act as the United States was at peace with Zambia at the time. In *United States v Terrell*²⁴ however the supplying of weapons to the Nicaraguan Contras was not considered a contravention of the *Foreign Relations Act* as there was no state of peace with Nicaragua.²⁵

²² Note 18 above, 106.

²³ 266 F Supp 318 (DNY 1967)

²⁴ 731 F Supp 473 (SD Fla 1989).

²⁵ C Walker & D Whyte, ‘Contracting out war?: Private military companies, law and regulation in the United Kingdom’ (2005) 54 *International and Comparative law Quarterly* 651, 668.

2.1.2. *The Neutrality Act*

The 1794 Neutrality Act prevents an individual from preparing to leave for a foreign conflict, whilst the new 1937 Neutrality Act prohibits the recruitment of mercenaries within the United States²⁶. The Neutrality Act has a limited scope as it does not define what a mercenary is, or what constitutes mercenary activity.²⁷ It also doesn't outlaw being a mercenary per se, but merely outlaws the recruitment of mercenaries, consequently the United States is able to get around this Act by hiring individuals as government agents and thereby avoiding the Act²⁸, or making use of the fact that the Act does not outlaw the sale of military services, which is how most private military security companies market themselves.²⁹

2.2. *Legislation Relating to Private Military Security Companies*

The Legislation relating to private military security companies is far more expansive and the three key pieces of legislation are: the Arms Export Control Act, the Uniform Code of Military Justice and the Military Extraterritorial Jurisdiction Act. These will be analysed in combination with the following pieces of legislation and committee reports: the Committee on Armed Services, the Department of State's Office of Defense Trade Control, the Special Maritime and Territorial Jurisdiction Act, the Stop Outsourcing Security Act and any applicable civil law.

2.2.1. *The Arms Export Control Act*

The Arms Export Control Act 1976 (AECA) is one of the primary means by which the United States regulates private military security companies. The AECA allows the President of the United States to control not only the import and export of defence articles and services, but also to create foreign policy guidance for personnel involved in the import and export of defence articles and services.³⁰ This control was implemented after the realisation by the State Department that a number of private military security companies were providing military training to people from countries with whom the United States did not have good relations.³¹ This control over defence articles and services is exercised by the International

²⁶ Note 20 above, 27.

²⁷ B Barrie, 'Private military firms and mercenaries: Potential for liability under international law' (2005) 12 *TFLR – International Law* 324, 344.

²⁸ Note 20 above, 27.

²⁹ Note 13 above, 537.

³⁰ S Franklin, 'South African and international attempts to regulate mercenaries and private military companies' (2008) 17 *TRANSNATIONAL Law & CONTEMPORARY PROBLEMS* 1, 253.

³¹ Note 18 above, 105.

Traffic in Arms Regulations (ITAR) which implements the authority which AECA grants to the President. The authority of the President was delegated in 1997 by Executive Order 11958 to the Secretary of State. The United States State Department administers that authority mainly through the Office of Defense Trade Controls at the Bureau of Political-Military Affairs. It is the Bureau of Political-Military Affairs which ultimately is responsible for the licensing of private military security companies.³² A private military security companies cannot operate until such time as it has been duly licenced.³³

The defence articles and services which may be exported are listed in part 121 of ITAR in the United States Munitions List (USML). Articles in the list include everything from firearms and tanks to nuclear radiation detection and measurement devices. Section 120.9 (a) of ITAR states that a defence service means:

‘The furnishing of assistance (including training) to foreign persons, whether in the United States or abroad in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarization, destruction, processing or use of defense articles.’

Section 120.9 (a) also covers the ‘furnishing of technical data’ and ‘military training of foreign units and forces, regular and irregular’, whether provided in the US or abroad.³⁴ The ITAR in general also covers various definitions, policies as well as violation and penalty issues.³⁵ The services provided and offered by private military security companies need to be covered under USML and ITAR in order for a license to be granted.³⁶

The ITAR and USML are constantly being updated and amended so as to reflect the changing nature and objectives of United States foreign policy. So for example, in 2002 the United States government prevented all applications for licences or requests to export defence articles or services to Zimbabwe. A similar status was placed over the Federal Republic of

³² C Ortiz, ‘Regulating private military companies: States and the expanding business of commercial security provision’ in L Assassi, D Wigan, K van der Pijl (eds) *Global Regulation. Managing Crises After the Imperial Turn* (2004) 205, 212.

³³ Note 30 above, 253.

³⁴ Note 32 above, 212.

³⁵ Note 32 above, 212.

³⁶ Note 32 above, 214.

Yugoslavia in the 1990s but has since reversed.³⁷ On the other end of the scale there are no constraints of any form placed on providing defence services or articles to NATO members.³⁸

If the cost of the defence article or service exceeds US\$50 million then special procedures need to be followed. In brief the President is required to ask for a licence from the Committee on Foreign Relations of the Senate by providing the Speaker of the House of Representatives with a written certificate. Congress has the capacity to deny such a licence unless the President states in the certificate that ‘an emergency exists which requires that consent to the proposed transfer become effective immediately in the national security interests of the United States.’³⁹

Whilst there are some who argue that AECA is an effective mechanism of providing control over private military security companies and the services and goods which they provide via the licensing process.⁴⁰ There are others who argue that the process of acquiring a license varies so considerable from one case to another that few are clear as to how the process works. Additionally it is noted that provided the contract amount is below the US\$50 million mark, Congress does not need to be informed, nor does Congress have any right to request any information about that contract.⁴¹ Many contracts either fall under this amount or are broken up into smaller contracts so as to fall below this threshold. Once a license is issued there is little to no follow up on the private military security company, and whilst this should be the responsibility of foreign United States embassy officials, no officials has been delegated such oversight power to date. Many officials also view their primary job as being the protection of Americans rather than the investigation of Americans.⁴² The purpose of the AECA also appears to uphold foreign policy rather than international law.⁴³ This can be seen by the diverse treatment given to various countries and that no distinction is drawn between governments and irregular forces. This diverse treatment illustrates that decision taken under the AECA do not cater to international law policies, but rather which country or force needs support in terms of the foreign policy considerations of the United States.⁴⁴

³⁷ Note 32 above, 213.

³⁸ Note 18 above, 105.

³⁹ Note 32 above, 214.

⁴⁰ Note 32 above, 218.

⁴¹ Note 18 above, 106.

⁴² Note 13 above, 539.

⁴³ Note 18 above, 105.

⁴⁴ Y Sandoz, ‘Private security and international law’ J Cilliers & P Mason (ed) *Peace, profit or plunder?: The privatisation of security in war-torn African societies* (1999) 201, 217.

2.2.2. *The Uniform Code of Military Justice*

The Uniform Code of Military Justice (UCMJ) of 1950 established a court martial which was created during a time when military law was applied to civilians and the UCMJ was in part designed to allow for the prosecution of civilians under martial law.⁴⁵ The decision in the case of *United States v Averette*⁴⁶ however ended the ability of UCMJ to prosecute civilians. *Averette* provided a narrow interpretation of Article 2(a)(10), which stated that military jurisdiction over civilians existed only during times of war, by holding that times of war referred only to wars formally declared by Congress. *Averette* therefore almost ended the ability of UCMJ to be applicable as the last time that the United States Congress formally declared war was World War II.⁴⁷

In 2006 the Graham Amendment to the National Defense Authorization Act for the Fiscal Year 2007, which is primarily concerned with the budget for the Pentagon, amended the section in UCMJ which referenced in a time of war and replaced it with ‘in time of declared war or a contingency operation [over] persons serving with or accompanying an armed force in the field.’⁴⁸ This amendment not only reflects a more accurate understanding of the private military security industry but also the nature and scope of their involvement in modern battlefields but also allowed for UCMJ to once again apply to civilians.⁴⁹ The immediate effect of the amendment was to potentially make all civilians accompanying the military subject to military law.⁵⁰

The current concern around UCMJ is whether or not the amendment will stand up to a constitutional challenge on the grounds of over-inclusive grounds, due process and vagueness.⁵¹ This concern is given support by a 1957 case, *Reid v Covert* which upheld the unaltered section of UCMJ and its reference to ‘in times of war’ as the ‘maximum historically recognized extent of military jurisdiction over civilians.’⁵² Future courts will have to

⁴⁵ A Ebrahim, ‘Going to war with the army you can afford: The United States, international law, and the private military industry’ (2010) 28 *Boston University International Law Journal* 182, 195.

⁴⁶ 19 U.S.C.M.A. 363, 365 (C.M.A 1970).

⁴⁷ Note 45 above, 196.

⁴⁸ *Ibid.*

⁴⁹ Note 45 above, 196.

⁵⁰ R Morgan, ‘Professional military firms under International law’ (2008) 9 *Chicago Journal of International Law* 213, 230.

⁵¹ Note 45 above, 196.

⁵² J Elsea, ‘Private security contractors in Iraq: Background, legal status, and other issues’ (2008) *Congressional Research Service* 1, 27.

determine whether or not the amendment exceeds this historical maximum. Future courts may also be posed with the question of whether or not the personnel of a private military security company is in fact a member of the armed forces and no longer a civilian based on the nature of their relationship with the armed forces and the nature of their duties and activities. If this is the case then the UCMJ in its entirety would be applicable.⁵³ *Reid* also held that Congress, despite its power to regulate the land and naval forces, does not have the power to prosecute civilians without providing them with the standards guaranteed by the Bill of Rights.⁵⁴ The court also mentioned in dicta that courts-martial are not the best place for the prosecution of civilians it did not expressly forbid the prosecution of civilians by the military. In fact lower courts have upheld the ability of the military to prosecute civilians.⁵⁵

If the courts accept that the constitution allows for the prosecution of civilians by the military, a civilian will still have to satisfy the statutory requirements of the UCMJ. These require that the civilian ‘serving with or accompanying an armed force’ that is operating ‘in the field.’⁵⁶ The phrase ‘serving with or accompanying an armed force’ means that the civilian’s presence must be dependent upon the armed forces and that there must be a connection and link between the two.⁵⁷ In other words the presence of the two together cannot merely be incidental. The phrase ‘in the field’ is concerned more with ensuring that the duties being performed by the civilian at the time of the offence are connected to the battlefield. In short the civilian does not have to be on the frontlines to be having an active impact on the battle.⁵⁸

The Gates Memorandum was released in 2007 to clarify the confusion which existed as to what effect the amendment had on private military security personnel. It required that any offences by such personnel should be reported and referred to the Department of Justice. This deferral of authority from the military to the Department of Justice does not mean that the military relinquish jurisdiction and in fact the military is expected to continue to ‘address’ crimes while the investigation is being conducted by the Department of Justice.⁵⁹

⁵³ Note 45 above, 197.

⁵⁴ Note 52 above, 27.

⁵⁵ Note 52 above, 28.

⁵⁶ Note 52 above, 29.

⁵⁷ Note 52 above, 29.

⁵⁸ Note 52 above, 29.

⁵⁹ Note 50 above, 230 & 231.

A concern with the UCMJ is what are the potential punishment which can be given to a civilian as most military punishment such as a loss of rank or dishonourable discharge are either not able to be carried out on the personnel of private military security companies or have no effect on these personnel. In addition is the concern that there is currently no way to compel private military security companies to retain their personnel so as to allow for the completion of courts-martial. A private military security company could just dismiss the accused individual and the military will no longer have jurisdiction over them.⁶⁰ Lastly is the problem that the UCMJ only applies to personnel working for the Department of Defense and is not applicable to personnel in the employ of other government agencies, many of whom are also heavily involved in conflict areas.⁶¹

2.2.3. *The Military Extraterritorial Jurisdiction Act*

The Military Extraterritorial Jurisdiction Act (MEJA) was created to fill in some of the gaps that were originally left by UCMJ before it was expanded as has been noted above.⁶² The MEJA does not extend territorial jurisdiction, but rather creates a status based source of jurisdiction. This it does by creating criminal jurisdiction over certain criminal offenses.⁶³ The MEJA applies to either members of the armed forces or to personnel of private military security companies who are accompanying the armed forces. In order for jurisdiction to arise the offence has to result in a sentence of a year or more in prison.⁶⁴

There are several concerns with the MEJA. The MEJA is only applicable to personnel of private military security companies who are working for the Department of Defense and therefore personnel working for other state departments, such as the State Department do not fall under the MEJA.⁶⁵ It is also not applicable to personnel who are paid by a third party but are working for the United States⁶⁶ or it appears personnel who are engaged in their own operations overseas.⁶⁷ The MEJA requirement that the personnel in question must be 'supporting the mission of the Department of Defense' has meant that the act does not cover

⁶⁰ Note 52 above, 30.

⁶¹ M Scheimer, 'Separating private military companies from illegal mercenaries in international law' (2009) 24 *American University International Law Review* 611, 621.

⁶² Note 13 above, 521, 537.

⁶³ Note 1 above, 344.

⁶⁴ Note 45 above, 193.

⁶⁵ Note 45 above, 193.

⁶⁶ Note 1 above, 344.

⁶⁷ Note 52 above, 24.

the conduct of personnel when they are acting independently or away from the armed forces. Lastly there is also the concern that the MEJA has been used too selectively which the Department of Justice has blamed on a lack of legal precedent⁶⁸ as well as the concern that the MEJA does not extend to offences punishable by less than one year.⁶⁹

In order to deal with some of these problems Congress has amended the MEJA in two ways; firstly it has expanded the definition of employee to not only include personnel contracted by the Department of Defense but also ‘any other Federal agency, or any provisional authority, to the extent such employment relates to supporting the mission of the Department of Defense overseas’. Secondly Congress has expanded the requirement about ‘supporting the mission of the Department of Defense’ to include any work being done in close proximity to an area where the armed forces are conducting their operations. There are still questions however about some ambiguous language in the act itself⁷⁰ and there will always remain the difficulty of being authority to gather evidence in foreign jurisdictions.⁷¹

In terms of the regulations issued by the Department of Defense for implementing the MEJA (Department of Defense Instruction 5525.11, *Criminal Jurisdiction Over Civilians Employed By or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members*, March 3, 2005) the Department of Defense Inspector General has to inform the Attorney General when there is a suspicion that a federal crime has been committed.⁷² The Inspector General is also responsible for implementing investigations and investigative policies so as to give effect to the MEJA. In 2008 there had been twelve people charged under the MEJA and more investigations that may result in charges. There have also been several personnel who have pleaded guilty to their respective charges.⁷³ These charges represent significant developments in the regulation of private military security companies, especially considering the international anger at some of the human rights abuses at times associated with private military security companies and their personnel.⁷⁴

⁶⁸ Note 45 above, 194.

⁶⁹ Note 1 above, 344.

⁷⁰ Note 45 above, 194 & 195.

⁷¹ D Kidwell, ‘Public war, private fight? The United States and private military companies’ 2005 *Combat Studies Institute Press* 1, 51.

⁷² Note 52 above, 24.

⁷³ Note 52 above, 25.

⁷⁴ Note 45 above, 195.

2.2.4. *The Committee on Armed Services*

The Committee on Armed Services (the Committee) is the House panel which has been given legislative authority over defense matters. Essentially it is the Committee which must authorize all funds for the military and how where those funds and spent. The Committee creates several bills which affect military research, development and procurement. The number of private military security companies which are employed is therefore affected by the decisions of this committee in so far as budget allocation is concerned.⁷⁵

2.2.5. *The Department of State's Office of Defense Trade Control*

The Department of State's Office of Defense Trade Control (ODTC) is mandated under ITAR to issue and authorise licences for private military security companies who are providing knowledge, services or goods. Applications are made by private military security companies to the ODTC which are then subject to review by the various offices of the ODTC. A concern that arises is that the licensing mechanism is confusing and often inadequate as well as the ability for oversight by bodies such as the ODTC and Congress is limited. The problem around the US\$50 million threshold for contracts to be reviewed by Congress has already been discussed. There are however moves in Congress to change this threshold and provide greater oversight of the granting of contracts to private military security companies.⁷⁶

2.2.6. *The Special Maritime and Territorial Jurisdiction Act*

The Special Maritime and Territorial Jurisdiction Act (SMTJ) is designed to extend United States jurisdiction and protect American citizens and property beyond the traditional borders of the United States. There are currently nine areas of special jurisdiction with the ninth being added in 2001 by the Patriot Act, these are: vessels on the high seas, vessels on international waterways, lands acquired by the United States, certain islands valued for their guano (bird excrement used for fertilizer), aircrafts, spacecrafts, lands outside the jurisdiction of any nation, and certain vessels bound for the United States and offenses committed by or against a United States national in any place or residence within a foreign state used by missions or entities of the United States government.⁷⁷ Some of the criminal statutes which apply under

⁷⁵ C Goss, 'Military committee membership and defense-related benefits in the house of representatives' (1972) 25 *The Western Political Quarterly* 215, 218.

⁷⁶ Note 9 above, 51.

⁷⁷ Note 45 above, 192.

the SMTJ include: maiming, assault, kidnapping, sexual abuse, assault or contact, murder and manslaughter. The responsibility for prosecuting the crimes under the SMTJ rests with the Department of Justice.⁷⁸

The 2001 amendment means that in theory that jurisdiction could be extended to include personnel of private military security companies although to date there have been very few convictions using the SMTJ. The first of these was in 2004 when David Passaro was convicted under Section 9(A) of the SMTJ statute. Whilst the United States has traditionally been hesitant to apply domestic law outside of traditional United States territorial jurisdiction, Section 9(A) and the Passaro case shows potential for the United States to start doing so and holding more personnel of private military security companies liable in terms of domestic law.⁷⁹ This was again seen in 2007 when a CIA contractor was convicted of assault whilst serving in Afghanistan.⁸⁰

2.2.7. *The Stop Outsourcing Security Act*

In 2010 Representative Jan Schakowsky and Senator Bernie Sanders introduced the Stop Outsourcing Security Act (SOSA) with the goal of prohibiting the use of private military security companies in war zones.⁸¹ The main motivation behind SOSA is the potential for private military security companies to endanger the lives of United States military personnel as well as undermine military missions and relations with foreign governments needs to be removed. There is also the concern that the high salaries offered to the personnel of private military security companies not only places a burden on the American taxpayer but that this saps the moral from United States troops who are fighting for their country whilst also battling to feed and cater for their families.⁸² Finally private military security companies are being increasingly relied upon to conduct essential services and missions, they do not form part of the traditional chain of command and several high ranking United States officials are concerned that private military security company personnel are hampering the chances of success in Iraq.⁸³

⁷⁸ Note 52 above, 21.

⁷⁹ Note 45 above, 193.

⁸⁰ Note 52 above, 22.

⁸¹ Note 19 above, 24.

⁸² Note 19 above, 25.

⁸³ Note 19 above, 26.

The SOSA would require that all military functions and training return to the United States military and that should the President wish to create exceptions to this, that such a decision and contract would have to be passed by Congress. The proposed act would also require any contract exceeding US\$5 million to be overseen by Congress and private military security companies which are granted contracts would have to be far more transparent about their operations than currently which would include making public any disciplinary actions against any of their personnel.⁸⁴

Currently the status of the SOSA is that it is sitting with Congress and being considered by the Committee on Foreign Affairs as well as the Committee on Armed Services and Intelligence.⁸⁵

2.2.8. *Civil Law*

The analysis provided under civil law will focus firstly on the law of contract and then tort law and how these can be used in the light of private military security companies. Contract and tort law have the ability to affect the decisions of private military security companies because they are companies and are therefore concerned by anything which could potentially affect their profit margins.⁸⁶

In terms of the law of contract the False Claims Act 1863 (FCA) allows private individuals to sue private military security companies on behalf of government and to then share in a portion of the damages won. Not only does the FCA therefore act as another mechanism to regulate private military security companies but it also lessens the burden on the United States government to investigate claims against the personnel of private military security companies.⁸⁷

Private military security companies may see their conduct regulated and punished under domestic tort law and more specifically the Alien Tort Claims Act 1789 (ATCA) which it has been argued allows for a foreigner to sue an American private military security company by

⁸⁴ Note 19 above, 25.

⁸⁵ The Library of Congress, Bill Summary and Status H.R. 2665 available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:h.r.2665>, accessed on 30 July 2013.

⁸⁶ Note 45 above, 198.

⁸⁷ Note 45 above, 198.

providing jurisdiction over ‘any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.’⁸⁸

3. LEGAL CONTROVERSIES WHICH HAVE ARISEN WITH THE USE OF PRIVATE MILITARY SECURITY COMPANIES IN THE UNITED STATES

The incorporation by the United States Army of the personnel and services of private military security companies has created several logistical and legal issues which the current legislation of the United States does not cater for. The following are some of the challenges still facing the integration of the private military security industry and the military.

Primarily there has been a failure to provide adequately for the legal incorporation of private military security companies and their personnel into the armed forces, especially during deployment.⁸⁹ In 1997, an effort to sort out some of the confusion, the Department of the Army released a memorandum wherein it established that it was the contracting officer (i.e.: an officer within the private military security company) who was in charge of ‘monitoring contractor performance’, and who must then report back to the armed forces. From this statement it appears as though the private military security company personnel are removed from the military chain of command, as they now reported to their PMSC officer rather than the military.⁹⁰ Oddly it remains is the responsibility of the armed forces to maintain the physical and spiritual quality of life of the private military security company personnel.⁹¹ The inclusion of private military security companies into the armed forces means that the potential for confusion between the private military security company and the military arises. An example of this is that often the times set by dining hall services (a service normally provided by a private military security company) often conflict with military duties. The relationship and duties of the two groups is often difficult to determine as they are motivated by different objectives, so whilst private military security companies are focused on securing a profit and running on cost effective strategy, the armed forces are focused on national

⁸⁸ Note 45 above, 198.

⁸⁹ Note 71 above, 48.

⁹⁰ Note 71 above, 49.

⁹¹ Note 71 above, 49.

strategic goals. This combination of complex regulations, confusing chain of command and divergent goals creates confusion within the armed forces.⁹²

The licensing process also contains problem areas. For example by only placing limits on weapon transfers where the financial benefit for the private military security company exceeds fifty million US Dollars there exist a large number of contracts which are not susceptible to limits as the financial benefit from those contracts does not exceed fifty million US Dollars. Even for contracts whose financial benefit for the private military security company exceeds fifty million US Dollars it is only the United States embassy in the contracting country which provides the only oversight of these contracts. Currently however no oversight duty has been delegated to any officer of such an embassy. The net result being that very few contracts are able to have limits placed on them and those that do are not being monitored, as the only body which can oversee these contracts as to date not been directed to oversee any contracts.⁹³

Additional problems which exist with United States domestic legislation is that not only can the definitions provided within legislation be circumvented but also private military security companies can easily avoid prosecution by moving their operations. The lack of extra-territorial jurisdiction is another problem which plagues most pieces of domestic legislation. Legislation also predominantly only caters for contracts with the Department of Defence and not other government bodies who also make use of the services of private military security companies. Lastly a lack of officials and oversight bodies constantly checking up on private military security companies means that there is little chance of enforcing domestic legislation.⁹⁴

The United States has stuck to its use of private military security companies despite accusations of human rights abuses, and several failed attempts by Congress⁹⁵ to reserve military functions for the exclusive domain of the public sector. So for example when the US Congress tried to end the practice of employing private military security companies to interrogate detainees, the United States President argued that in some cases these personnel

⁹² Note 71 above, 50.

⁹³ Note 27 above, 344.

⁹⁴ Note 27 above, 345.

⁹⁵ Note 19 above, 13.

possessed ‘the best combination of skills to obtain critical intelligence’.⁹⁶ Never the less some in Congress remain concerned by the apparent loss of control they have over those employed to fight in United States wars.⁹⁷

Despite the existence of the aforementioned legislation, this does not always ensure the prosecution of all personnel of private military security companies as some of these personnel do not fall within the definitions within these pieces of regulation. This means that despite a responsibility under international law to prosecute the United States is unable to prosecute.⁹⁸ There are several examples of how this occurs; the ability to prosecute does exist under other pieces of legislation such as the War Crimes Act and applies to acts of torture regardless of the nationality of the perpetrator and includes members of the armed forces of the United States, but this does not appear to include the personnel of private military security companies.⁹⁹ Murder can also be prosecuted where both the victim and the perpetrator are United States nationals, but the approval of the Attorney General is required. This approval can only be granted where the murderer has not already been prosecuted for the crime, and where the suspect is no longer in the country where the murder took place, and in addition where that country is no longer able to secure the arrest of the suspect.¹⁰⁰ Other legislation also allows for the prosecution of the personnel of private military security companies however this power seldom extends to foreign nationals¹⁰¹, even if in the employ of the United States and this power does not extend to a foreign private military security company.¹⁰²

A further consideration in the ability of the United States to be held liable for the actions of personnel of private military security companies is the question of the degree of control which a state exercises over that private military security company and their personnel. In *Nicaragua v United States* the degree of control required according to the International Court of Justice was a very stringent. This meant that whilst the United States may well have been liable for certain individual actions, in order for it to be liable for the actions of the *Contras* as a whole then it was needed to be proven that the United States had effective control of the

⁹⁶ Note 19 above, 51.

⁹⁷ Note 19 above, 24.

⁹⁸ Note 52 above, 20.

⁹⁹ Note 52 above, 22.

¹⁰⁰ Note 52 above, 22.

¹⁰¹ Note 52 above, 22.

¹⁰² Note 61 above, 622.

military operations during the period when the alleged violations occurred.¹⁰³ The requirement was however altered by the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in the case of *Prosecutor v Tadic* who found the decision in *Nicaragua v United States* to be confusing and also inconsistent with international law around state responsibility. International law makes states responsible for the actions of individuals who aren't state organs so long as they are acting on behalf of the state. The Appeals Court stated that the international law requirement is that states must exercise control over that individual in order to be liable for the actions performed by that individual but that the degree of control may vary according to the factual circumstances of each unique case.¹⁰⁴ The decision of the Appeals court therefore was that state responsibility arises out of two potential circumstances; either a state official commits an unlawful act, or private individuals who are acting as de facto states organs perform an unlawful act. In order to be considered a de facto state organ the individual needs to be paid or financed by the state and that there conduct must be supervised and authorised by the state.¹⁰⁵ The impact on the United States in particular may mean that by placing private military security companies under the jurisdiction of the UCMJ that based on either the *Nicaragua* or *Tadic* decisions the personnel of private military security companies are meeting the requirements of effective control and de facto state organs and that the United States is responsible for their actions.¹⁰⁶

When the International Criminal Court (ICC) was established with the Rome Statute in 2002 and the possibility of the American military personnel being brought to justice based on the state responsibility findings in *Tadic* the United States responded by entering into Article 98 Agreements with over ninety countries. These agreements prevented either party from turning over the military or private military security company personnel to the ICC without the other parties consent.¹⁰⁷

¹⁰³ Note 50 above, 233.

¹⁰⁴ Note 50 above, 233.

¹⁰⁵ Note 50 above, 233.

¹⁰⁶ Note 50 above, 234.

¹⁰⁷ Note 50 above, 236.

4. CONCLUSION

There is a general consensus throughout the various acts and committee reports discussed above that the United States has sought to outlaw mercenaries and prevent their citizens from at the very least recruiting mercenaries¹⁰⁸, and secondly that there is a need to regulate private military security companies and hold them accountable for their actions.¹⁰⁹ Moreover the creation of a licensing system under the AECA indicates the United States desire to utilise private military security companies, and even the SOSA creates room for exceptions to allow for the use of private military security companies.¹¹⁰ When problems with various acts have been mentioned above it has mainly been to raise concern over the lack of oversight of private military security companies¹¹¹ or that further offences need to be included.¹¹² The simple conclusion therefore is that what the United States should be looking to do is further regulate and monitor the private military security industry.

United States laws and in particular the AECA show a trend towards the creation of a regulatory system of laws rather than the explicit banning of both mercenaries and private military security companies such as is seen in the South African legal system.¹¹³ There are also those who argue that despite some of the problems faced by the United States in regulating private military security companies that its attempts at licensing defence articles and services could well serve as examples for other countries and the difficulties that it has faced with oversight could serve as good lessons for other countries.¹¹⁴

With the jurisdiction of UCMJ being increased and the possibility arising that the United States may well be held responsible for the actions of the personnel of private military security companies there is a need for the United States not only to clarify the role played private military security companies but also to consider incorporating private military security companies into the armed forces so as to exert great control over them.¹¹⁵ This would be done in order to protect both civilian and military commanders from being held criminally liable for the commission of offences by private military security company personnel.¹¹⁶

¹⁰⁸ Note 25 above, 668.

¹⁰⁹ Note 45 above, 195.

¹¹⁰ Note 19 above, 25.

¹¹¹ Note 13 above, 539.

¹¹² Note 1 above, 344.

¹¹³ Note 30 above, 254.

¹¹⁴ Note 9 above, 51.

¹¹⁵ Note 50 above, 215.

¹¹⁶ Note 50 above, 235.

It is important to remember that the current structure of the armed forces of the United States is such that private military security companies form an integral and permanent part of it. Therefore whatever future steps are taken they need to be developed with this fact in mind.¹¹⁷ Bearing in mind the integral role played by private military security companies within the armed forces the findings of the report of the Senate Armed Services Committee, 'Inquiry into the Role and Oversight of Private Security Contractors in Afghanistan,' which was approved in 2010 should be worrying to Congress. The report highlights that not only are there gaps in terms of responsibility and accountability with regard to private military security companies but that these gaps pose a risk to civilians, military and private military security company personnel and military missions. The inquiry found that the United States government is failing to sufficiently oversee private military security companies and their actions. That the Department of Defense is failing to enforce policies designed to hold private military security companies accountable and prevent deficiencies from arising and finally United States military personnel are being put in harm's way because the Department of Defense is not properly training the personnel of private military security companies.¹¹⁸ The potential result of this lack of government oversight is that with an increased legal duty the United States will be finding itself responsible for more and more criminal offences.¹¹⁹ In order to deal with this possibility the United States has entered into Article 98 Agreements with currently over ninety countries. The Article 98 Agreements guarantee that neither party to the agreement will surrender a national of the other party to the ICC without the consent of that party. It would appear that these agreements cover the personnel of private military security companies. These agreements however are merely short term solutions as they don't actually deal with legal culpability and there is always the possibility of countries to refuse to accept these agreements or fail to uphold them and whilst this might not always currently be in a countries interest there is no guarantee that in the future countries will still depend on support from the United States. Mexico is a good example of a country which has refused to enter into such an agreement with the United States. Lastly the agreements don't cover personnel of private military security companies when employed by a nation other than the United States.¹²⁰ The United States has also entered into over 120 contracts with various

¹¹⁷ Note 6 above, 61 & 62.

¹¹⁸ Note 19 above, 27.

¹¹⁹ Note 50 above, 215.

¹²⁰ Note 50 above, 236.

private military security companies whereby the United States is required to cover any liability incurred by the private military security company. Whilst this may protect the private military security company, not only do the American taxpayers have to foot the bill¹²¹ but bilateral agreements such as the two mentioned above are not an appropriate response to the growth of the private military security industry. A better and longer term solution may well be the establishment of an international norm of incorporation which would resolve questions of legal responsibility and allow the United States to fulfil its foreign policy objectives.¹²²

There are several incentives for the United States to establish and buy into an international regulatory system. The starting point is to understand that currently the United States is the leading supplier and user of private military security companies and their personnel. This means that they are leading the industry and have an enormous ability to influence the industry. It is therefore in the best interest of the United States to utilise its current industry dominance to dictate how international law should regulate the private military security industry.¹²³ The United States however cannot expect this industry dominance to last forever and so it needs to act before other countries such as China or Russia start to gain too much influence in the industry. In the future with other countries increasing their use of private military security companies the United States would also want to be able to hold countries accountable for the actions of private military security company personnel in their employ and this is not going to be possible without an international system which forces states to be held responsible for the actions of such personnel.¹²⁴ The benefit to a future with a larger private military security industry is that true competition not only drives down costs, which is a major public criticism of private military security companies, but also improves service delivery, which also happens to be concern raised about current private military security companies.¹²⁵ It is also unrealistic to expect other countries to sit idly by whilst being adversely affected by private military security companies and not have the power to do anything about it. It therefore makes sense for the United States to create an international system if it is going to continue to utilise private military security companies, which has already been noted as an almost certainty.¹²⁶ Lastly the incorporation of private military

¹²¹ Note 1 above, 345.

¹²² Note 50 above, 236.

¹²³ Note 50 above, 215.

¹²⁴ Note 50 above, 242.

¹²⁵ Note 71 above, 42.

¹²⁶ Note 50 above, 241.

security companies into the armed forces would increase control and accountability and in the process decrease the likelihood of offences against international laws.¹²⁷

In final conclusion noting that what has been discussed above clearly indicates the entrenched nature of private military security companies within the United States armed forces, and the development of a legal system which is clearly a regulatory mechanism which is evolving through various amendments to create better regulation, accountability and criminal jurisdiction. The incentives just discussed make a strong argument for the United States to buy into an international regulatory system where currently they would have the power and dominance to influence it so as to benefit their reliance and use of private military security companies.

¹²⁷ Note 50 above, 237.

CHAPTER FOUR

UNITED KINGDOM

1. INTRODUCTION

The United Kingdom has had a long association with mercenaries and private military security companies which includes the government of the United Kingdom itself hiring mercenaries such as the hiring of Hessian soldiers during the American War of Independence.¹ In 1815 the United Kingdom licensed private companies such as the East India Company, which was used by the British government to colonise India, and had an army of 150 000 soldiers.² The result of this long history and association with mercenaries and private military security companies is that the United Kingdom also has a long history in legislating and regulating the activities of mercenaries and private military security companies.³

With the rise of the modern private military security company the use of mercenaries is no longer necessary for the United Kingdom who continues their use of private military security companies to this day.⁴ Despite, for example, having ended its combat operations in Iraq the United Kingdom still has several private military security companies on the ground in Iraq and Afghanistan. There are also British incorporated private military security companies who are serving contracts with the United States Department of Defense.⁵ Almost 80 per cent of British Army training program is conducted by private military security companies⁶ and some reports reveal that the number of privately employed personnel working for the British Army may exceed the number of publically employed personnel.⁷ Unlike the United States, the United Kingdom does not have a licensing system for its private military security companies. Instead it relies on a system of self-regulation based on an industry-wide voluntary code of

¹ D Shearer, 'Outsourcing war' (1998) 112 *Foreign Policy* 68, 69&70.

² Note 1 above, 69&70.

³ Note 1 above, 69&70.

⁴ A Irvin, 'Rethinking the role and regulation of private military companies: What the United States and United Kingdom can learn from shared experience in the war on terror' (2011) 39 *GA. J. INT'L & COMP. L.* 446, 446.

⁵ *Ibid.*

⁶ D Whyte, 'Lethal regulation: State-corporate crime and the United Kingdom government's new mercenaries' (2003) 30 *Journal of Law and Society* 575, 576.

⁷ C Walker & D Whyte, 'Contracting out war?: Private military companies, law and regulation in the United Kingdom' (2005) 54 *The International and Comparative Law Quarterly* 651, 652.

conduct.⁸ The result is that currently private military security companies within the United Kingdom have very little legislative oversight.⁹ The British government is therefore under a great deal of pressure to create regulations for the private military security industry. To date the preferred method for regulating the industry, according to the Foreign and Commonwealth Office, involves three components: Firstly, the development of a code of conduct for private military security companies, secondly to try restrict any contracting with private military security companies to those companies which follow this code of conduct, and lastly, to develop global standards for the private military security industry by working with other international actors.¹⁰

Unlike the United States, the British Government has not yet elected to prosecute any personnel of a British private military security company, but the reality is that there is a very real risk that very soon the need may arise for scrutiny of the British government and there stance on PMSC.¹¹ The conviction and sentencing of Danny Fitzsimons by an Iraqi court in 2011 for shooting two fellow contractors and an Iraqi guard is a clear statement from the British government that they consider the personnel of private military security companies the sole concern of the private military security companies, and not the British Government.¹² To date the only tangible step taken by the British government towards greater regulation of the private military security industry is the 2002 Green Paper¹³, which will be discussed later in this chapter.

Having analysed the history and present day reality of the relationship between the United Kingdom and mercenaries and private military security companies and highlighting some of the general problems which exist at a domestic level, this dissertation will now focus on analysing each piece of legislation independently.

⁸ Note 4 above, 447.

⁹ The Export Control Act does provide some restrictions on the trafficking and brokering of military equipment, as does the Landmines Act which would apply to any private military security company dealing in landmines or landmine based services. These two acts, which will be discussed in more detail later on, however are not specifically designed and created to deal with private military security companies (A Irvin, 'Rethinking the role and regulation of private military companies: What the United States and United Kingdom can learn from shared experience in the war on terror' 454).

¹⁰ Note 4 above, 446&453.

¹¹ Note 4 above, 455.

¹² Note 4 above, 455.

¹³ Note 4 above, 453.

In analysing the United Kingdom's domestic legislation this dissertation hopes to provide insight into possible emerging trends within domestic legal systems, and analyse how effective domestic law has been in dealing with the different concerns posed by mercenaries and private military security companies. This chapter in particular will discuss each piece of domestic UK law in turn, and explore how each in turn deals with mercenaries and private military security companies.

2. DOMESTIC LEGISLATION OF THE UNITED KINGDOM

The first piece of British legislation dealing with mercenaries and private military security companies was the Foreign Enlistment Act of 1736. This act prevented individuals enlisting or seeking to enlist others, 'in the service of any foreign prince, State, or potentate without the prior express leave or licence of the Crown'.¹⁴ Such an activity was considered to be prejudicial to the safety and welfare of the monarch, as well as the country as a whole.¹⁵ Twenty years later, the Foreign Enlistment Act of 1756, increased the list of actors with whom a British citizen was not allowed to enlist, to include the French King. In a similar fashion the Militia Act of 1768 dictated that those who sought enlistment in the 'Scotch Brigade in the service of the States General of the United Provinces' were first required to take an oath of allegiance to the British Monarch. If a British citizen were to enlist in the services of another prince or state, without first obtaining the required permission, their actions might be punishable by a fine and/or imprisonment. During the reign of King George II this misdemeanour was re-classified as a felony, which could be punishable by death.¹⁶

In 1819, pursuant to the 1814 Treaty of Paris with Spain, in which the British government¹⁷ agreed to take all measures necessary to prevent British subjects from supporting insurgents in the Spanish Colonies in South America with their fight for independence¹⁸, the British government enacted the Foreign Enlistment Act. The purpose of this act was to provide the British government with the requisite power to enforce the consequent proclamation of neutrality which was issued in 1817. The Foreign Enlistment Act repealed the earlier pieces

¹⁴ A Layeb, 'United Kingdom legislative control of mercenary activity, its effectiveness' (1988) 45 *Mil. L. & L. War Rev.* 47, 50.

¹⁵ *Ibid.*

¹⁶ Note 14 above, 50..

¹⁷ Bowing to political and economic pressure.

¹⁸ Note 14 above, 49.

of legislation, and was more stringent, precise and elaborate.¹⁹ This new act was applicable to acknowledged and unacknowledged powers²⁰, as well as to any power which rose to power regardless of whether or not that power had assumed power via legitimate means.²¹ The 1819 Act also extended the prohibited grounds from enlistment to include the equipping or fitting out of vessels for warlike purposes²², and it was these very provisions which resulted in Great Britain being held liable during the American Civil War for allowing ships to be equipped.

The 1819 Act also re-classified any failure to comply with its provisions once again as a misdemeanour rather than a felony.²³ In 1867 a Royal Commission was appointed to investigate the shortcomings of the 1819 Foreign Enlistment Act. The Royal Commission recommended that the act be extended and amended so as to grant further and sufficient powers to the Crown, which eventually resulted in the promulgation of the Foreign Enlistment Act of 1870.²⁴ The 1870 Act is still in effect today and shall be fully analysed and discussed later in this chapter.

Currently there are four pieces of legislation which pertain to the activities of private military security companies and mercenaries: the Foreign Enlistment Act of 1870, the Export Control Act of 2002, The Landmines Act of 1998 and the Anti-Terrorism, Crime and Security Act of 2001. There is also one Green Paper, drafted in 2002, but which has not yet been promulgated. These will be explored further in detail here.

2.1. The Foreign Enlistment Act of 1870

The existing Foreign Enlistment Act of 1870 differs in two important respects from its 1819 precursor. The first is that the 1870 Act expanded the definition of a British subject from natural-born British subjects, to all British subjects regardless of how they acquired their citizenship.²⁵ The second difference was that the prohibition against service in a foreign state which is friendly with Britain was given a broader application in the new act. The effect of

¹⁹ Note 14 above, 49&50.

²⁰ This meant that the Act was applicable regardless of whether or not the British government had acknowledged the authority of the state or rebel force in question.

²¹ Note 14 above, 49&50.

²² Note 14 above, 49&50.

²³ Note 14 above, 49&50.

²⁴ Note 14 above, 51.

²⁵ Note 14 above, 51.

these two amendments made the 1870 Act the piece of British legislation which prohibited its citizens from becoming mercenaries for foreign countries.²⁶

The essence of the 1870 Act is captured in the following section:

‘If any person, without the licence of Her Majesty, being a British subject, within or without her Majesty's dominions, accepts or agrees to accept any commission or engagement in the military or naval service of any foreign state at war with any foreign state at peace with Her Majesty... [h]e shall be guilty of an offence against this Act, and shall be punishable by fine and imprisonment or, either of such punishments’.²⁷

The 1870 Act, unlike the legislation emanating from the United States, applies to acts committed both within and outside the borders of the United Kingdom.²⁸ The one thing that the 1870 Act does have in common with other countries domestic legislation is that it does not offer a definition of a mercenary, but rather seeks to criminalise mercenary type activities.²⁹

2.1.1. *Sections 4-7, 11-12 and 30 of the 1870 Act*

Section 4 of the 1870 Act prevents British citizens from enlisting their services with a foreign state's military or navy, without a licence issued by the Crown, while section 5 prevents a British citizen from boarding a ship with the intention of committing the offence mentioned in section 4 or inducing another person to board a ship for the purposes listed in section 4.³⁰ The fact that section 5 of the Act makes no references to the boarding of an aircraft perhaps speaks to the vintage of the Act, rather than the notion that aircraft are not also means used to enlist the services of mercenaries.³¹ Without mentioning the word mercenary the net effect of sections 4 and 5 is to outlaw the potential activities associated with mercenarism. The 1870 Act makes one allowance for mercenary type activities, but only on condition that the ‘perpetrator’ of these activities does so with a licence issued by the Crown.³²

²⁶ Y Sandoz, ‘Private security and international law’ J Cilliers & P Mason (ed) *Peace, profit or plunder?: The privatisation of security in war-torn African societies* (1999) 201, 217.

²⁷ Foreign Enlistment Act of 1870 Section 33 and 34.

²⁸ E Kwakwa, ‘The current status of mercenaries in the law of armed conflict’ (1991) 67 *Hastings Int'l & Comp. L. Rev.* 67, 81.

²⁹ B Barrie, ‘Private military firms and mercenaries: Potential for liability under international law’ (2005) 12 *Tilburg Foreign L. Rev.* 324, 343.

³⁰ C Beyani & D Lilly, ‘Regulating private military companies: Options for the UK government’ (2001) *International Alert* 1, 28.

³¹ H Burmester, ‘The recruitment and use of mercenaries in armed conflicts’ (1978) 72 *Am. J. Int'l L.* 37, 50.

³² Note 14 above, 53.

Section 6 of the 1870 Act also makes it an offence to induce any person to quit the British dominions, or embark on any ship within the British dominions, under the misrepresentation of what he is to be engaged in, when his actual intention is to join the services of a foreign state's military or naval forces.³³ Section 7 makes the master of a ship guilty of an offence if he agrees to take on board a person who is guilty of an offence in terms of sections 4, 5 or 6.³⁴ Section 7 also prevents the fitting or preparation of a ship within British waters, for the purpose of taking part in a military or naval operation, against a foreign state which is at peace with Britain.³⁵ Any person involved in the fitting and preparation of the ship will also find themselves liable under section 7 of the Act.³⁶ Section 12 provides that any person who aids, abets, counsels or procures the commission of any one of the offences listed in the 1870 Act shall be tried and punished as a principal offender.³⁷ In interpreting section 12, the British Courts have adopted a wide interpretation, in the interest of maintaining good relations with foreign states.³⁸

One of the questions arising from the 1870 Act is whether or not its reference to a foreign state means that it is not applicable to those who enlist in cases of civil wars or wars of self-determination. In order to answer this question most academics turn to the interpretation clause found in section 30 of the Act, which defines foreign state as: 'includ[ing] any foreign prince, colony, province, or part of any province or people, or any person or persons exercising or assuming to exercise the powers of government in or over any foreign country, colony, province, or part of any province or people.'³⁹ From this they conclude that a very wide definition is given to the term 'foreign state', and as such it is clear that those who enlist in support of parties to a civil war are also included in this definition. The result of this interpretation is that a licence issued by the Crown is needed whether attempting to join the forces of the rebels or the forces of the government.⁴⁰ In such instances a peculiar difficulty arises in that the 1870 Act requires the British government to recognise the civil war before it can issue a license required under the provision of the act. On the other hand there are those

³³ Note 14 above, 53.

³⁴ Note 14 above, 53.

³⁵ Note 14 above, 53.

³⁶ Note 14 above, 53.

³⁷ Note 14 above, 54.

³⁸ Note 14 above, 54.

³⁹ Note 14 above, 55.

⁴⁰ Note 14 above, 55.

who argue that despite this potential hurdle the 1870 Act does still apply to rebel forces. They argue that such rebels are automatically recognised by the British government, since the purpose behind the 1870 Act is to maintain Britain's neutrality, by preventing its citizens from entering or assisting any war effort of any state, or as the case may be, rebel force. To allow for an interpretation of the 1870 Act which undermines the very purpose of its existence is counterintuitive.⁴¹ There are those however who argue that section 30 requires a force, state or rebel, to have actual control or governance over territory.⁴² Since this is unlikely to be the case for most rebel groups, especially guerrilla forces, some have questioned whether or not the 1870 Act does in fact cover rebel forces.⁴³ The potential uncertainty created by the 1870 Act was best shown when, in 1937, the British Government expressly prohibited any British citizen from assisting either side of the Spanish Civil War.⁴⁴ Despite the British government never officially recognising the war, the British government made it clear that to assist without the requisite licence was an offence under sections 4 and 5, this despite recognition being required under the 1870 Act. The need for the British government to issue such a clear statement is evidence of the flaws, with regards to the status of rebels and British citizens who assist rebel forces, or at the very least the fear of there being flaws within the 1870 Act.⁴⁵ It is also worth noting that section 11 of the 1870 Act potentially covers unrecognised wars by referring to 'hostile acts'. Despite the declaration by the British government, and the provisions contained in sections 4, 5, 11 and 30, there were many British citizens who fought on both sides of the Spanish Civil War and indeed many other wars over the years. It is notable that very few have found themselves convicted under the 1870 Act or any legislation existing prior to it.⁴⁶

2.1.2. *Case law pursuant to the 1870 Act*

The reaction to the 1870 Act was not altogether supportive. Shipbuilders saw the 1870 Act as an infringement on their ability to trade and expand British trade and commerce.⁴⁷ This view was also shared by the courts, which were also of the view that the 1870 Act placed too many restrictions on the British citizen.⁴⁸ The first case decided was *R v James Carlin* where the

⁴¹ Note 14 above, 56.

⁴² Note 28 above, 81.

⁴³ Note 28 above, 81.

⁴⁴ Note 14 above, 59&60.

⁴⁵ Note 14 above, 59&60.

⁴⁶ Note 14 above, 60.

⁴⁷ Note 14 above, 56&57.

⁴⁸ Note 14 above, 56&57.

ship *Salvador* was seized by the governor of the Bahaman Islands for assisting rebels in the Island of Cuba, in violation of section 7 of the act. The Vice-Admiralty Court decided that the ship should be returned as no violation of section 7 had occurred. The court argued that the ship was not engaged against any foreign state, as the rebels did not assume to act with any of the powers of government, or control any of the territory of the Island of Cuba.⁴⁹ This decision was reversed by the Judicial Committee of the Privy Council on appeal. The committee found that they were satisfied that the rebels had in fact formed themselves into a group which formed a part of the people and territory of the Island of Cuba, and that the ship had been engaged in assisting them.⁵⁰

Another authoritative cases dealing with the 1870 Act was the case of *R v Sandoval*.⁵¹ In this case goods and munitions were purchased in Britain with the intention of being shipped to Venezuela to assist in fighting there. The court held that the act of fitting out an expedition included its preparation, and that an offence was committed in terms of the 1870 Act the moment an overt act of preparation had occurred. This was to ensure that any attempt to breach the 1870 Act could be dealt with and prevented as soon as possible.⁵²

In the case of *R v Jameson and Others*⁵³ a British subject attempted to assist a military force in their efforts to engage the Transvaal government, who opposed Cecil John Rhodes' plan to incorporate the whole of Southern Africa under British rule. The court held that any person, who assists in the preparation of an unlawful expedition, even if such assistance is provided outside one of the territories of Great Britain, shall be guilty of an offence.⁵⁴

The 1870 Act has been heavily criticised for hindering British citizens in conducting their work and inhibiting the development and expansion of the British trade and commercial empire.⁵⁵ In addition to this the 1870 Act has hardly ever been used to prosecute individuals, and has resulted in even fewer convictions despite British civilians being involved in several conflicts since its adoption.⁵⁶ One of the biggest criticisms levelled at the Act is that the idea

⁴⁹ Note 14 above, 56&57.

⁵⁰ Note 14 above, 57.

⁵¹ (March 1887), 56 *The Law Times* (1887) 526-529.

⁵² Note 14 above, 58.

⁵³ (July 1896), 2 Queen's Bench Division (1896) 425.

⁵⁴ Note 14 above, 58.

⁵⁵ Note 14 above, 56.

⁵⁶ Note 29 above, 343.

of neutrality, upon which the 1870 Act is based, is no longer an acceptable foreign policy in the modern world and that the purpose behind the legislation is outdated.⁵⁷ The shortcomings of the 1870 Act were analysed by the Diplock Report.

2.1.3 *The Diplock Report*

The Diplock Committee was established as a response to the trial of several British mercenaries in Angola between 1975 and 1976, and which resulted in the public execution of those British mercenaries.⁵⁸ The Diplock report represented the findings of the committee and was released in 1976.⁵⁹ The committee was asked to analyse the 1870 Act, and to determine whether sufficient controls existed in respect of the enlistment and recruitment of British citizens as mercenaries, and then to make recommendations for either fresh legislation or for the amendment of the 1870 Act.⁶⁰

The Diplock Report found the 1870 Act inappropriate and in dire need of updating. The 1870 Act was found to be an unjustified infringement on the rights and freedoms of British citizens, in that it prevented them from working overseas in the security industry – assuming that they were mercenaries.⁶¹ The Diplock Report stated that those prohibited mercenary type activities should be defined not on the basis of motivation for private gain, but rather that the more pertinent enquiry should look at the purpose for which the individual's had been hired. The Diplock Report went further to say that any definition of mercenarism which was dependant on determining an individual's motivation would be impractical and unworkable.⁶² A more accurate means of determining whether such activities were acceptable would be by looking at the purpose for which these individuals were hired and what the potential consequences of their actions might be.⁶³

The Diplock Report also concluded that the wording and requirements of the 1870 Act were outdated and unusable. Some of the problems highlighted in the Report included the fact that the 1870 Act only referred to those individuals who departed by ship, without making any mention of more modern forms of transportation. The 1870 Act is also not applicable to

⁵⁷ Note 30 above, 29.

⁵⁸ Note 30 above, 29.

⁵⁹ Note 28 above, 81.

⁶⁰ Note 14 above, 61.

⁶¹ Note 30 above, 29.

⁶² Note 31 above, 37.

⁶³ Note 30 above, 29.

Commonwealth countries, especially those which still keep the British Monarch as their monarch, since the 1870 Act speaks of ‘foreign states’ consequently excluding any activities carried out on the territory of Commonwealth countries. Finally the 1870 Act was originally designed to support the policy of neutrality, which in 1870 might have had political purchase, but which today has undergone significant modern developments, none of which the 1870 Act has been kept abreast of.⁶⁴

The final recommendations of the Diplock Report was that British citizens seeking work outside the territory of Britain, in undertaking mercenary type activities, should be allowed to pursue these activities so long as the countries they wish to work for are not on a restrictive list, which was to be drawn up by the British government.⁶⁵ The hiring and training of mercenaries within Britain should however remain prohibited.⁶⁶ The main problem with the recommendations made by the Diplock Report is that they concern themselves too heavily with internal regulation, and do not consider international obligations and consequences which flow from British policies.⁶⁷ The findings of the Diplock Report in 1976 have since become outdated and are no longer in tune with the modern international and domestic movement towards regulation rather than outright prohibition of ‘mercenary type’ activities, and fails to deal with the rise of private military security companies⁶⁸ and the nuance responses that this new actor demands of states in their regulation of mercenary type activities.

2.2. The 2002 Green Paper, ‘Private Military Companies; Options for Regulation’

The 2002 Green Paper on ‘Private Military Companies; Options for Regulation’ (Green Paper) was the product of a House of Commons Foreign Affairs Committee which reported on the role of the private military security company Sandline International and the role they played in Sierra Leone in 1997. Sandline International had apparently received approval from the Foreign Office in 1997 to ship weapons to Sierra Leone, in breach of a United Nations embargo, in what would become known as the ‘Arms to Africa’ affair. The effect of the ‘Arms to Africa’ affair was to impact negatively upon the United Kingdom’s much praised and ethical stance on how it had so far conducted itself internationally and the degree of control

⁶⁴ Note 14 above, 63&64.

⁶⁵ Note 26 above, 217.

⁶⁶ Note 31 above, 37.

⁶⁷ Note 28 above, 82.

⁶⁸ Note 30 above, 29.

it had been able to hold over its citizens at an international level. The Green Paper was first presented on 13 February 2002 and sought to create legislation, after a long process of engagement with the international community, around the subject of private military security companies and mercenaries.⁶⁹

The position of the United Kingdom as set out in the Green Paper is that there is little or no prospect of successfully outlawing private military security companies and that the better approach therefore is to bring private military security companies into the fold by some form of regulatory government framework.⁷⁰ The logic behind this is that a government would rather be aware of what is happening in the private military security industry, and therefore be able to control and regulate it, rather than be unaware and unable to control the industry.⁷¹ The Green Paper also argues that not only is the growth of the private military security industry inevitable, but that there are also several benefits which arise from the use of private military security companies, and that regulating them is the best way to reap the benefit which flow from their use.⁷² The benefits noted by the Green Paper include the use of private military security companies by weak states, to create a state owned monopoly of violence, which in turn might stabilise the region. Other benefits include the economic benefits to using private military security companies rather than an entirely state funded military.⁷³ Private military security companies could also be put to greater use in the delivery of humanitarian aid, as well as an increase in the ability to fund permanently deployed forces in destabilised regions.⁷⁴ The United Kingdom government also acknowledges in the Green Paper that the best way to force disreputable private security companies to change their behaviour is to award lucrative government contracts to reputable private military security companies.⁷⁵ The export of military services and arms also comprises a large portion of United Kingdom exports and as such by regulating rather than prohibiting these companies, and therefore these exports, the United Kingdom is able to maintain the income generated from these exports. The use of private military security companies also means that there is

⁶⁹ Note 6 above, 575, 586.

⁷⁰ Note 6 above, 586&587.

⁷¹ Note 6 above, 586&587.

⁷² Note 6 above, 587.

⁷³ Note 6 above, 587.

⁷⁴ Note 6 above, 587.

⁷⁵ Note 7 above, 660&661.

less political pressure on the government of the United Kingdom as there would be if they were to utilise their armed forces.⁷⁶

The Green Paper lists six options for the United Kingdom government to consider going forward with its legislation regarding the private military security industry. They are:

- a ban on military activity abroad
- a ban on recruitment for military activity abroad
- a licensing regime for military services
- registration and notification
- a general licence for private military security companies
- self-regulation through a voluntary code of conduct⁷⁷

These six options can be grouped into three basis policy based groups:

- a ban on participation in armed conflict abroad (options 1 and 2)
- a licensing and authorisation system (options 3, 4 and 5)
- the promotion of codes of conduct for private military security companies (option 6)⁷⁸

These three groups will now each be discussed in turn to determine which option is arguably the most defensible and therefore the most likely way forward for UK legislation aimed at regulating private military security companies.

2.2.1. *A ban on participation in armed conflict abroad*

The ban mentioned in the Green Paper could either be a complete ban or the partial ban of certain activities which the government decides should be prohibited, such as direct involvement in conflict.⁷⁹ The problems which prevented the ban on participation in armed conflict abroad, as found in the 1870 Act, from being successful are likely to prevent any future ban from being effective for the same reasons. The failure of the 1870 Act in this regard, and the fact that British citizens continued to fight in wars despite the 1870 Act paint a very clear picture that such a policy is doomed to fail. One of the key problems associated

⁷⁶ Note 7 above, 660&661.

⁷⁷ P Jackson, 'War is much too serious a thing to be left to military men: Private military companies, combat and regulation' (2002) 5 *Civil Wars* 30, 41.

⁷⁸ *Ibid.*

⁷⁹ C Ortiz, 'Regulating private military companies: States and the expanding business of commercial security provision' in L Assassi, D Wigan, K van der Pijl (eds) *Global Regulation. Managing Crises After the Imperial Turn* (2004) 205, 216.

with enforcing a ban is the collection of evidence in order to enforce that ban. The problems with collecting evidence include the fact that these offences often happen in foreign countries, in regions which are difficult to reach. Moreover the current definitions of mercenarism offered by the UN and OAU also provide difficulty in collecting evidence to prove for example that profit was in fact the sole motivating factor.⁸⁰ There is also the technical difficulty of legislating the banning itself. This would require the banned conduct to be defined, and current attempts at providing such a definition have proven to be completely unable to provide a sufficient, workable and effective definition.⁸¹ Assuming that an effective definition could be created this would potentially limit the ability of humanitarian private military security companies, such as mine clearers, from performing their often essential work.⁸²

There is also a clear lack of political will to ban the actions of private military security companies. This is evidenced by the fact that there are very few convictions for mercenarism per se, despite international conventions having been in force for several years.⁸³ On the other hand there is an abundance of private military security companies and countries which engage and support their activities.⁸⁴ The general intentional intention regarding the private military security industry therefore appears to be one which is moving away from the banning of private military security companies and towards their regulation.⁸⁵ The use of private military security companies from the United Kingdom in the reconstruction efforts in Iraq are a good indication that the United Kingdom's government have little intention of banning the industry outright.⁸⁶

This option was also dismissed by the Green Paper and the Foreign Affairs Committee for the additional reasons that private military security companies provide an essential service to weak but legitimate governments, and that to ban them would inhibit the United Kingdom's ability to assist these governments.⁸⁷ The effect of the ban on the ability of United Kingdom

⁸⁰ Note 77 above, 42.

⁸¹ P W Singer, 'War, profits, and the vacuum of law: Privatized military firms and international law' (2004) 42 *Columbia Journal of Transnational Law* 521, 531.

⁸² C Kinsey, 'Regulation and control of private military companies: The legislative dimension' (2006) 26 *Contemporary Security Policy* 84, 89.

⁸³ *Ibid.*

⁸⁴ See the chapter on the United States as an example.

⁸⁵ Note 77 above, 42.

⁸⁶ Note 79 above, 217.

⁸⁷ E Krahmann, 'Private military services in the UK and Germany; Between partnership and regulation' 288.

defense exporter's ability to conduct legitimate business was also cited as a reason not to follow this option.⁸⁸ The additional fear with banning private military security companies is that these companies will simply leave the United Kingdom and set up business elsewhere, not only depriving the United Kingdom of potential trade, but also operating outside the government's control, whilst having the potential to conduct themselves in such a way so as to tarnish the United Kingdom's international image.⁸⁹

2.2.2. *A licensing and authorisation system*

The first option under this group is for a licensing regime, which is what the United States currently uses; whereby private military security companies have to apply for a licence each time they wish to provide military services or export military goods. Whilst this system does have the benefit of increased government control over the actions of private military security companies, the downside is that this type of regime creates a lot of administrative work for both the government, as well as the private military security company. There is also the potential of delays in the awarding of these licences as a consequence of the administrative burden which accompanies this type of licensing regime.⁹⁰ This has the potential to impact negatively upon the profits of a private military security company. It is also cited as one of the reasons why United States private military security companies are less inclined to take on overseas contracts, than private military security companies emanating from the United Kingdom. The reason for this is that in an industry which requires a quick response and ability to adapt rapidly to change, private military security companies which do not have to jump through several administrative hoops are more likely to succeed and be awarded the contract, than those who have to secure a government license prior to deployment. In the United States this system works because the federal government is the largest customer for private military security companies, and so they are willing to deal with all the administrative burdens if it means large and lucrative contracts. The government of the United Kingdom does not offer as lucrative contracts as the government of the United States and therefore private military security companies are more likely to suffer from a delay in the granting of licenses for their foreign work.⁹¹ The licensing option also crucially allows for a contract by

⁸⁸ *Ibid.*

⁸⁹ Note 6 above, 588.

⁹⁰ Note 77 above, 42.

⁹¹ Note 77 above, 43.

contract analysis, allowing the government to control the impact that private military security companies have especially within various contexts and ever changing situations.⁹²

The second option presented under this group is one which requires notification. The effect of this is that private military security companies would have an automatic licence to operate but would have to provide the government with notice of their potential actions, affording the government the ability to prohibit that action. This does solve the problem created by the administrative burden which accompanies the licensing mechanism, however it too creates its own problems as well. These problems include the potential for private military security companies to be evasive in providing their notification and therefore either not providing it at all or delaying when they provide it, as well as not providing full and complete notification, and lastly that it is difficult to monitor changes to the action requested in the notification, especially when the ever changing nature of conflict is taken into account. This system also lessens the hold that government is able to exercise over private military security companies, especially in comparison to the licensing approach, which could impact the United Kingdom's ability to manage effectively its impact on the international stage.⁹³

The third option under this group is a the granting of a general licence that would for example allow a private military security company to operate in a set of listed countries, and perform a selection of listed activities. This would allow for the government to set out clear standards of practice while still exercising a degree of control over private military security companies without hindering these companies with too many administrative burdens.⁹⁴ This option might not provide as much control over private military security companies as the government might like, but could potentially be paired with another regulatory mechanism in order to overcome this problem.⁹⁵ The granting of a general licence implies that the government supports that particular private military security company. This could prove problematic when the company is not well known, or if the company breaches international laws or commits human rights violations.⁹⁶

⁹² C Holmqvist, 'Private security companies: The case for regulation' (2005) Policy paper 9 *Stockholm International Peace Research Institute* 1, 53.

⁹³ Note 77 above, 42.

⁹⁴ Note 77 above, 43.

⁹⁵ Note 87 above, 289.

⁹⁶ Note 82 above, 96.

The overarching concern for all three of these options however is the question of monitoring, which is also a problem with the United States licensing system. Effective monitoring is costly and cumbersome, but essential to ensure that private military security companies obey international regulations and laws, and abide by any requirements placed on them by the government of the United Kingdom or various codes of conduct.⁹⁷

2.2.3. *The promotion of codes of conduct for private military security companies*

This option aims to help develop the respectability of the United Kingdom's private military security industry whilst at the same time ensuring that private military security companies operate in accordance with international laws, including the respect for human rights, a state's sovereignty as well as ensuring their conduct is transparent. This is done by creating a voluntary code of conduct and forming a trade association. The trade association would also have some of the difficulties faced by the government, such as an inability to evaluate the activities of private military security companies whilst abroad. The general consensus is also that from a regulatory perspective that a voluntary code of conduct cannot be effective by itself and would have to be used in conjunction with one of the licensing mechanisms discussed above. Those in favour of a code of conduct cite the fact that many private military security companies currently have their own independently developed codes of conduct which they hold themselves accountable to.⁹⁸ This option does not allow for companies and individuals to be held accountable for any offences which they commit. This creates not only a negative perception for the United Kingdom, but also undermines the principles of justice and international law.⁹⁹ The lack of power associated with this option also means that government has no say in how private military security companies engage with other countries at an international level, and not having control over this process could potentially be detrimental for the United Kingdom.¹⁰⁰

To date however no real action has been taken by the government of the United Kingdom towards adopting any of the options identified by the Green Paper. The current attempts at a form of regulation are fragmented and come from several other laws, most of which were not designed specifically for the private military security industry.¹⁰¹ This delay has been

⁹⁷ Note 92 above, 54.

⁹⁸ Note 77 above, 43.

⁹⁹ Note 82 above, 96.

¹⁰⁰ Note 82 above, 97.

¹⁰¹ Note 87 above, 289.

attributed to the negative public perception around private military security companies, especially after incidents such as the 'Arms to Africa' affair. The government of the United Kingdom may also be taking their time so as to ensure that the best policy and method of regulation is created, so as to prevent any detrimental effects on international security or any more events like the 'Arms to Africa' affair which would inhibit the good work being done by private military security companies at present.¹⁰² The decision is also an important one and therefore one requiring a great deal of thought, as it is likely to affect how other European countries regulate their private military security industries.¹⁰³ A further explanation for the delay in implementing the recommendations of the Green Paper has been opposition from within British parliament and most particularly the Labour Party which disagrees with the Green Paper's recommendation handing over power to private military security companies.¹⁰⁴ The Labour Party feels that such military power must remain entrusted with government.¹⁰⁵ The laws which currently assist in the regulation of private military security companies include the Export Control Act and the Terrorism Act which will be discussed next.

2.3. *The Export Control Act*

The Export Control Act of 2002 (ECA) was promulgated in order to update United Kingdom legislation, and bring it in line with current European Union and international standards. ECA therefore replaces the Import, Export and Customs Powers (Defence) Act of 1939.¹⁰⁶ Sections 2 (technology transfers) and 3 (technical assistance) can be applied to private military security companies, and even have the potential to be applied on an extra-territorial basis if a citizen of the United Kingdom is involved. These two sections can be used to prevent private military security companies from trading in military equipment and on the basis of concern about an 'adverse effect on peace, security or stability in any region of the world or within any country'.¹⁰⁷ The conduct of private military security companies is potentially further regulated by the Trade in Goods (Control) Order 2003 and the Trade in Controlled Goods (Embargoed Destinations) Order 2004. These two orders have the effect of preventing persons from trading in restricted or controlled goods to any country or embargoed country. The ECA however does not specifically cater to regulate the private military security

¹⁰² Note 82 above, 86.

¹⁰³ Note 82 above, 54.

¹⁰⁴ Note 29 above, 343&344.

¹⁰⁵ Note 81 above, 540&541.

¹⁰⁶ Note 87 above, 287.

¹⁰⁷ Note 7 above, 657.

industry, and is more focused on regulating and preventing the trade and creation of weapons of mass destruction. The ECA does not concern itself with the trade of normal weapons and where it prohibits technical assistance it is not referring to military consulting and training.¹⁰⁸

2.4. *The Landmines Act*

In terms of Section 2(1) of the Landmines Act 1998; no person shall:

- (a) use an anti-personnel mine;
- (b) develop or produce an anti-personnel mine;
- (c) participate in the acquisition of a prohibited object;
- (d) have a prohibited object in his possession; or
- (e) participate in the transfer of a prohibited object.

It is also an offence to assist, encourage or induce any other person to engage in any conduct mentioned in subsection (1). Section 3 makes it clear that the bans also apply outside the jurisdiction of the United Kingdom as well as within. Despite the provision in the Landmines Act when there were allegations made against Dyncorp Aerospace Ltd that they were in the process of storing landmines in preparation for the Iraqi War. There was no legal action or follow up to the allegations.¹⁰⁹

2.5. *The Terrorism Act*

The Anti-Terrorism, Crime and Security Act of 2001 is designed to prevent the training and recruitment of personnel for the purposes of committing acts of terrorism. The definitions in Section 54 also prevent the training of personnel in the production of radioactive or chemical weapons. The Terrorism Act applies to British citizens and residents, and applies both within the territories of the United Kingdom and outside them. The Act which was originally created in response to the Irish revolts was more recently being used to protect the United Kingdom's military forces in Afghanistan and Iraq.¹¹⁰

¹⁰⁸ Note 87 above, 288.

¹⁰⁹ Note 7 above, 657.

¹¹⁰ Note 7 above, 655&656.

3. CONCLUSION

The current UK approach to legislating the private military security industry is entirely outdated and does not cater for the industry in its current form. The few pieces of legislation which do apply to private military security companies, only applies to them indirectly and only regulates certain sectors of industry. The government of the United Kingdom has also failed to implement any of the recommendations of the Green Paper and has therefore left the industry to be regulated largely by itself, as well as international law or the laws of the countries in which its private military security companies operate.¹¹¹ The continued use and acceptance of the practices of British private military security companies indicates government's acknowledgment of the uses of this industry, but without more comprehensive legislation and regulation the United Kingdom's government does not fully exercise the potential control it could exert over the industry via regulations.¹¹² The reality is that British private military security companies are currently active in conflict areas around the world and that the United Kingdom needs to develop some form of regulation for them.¹¹³ The difficulty is going to be how much control the government exerts over these companies without preventing them from being profitable but also allowing the government control to be effective.¹¹⁴

¹¹¹ Note 4 above, 460.

¹¹² Note 87 above, 289.

¹¹³ Note 79 above, 216.

¹¹⁴ Note 79 above, 216.

CHAPTER FIVE

SOUTH AFRICA

1. INTRODUCTION

South Africa has a long history with of its citizens being contracted as mercenaries and personnel of private military security companies which goes back as far as the 1960's.¹ More recently however the context which establishes South Africa's current stance on mercenaries and private military security companies begins at the end of apartheid. During apartheid the South African government had trained a large standing army which was drastically down sized when apartheid ended, and the new democratic government was elected into power.² This created a ready supply of trained military men who suddenly found themselves without a job. These were the people who then entered the booming 'guns for hire' market in Africa, either by acting alone or by joining private military security companies such as Executive Outcomes.³ Executive Outcomes capitalised on this surge in supply by privatising entire battalions of the former South African Army.⁴ The new South African government's initial response to private military security companies such as Executive Outcomes was to tolerate them as they arguably played an important role in assisting with the peaceful transition of South Africa from apartheid to democracy, by removing from the country those most likely to attempt to disrupt this transitional process.⁵

Executive Outcomes was one of the largest private military security companies in South Africa and contracted with several countries, primarily within Africa. It secured contracts ranging from twenty million to one hundred million US Dollars per year.⁶ Executive Outcomes had its biggest impact on the African continent, where it assisted in the creation and training of a number of professional armed government forces⁷, played an important role in ending conflicts in Angola (1994) and Sierra Leone (1996), and stabilised these countries so as to allow for the best circumstances for the new governments of Angola and Sierra

¹ S Franklin, 'South African and international attempts to regulate mercenaries and private military companies' (2008) 17 *Transnational Law and Contemporary Problems* 240, 247.

² Note 1 above, 246.

³ Note 1 above, 246.

⁴ Note 1 above, 246.

⁵ Note 1 above, 246.

⁶ Note 1 above, 247.

⁷ K O'Brien, 'PMCs, myths and mercenaries: The debate on private military companies' (2000) 145 *The RUSI Journal* 59, 60.

Leone to succeed.⁸ Executive Outcomes also provided non-combatant services which included mine clearing, as well as medical and welfare services, and the rebuilding and creation of infrastructure. These services also had a positive impact on the stability within several African countries.⁹ These positive effects, in addition to removing potential trouble makers from South Africa, have often been cited as justification for why the South African government permitted the existence of Executive Outcomes. It should also be noted that Executive Outcomes never undertook a contract which was contrary to the foreign policy of the South African government¹⁰ and in fact Executive Outcomes contracts were often punted by the South African government in the rest of Africa.¹¹ Despite the stabilising effect which Executive Outcomes brought to the region, there were already questions being asked about its influence¹², and its access to natural resources in Angola and diamond fields in Sierra Leone, as part payment for their activities. Executive Outcomes had strong connections to the Branch-Heritage Banking Group and as a result the subsidiaries of the Branch-Heritage Group received concessions to those resources from Executive Outcomes.¹³ The payment by means of granting concession to state resources was not only creating bad publicity for South Africa internationally, but these activities were also beginning to attract the attention of the United Nations Special Rapporteur.¹⁴

The growing international criticism levelled at the activities of many South African private military security companies, including Executive Outcomes, is often cited as one of the reasons for the creation of South Africa's first piece of anti-mercenary legislation, the Regulation of Foreign Military Assistance Act (FMA) of 1998.¹⁵ Pursuant to the entry into force of the FMA Executive Outcomes terminated all its services with effect from January 1999, citing in part the negative public criticism and the constrictive provisions contained within the FMA.¹⁶ Most of Executive Outcomes' personnel still operate in Africa within other private military security companies, although these personnel are no longer based

⁸ Note 1 above, 247.

⁹ Note 7 above, 60.

¹⁰ Note 7 above, 60.

¹¹ Note 7 above, 60.

¹² Note 1 above, 247.

¹³ F Mathieu & N Dearden, 'Corporate Mercenaries: The threat of private military and security companies' (2007) 34 *Review of African Political Economy* 744, 747.

¹⁴ Note 1 above, 247.

¹⁵ E Frye, 'Private military firms in the new world order: How redefining "Mercenary" can tame the "Dogs of War"' (2005) 73 *Fordham Law Review* 2635.

¹⁶ Note 7 above, 59.

within South Africa.¹⁷ At an international level, the fall of Saddam Hussein and the advent of the Afghan conflict, saw coalition forces spread thin on the ground, and an increasing demand for private military security companies and their personnel, to not only train police forces in Iraq and Afghanistan but also to protect key infrastructure and people.¹⁸ These conflicts have also proved a fertile ground for South African nationals seeking employment in the private security sector.

In 2005 eight men (all South African nationals) were arrested and charged under the FMA for their alleged involvement in an attempted coup in Equatorial Guinea.¹⁹ The coup supposedly involved kidnapping President Teodoro Obiang Nguema Mbasogo, in order to overthrow his government and replace him with exiled opposition politician Severo Moto.²⁰ The alleged coup was foiled however when these eight men, and their South African pilot, were arrested in Zimbabwe on route to Equatorial Guinea. The pilot along with four other South Africans was sentenced to 34 years and was imprisoned in Equatorial Guinea. Meanwhile, in South Africa, the son of the former British Prime Minister Margaret Thatcher, Mark Thatcher was charged under the FMA and plead guilty to his alleged involvement in negligently financing a plane which was used in the plot.²¹ He received a four year suspended sentence, and a R265 000.00 fine.²² Domestic charges were also brought against the other eight men under the FMA in South Africa, in the end these charges were eventually dismissed as the evidence before the court suggested that the South African government had sanctioned their actions. The court upheld the arguments of the lawyers of the eight men that at the very least the South African government had been aware of the plot and that by not acting they had tacitly sanctioned their actions.²³ This allegation of involvement on the part of the South African government was never proved and has always been officially denied by government sources.²⁴ It was in light of this case that the South African government drafted the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act of 2006 (PMA)²⁵ to improve the possibility of successfully prosecuting

¹⁷ Note 7 above, 59.

¹⁸ D Avant, 'Private security companies' (2005) 10 *New Political Economy* 121, 121.

¹⁹ Note 1 above, 247&248.

²⁰ Note 1 above, 247&248.

²¹ Note 1 above, 248.

²² Note 13 above, 746.

²³ 'S. Africa Court Drops Eq. Guinea Mercenary Charges' *Reuters* Feb. 23, 2007, available at <http://www.reuters.com/article/africacrisis/idUSL23125693>.

²⁴ Note 1 above, 248.

²⁵ Note 1 above, 247&248.

those South Africans undertaking mercenary activities. Despite being several years old, the PMA has still not received the necessary presidential proclamation in order to turn it into law.²⁶

Today South Africa is not only the only African country to have anti-mercenary legislation²⁷, but the FMA and the PMA are considered to be the harshest pieces of legislation relating to mercenaries and private military security companies in the world.²⁸ Whilst the stance of South Africa's government appears at the moment to be to remain steadfast in its principle of not utilising private military security companies as well as outlawing the export of private military security skills. The reality is that there are South African citizens who are engaged in Iraq and Afghanistan working for private military security companies.²⁹ Despite these pieces of legislation it is currently estimated that up to 20 000 South Africans are working for private military security companies throughout the world.³⁰ Moreover, the generous salaries which these international private military security companies offer has resulted in, for example, a large portion of Durban's police force resigning in order to take advantage of these offers of higher salaries.³¹

Despite what appears to be a flagrant disregard for the FMA, South Africa's legislation has yet to be put to a real litmus test, and so there are doubts as to South Africa's ability to effectively control its citizens undertaking private security jobs elsewhere. It has been suggested that perhaps less stringent controls and restrictions might actually afford South Africa better control over private military security companies, and its citizens who are employed by them.³²

This chapter will now discuss the FMA and PMA in turn, and address some of the concerns surrounding both acts. This chapter will also discuss the effects the two acts have on South Africa's ability to regulate effectively the private military security industry, before looking at what the future may hold for South Africa, by briefly analysing the Defence Review 2012.

²⁶ S Bosch & M Maritz, 'South African private security contractors active in armed conflicts: Citizenship, prosecution and the right to work' (2011) 14 *Potchefstroom Electronic Law Journal* 71, 98.

²⁷ Note 15 above, 2637.

²⁸ Note 26 above, 75.

²⁹ Note 18 above, 128&129.

³⁰ Note 1 above, 246.

³¹ Note 1 above, 247.

³² D Brooks, 'Messiahs or mercenaries? The future of international private military services' (2000) 7 *International Peacekeeping* 129, 136.

2. DOMESTIC LEGISLATION OF SOUTH AFRICA

2.1. *The Regulation of Foreign Military Assistance Act of 1998*

Prior to the promulgation of the FMA in 1998, members and auxiliary members of the South African Defence Force were prohibited from serving as mercenaries in terms of Section 121A of the Defence Act³³ which stated:

(1) Any person who-

(a) is a member of the South African Defence Force or the Reserve or an auxiliary or voluntary nursing service established in terms of this Act and who binds himself to service or renders service as a mercenary; or

(b) makes any utterance or performs any act or does anything with intent to advise, encourage, assist, incite, instigate, suggest to or otherwise persuade any member referred to in paragraph (a) to bind himself to serve or to render service as a mercenary, shall be guilty of an offence³⁴.

One of the primary objectives of the FMA was to extend this prohibition to all South African civilians, private military security companies as well as foreign civilians operating within the boundaries of South Africa.³⁵ The FMA is also a constitutionally mandated piece of legislation, as Section 198(b) of the South African Constitution states that: 'The resolve to live in peace and harmony precludes any South African citizen from participating in armed conflict, nationally or internationally, except as provided for in terms of the Constitution or national legislation'.³⁶ The FMA was drafted and adopted as a response to the controversy surrounding the involvement of Executive Outcomes and other South African private military security companies, such as Logo Logistics, in countries such as Sierra Leone, Equatorial Guinea and Zimbabwe.³⁷ The FMA is widely viewed as the most hard-lined approach to anti-mercenary legislation in the world.³⁸ This hard-line response is especially interesting considering that South Africa has not signed either of the United Nations nor OAU/AU

³³ Y Sandoz, 'Private security and international law' J Cilliers & P Mason (ed) *Peace, profit or plunder?: The privatisation of security in war-torn African societies* (1999) 201, 215.

³⁴ Defence Act 44 of 1957 Section 121A(1)

³⁵ Note 1 above, 249.

³⁶ C Ortiz, 'Regulating private military companies: States and the expanding business of commercial security provision' in L Assassi, D Wigan, K van der Pijl (eds) *Global Regulation. Managing Crises After the Imperial Turn* (2004) 205, 214.

³⁷ Note 26 above, 95.

³⁸ Note 26 above, 95.

Mercenary Conventions.³⁹ Moreover it is widely agreed that the provisions within the FMA go further than what is required in terms of these two international conventions.⁴⁰

Broadly speaking the FMA has two functions; the first is ban mercenary activity, which is defined in the act as ‘direct participation as a combatant in armed conflict for private gain’.⁴¹ The second function of the act is to regulate military assistance provided outside of South Africa, either by private citizens or members of the South African armed forces.⁴²

The FMA’s definition of what constitutes ‘mercenary activity’ is in line with what the various international conventions consider to be mercenarism.⁴³ The FMA incorporates within its definition of ‘military assistance’ any form of assistance and therefore includes, not only the provision of personnel and equipment, but also training, advice and financing operations.⁴⁴ ‘Military assistance’ however does not extend to those providing humanitarian or otherwise civilian services, which are aimed at assisting people within conflict areas.⁴⁵ Where the FMA does extend its ambit further than the requirements of the international anti-mercenary conventions is in prohibiting the provision of military assistance and requiring those wishing to provide such assistance to gain authorisation from the National Conventional Arms Control Committee (NCACC).⁴⁶

The FMA requires potential private military security companies to first gain authorisation from the NCACC, a body established in terms of the FMA, to offer ‘military assistance’, and once granted each subsequent agreement must be agreed to by the NCACC.⁴⁷ The NCACC has the ability to either grant or reject an application to provide military assistance, or it can as it sees fit add conditions to the granting of permission to provide military assistance. This permission from the NCACC needs to be received before a contract to provide military assistance can be entered into.⁴⁸ According to the FMA the NCACC should not grant authorisation for a contract where that contract would result in a ‘breach of the principles of

³⁹ Note 26 above, 95.

⁴⁰ Note 26 above, 95.

⁴¹ FMA Section 1.

⁴² C Holmqvist, ‘Private security companies: The case for regulation’ (2005) Policy Paper 9 *Stockholm International Peace Research Institute* 1, 52.

⁴³ *Ibid.*

⁴⁴ Note 42 above, 52; FMA Section 1.

⁴⁵ Note 26 above, 96.

⁴⁶ Note 26 above, 96.

⁴⁷ Note 36 above, 215.

⁴⁸ Note 42 above, 52.

international law, international human rights law, or endanger peace, destabilise or escalate conflicts within a region, support terrorism or prejudice South Africa's interests'.⁴⁹ Under the FMA, the provision of military assistance, without the permission of the NCACC, or failing to comply with the conditions imposed on such permission is an offence which carries a potential prison sentence of 10 years or a fine of not more than 1 million rand.⁵⁰ The FMA only applies however to parties of an armed conflict; the act is therefore triggered by the declaration of an armed conflict.⁵¹

2.1.1. Criticisms of the Regulation of Foreign Military Assistance Act

There are several criticisms of the FMA which broadly speaking fit into three categories. They are; the constitutionality of the FMA, the impact which the FMA has on policy considerations and lastly the lack of successful prosecutions under the FMA. Each of these categories will be analysed in turn.

2.1.1.1. Issues of constitutionality and administrative legality

Since the enactment of the FMA there have been challenges expressed regarding the constitutionality of its provisions, in light of the right to freedom of trade, occupation and profession expressed in section 22 of the Constitution of the Republic of South Africa 1996. The right to freedom of trade, occupation and profession, as set out in the case of *S v Lawrence*⁵², entitles everyone to 'free participation in economic activity and in pursuing a livelihood'.⁵³ Under the interim constitution section 26(2) the right did have some limitations, primarily that one's economic activity must be lawful, and the person must be suitably qualified if required by that profession.⁵⁴ It is worth noting that this subsection no longer exists in the final constitution, and that these restrictions to the right no longer apply. That does not however mean that the right is without any limitations in the final constitution. Rather under the final constitution this right may be limited in terms of section 36 of the 1996 Constitution. This application and understanding of the right to economic activity was also

⁴⁹ Note 1 above, 250.

⁵⁰ F Schreier & M Caparini, 'Privatising security: Law, practice and governance of private military and security companies' 107.

⁵¹ *Ibid.*

⁵² *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 (4) SA 1176 (CC). At the time of the judgment the right was then known as the right to economic activity in terms of the Constitution of the Republic of South Africa 1993 [the interim Constitution]

⁵³ *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 (4) SA 1176 (CC) 1193 para 32.

⁵⁴ *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 (4) SA 1176 (CC) 1193-1194.

endorsed by the court in *S v Jordan*⁵⁵ in a case which dealt with the right as expressed in the final constitution.

Besides the concerns that the FMA might compromise the constitutional right to freedom of trade, there have also been questions raised as to whether the provisions of the FMA will pass muster in terms of administrative law. Here critics of the FMA point out that the discretionary powers granted to the NCACC were flawed in that there was little clarity as to the factors which are to be applied⁵⁶ when they exercised their discretion. Admittedly, as highlighted in *Dawood v Minister of Home Affairs*⁵⁷, discretion is important and ‘plays a crucial role in any legal system’⁵⁸, and may be broad as well as varied, nevertheless there ultimately still has to be accountability and transparency. Consequently, whilst a committee or person may have a wide variety of factors to consider in making a decision, and they may legitimately give greater weight to some factors over others, they nevertheless are not completely unfettered in determining which factors may play a role in their decision.⁵⁹ Whilst the legislature may not be able to foresee every factor that may be relevant to the decision, and hence is allowed to provide broad and varied factors. The Legislature must still limit the factors which can be considered so as to provide some degree of certainty for those subjected to the exercise of this discretionary power. This limitation is what ensures clarity and enables a person or company to attempt to align themselves with the requirements set out by the legislature.

Having established what is meant by the right to freedom of trade, occupation and profession, as well as the requirements in terms of administrative law, the FMA will be analysed to determine whether or not it conforms to both these legal constraints.

According to section 3, the FMA prohibits the rendering of foreign military assistance, which has been broadly defined in section 1 to include the activities of private military security companies which have already been discussed. The FMA currently places an enormous amount of power in the hands on the NCACC to allow or prevent private military security

⁵⁵ *S v Jordan and Others (Sex Workers Education and Advocacy Task Force and Others)* 2002 (6) SA 642 (CC) 653, 663 & 664.

⁵⁶ *Dawood v Minister of Affairs* 2000 3 SA 936 (CC) 969 para 53.

⁵⁷ *Dawood v Minister of Affairs* 2000 3 SA 936 (CC).

⁵⁸ *Dawood v Minister of Affairs* 2000 3 SA 936 (CC) 969 para 53.

⁵⁹ *Dawood v Minister of Affairs* 2000 3 SA 936 (CC) 969

companies from operating. In terms of section 4 and 5 the NCACC has the power not only to authorise or deny a company or person's application to render foreign military assistance but also, in terms of subsection 3 of both section 4 and 5 to 'at any time withdraw or amend an authorisation so granted'. Furthermore in terms of section 7 the criteria⁶⁰ which the committee has to apply in determining whether or not to authorise a company's application is so broad that subsection (1)(g) allows for 'any other reason to be considered'.

In terms of administrative law the extremely broad and vague list of factors in section 7 of the FMA means that the NCACC has the ability to consider any and all factors which it deems necessary to consider. This lack of certainty makes it extremely difficult for applicants to accurately predict the outcome of such an application. This is because they are unsure about how to align themselves with the standards of the NCACC, as they do not know the full list of factors which the NCACC will be using. The NCACC could potentially therefore, due to this large scope, deny an otherwise legitimate application on the basis of private political agendas⁶¹, or on the basis that all applications must be denied in order to prevent completely any future links between South Africa and the private military security industry; in effect creating a blanket ban under the guise of regulation. Whatever the motives behind the denial the judicial process that potential applicants have to take after their application is denied is a long one. First they have to request reasons in terms of the Promotion of Administrative Justice (PAJA).⁶² Then they can make application to the courts for the decision of the NCACC to be overturned.⁶³ This is however a long and drawn out procedure that wastes time

⁶⁰ Section 7 of the FMA is as follows:

Criteria for granting or refusal of authorisations and approvals

(1) An authorisation or approval in terms of sections 4 and 5 may not be granted if it would-

- (a) be in conflict with the Republic's obligations in terms of international law;
- (b) result in the infringement of human rights and fundamental freedoms in the territory in which the foreign military assistance is to be rendered;
- (c) endanger the peace by introducing destabilising military capabilities into the region where the assistance is to be, or is likely to be, rendered or would otherwise contribute to regional instability and would negatively influence the balance of power in such region;
- (d) support or encourage terrorism in any manner;
- (e) contribute to the escalation of regional conflicts;
- (f) prejudice the Republic's national or international interests;
- (g) be unacceptable for any other reason.

(2) A person whose application for an authorisation or approval in terms of section 4 or 5 has not been granted by the Minister may request the Minister to furnish written reasons for his or her decision.

(3) The Minister shall furnish the reasons referred to in subsection (2) within a reasonable time.

⁶¹ S Bosch and M Maritz, 'South African private security contractors active in armed conflicts: Citizenship, prosecution and the right to work' 103.

⁶² Promotion of Administrative Justice Act 3 of 2000 S7(5).

⁶³ Note 61 above, 104.

and requires money on the part of the applicant to institute court proceedings. Given the nature of modern warfare and the speed with which conflicts flare up, such a long and uncertain process will place South African private military security companies and individuals seeking employment by international private military security companies in a heavily compromised position⁶⁴, especially in comparison to companies and individuals from other states within Africa; where there is little real domestic level regulation⁶⁵, or other international countries such as the United States where the private military security industry is flourishing.⁶⁶

From the outset the FMA undermines the right to freedom of trade, occupation and profession. It does so by defining foreign military assistance so broadly as to include the legitimate aims of private military security companies and in so doing places the burden on these companies to justify their actions, rather than force the NCACC to provide reasons as to why a company may no longer operate. This position is in contrast with the decision in *S v Lawrence*, which held that the right to freedom of trade, occupation and profession ensures free participation that can only then be limited when it can be justified by a legitimate government objective.⁶⁷ What the FMA does in its definition section is in effect create a blanket ban for the entire private military security industry. Assuming that this was not an unconstitutional limitation of the right to freedom of trade, occupation and profession, the FMA then proceeds to provide broad and unlimited powers to the NCACC in terms of the factors that need to be considered in exercising this very broad discretionary power. Not only is this unacceptable in terms of administrative law principles which demand transparency in the exercise of discretionary powers, but it is also unacceptable in light of section 22 of the Constitution. In short the FMA as it stands at present negatively affects the right of these personnel and companies to be able to engage freely in their choice of profession because not only are applicants unable to gauge their likelihood of success when they approach the NCACC, but the courts are unable to review any erroneous decision of the NCACC within the tight time frames which characterise the deployment demands of those working in the private military security industry. Sadly the contracts and employment are awarded to those individuals and companies who do not have to content with the vagaries of the NCACC.

⁶⁴ Note 61 above, 104.

⁶⁵ S Gumedze, 'Pouring wine into new bottles? The debate around mercenaries and private military and security companies' (2008) 147 *ISS Monograph Series* 21, 33.

⁶⁶ S Gumedze, 'The private security sector in Africa. The 21st century's major cause for concern?' (2007) 133 *ISS* 1, 3.

⁶⁷ *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 (4) SA 1176 (CC)

Even if one is initially successful in securing the NCACC's authorisation, there is always the potential that the NCACC will invoke section 4(3) and 5(3) of the FMA and simply withdraw its authorisation. Consequently for South African companies and citizens, there is always the possibility that in the middle of delivering in terms of a private military security contract, the NCACC can deem their actions unlawful and demand that they return to South Africa to re-apply for authorisation or face criminal proceedings.⁶⁸ This unregulated power will ultimately have the effect of making companies weary of awarding private security contracts to South African companies, and similarly circumspect of employing South African's to carry out such work abroad.

2.1.1.2. *Prosecutorial failure*

The unconstitutionality of the FMA is arguably most evident in its many attempted and mostly failed prosecutions. The first prosecution under the FMA was that of Richard Rouget, who plead guilty to recruiting persons for military assistance as well as providing logistical support and equipment in the Ivory Coast in 2003.⁶⁹ His original fine of R100 000 was reduced to R75 000 on appeal.⁷⁰ Carl Alberts was arrested in 2004 for alleged mercenary activity in the Ivory Coast. Despite initially being sentenced to two years in jail or a R20 000 fine, he eventually only paid R10 000 after entering into a plea agreement with the National Prosecuting Authority (NPA).⁷¹ As already discussed, the coup attempt in Equatorial Guinea also failed to prove the prosecutorial value of the FMA. In these cases four of the alleged coup plotters prosecuted in South Africa either plead guilty or entered into plea agreements, whilst eight others eventually went to trial and were ultimately acquitted as there was insufficient proof that they were guilty of the charges laid against them.⁷² The net effect is that under the FMA the NPA has had to rely on plea bargains and confessions, and has yet to successfully take a case to trial and secure a conviction.⁷³ Those that do plead guilty or enter into plea agreements serve very little jail time.⁷⁴ Not surprisingly, given the limitations already exhibited by the FMA in securing a successful prosecution, the NPA has generally

⁶⁸ Note 61 above, 104.

⁶⁹ Government gets tough on hired guns <http://www.iol.co.za/news/south-africa/government-gets-tough-on-hired-guns-1.110518?ot=inmsa.ArticlePrintPageLayout.ot> accessed on 26 November 2013

⁷⁰ Note 26 above, 100.

⁷¹ Note 26 above, 101.

⁷² Note 26 above, 101.

⁷³ Note 42 above, 52.

⁷⁴ Note 42 above, 52.

been reluctant to lay charges for anything but conduct which is more closely associated with uncontroversial mercenary activity, rather than military assistance or conduct associated with private military security companies. It would appear that under the FMA the NPA are toothless when it comes to private military security companies.⁷⁵ In potential response to this the South African government sought to amend section 6 of the South African Citizenship Act in order to deny citizenship to those South African's engaging in private security work without NCACC authorisation.⁷⁶ This amendment has permitted the South African government to revoke the citizenship of a South African citizenship who is working for a foreign military for 'engaging in a war under the flag of a country that the Government of South Africa does not support'.⁷⁷ This amendment has the potential to impact massively upon South African's working within the private military security industry and represented an even harder stance against the industry as a whole by the South African government.⁷⁸ This amendment which was assented to on 3 December 2013 and which commenced on 1 January 2013⁷⁹ has added subsection 3 to section 6 of the act which grants this power to the South African government. At the time of writing this however no record could be found of this section being used to revoke a South African's citizenship and it appears that in a similar fashion to the FMA the flaunting of South African laws continues without any repercussion.⁸⁰

2.1.1.3. *Policy considerations*

The FMA has also faced several criticisms from a perspective of domestic and foreign policy. The first criticism is that the FMA has not been supported by other countries, who for the most part accept and utilise private military security industry.⁸¹ This has had a negative impact on the FMA's ability to successfully prosecute individuals. It has been discussed in

⁷⁵ Note 26 above, 101&102.

⁷⁶ Note 26 above, 105.

⁷⁷ South African Citizenship Amendment Act 17 of 2010, Section 6.

⁷⁸ Note 26 above, 105&106.

⁷⁹ [http://jutastat.ukzn.ac.za.ezproxy.ukzn.ac.za:2048/nxt/gateway.dll/University%20of%20KwaZulu-Natal/Statutes%20and%20Regulations%20of%20South%20Africa/STATREG/2/30370/30371/30429/30483?f=t&templates\\$fn=document-frameset.htm\\$q=\[field%20folio-destination-name:'a17y2010'\]\\$x=Advanced#0-0-0-317099](http://jutastat.ukzn.ac.za.ezproxy.ukzn.ac.za:2048/nxt/gateway.dll/University%20of%20KwaZulu-Natal/Statutes%20and%20Regulations%20of%20South%20Africa/STATREG/2/30370/30371/30429/30483?f=t&templates$fn=document-frameset.htm$q=[field%20folio-destination-name:'a17y2010']$x=Advanced#0-0-0-317099)

⁸⁰ Note 18 above, 128 & 129.

⁸¹ JJ Messner, 'Working towards effective legislative and regulatory solutions for the private security industry in Africa' (2008) 147 *ISS Monograph Series* 145, 152.

earlier chapters how the legislation of the United States and the United Kingdom seeks to regulate rather than prosecute companies and personnel within the private military security industry. The United Kingdom's Green Paper is based on the government of the United Kingdom acknowledging the positive and global role which private military security companies can play at an international level.⁸² The United States not only regulates the provision of military assistance, through the Arms Export Control Act, but further it has extended federal jurisdiction over offences committed by personnel of private military security companies through the Military Extraterritorial Jurisdiction Act, as well as more recently the Uniform Code of Military Justice.⁸³ The effect of the US system is that private military security companies are able to monitor and regulate the activities of private military security companies, whilst also being able to hold individual personnel responsible for their actions.⁸⁴ It is clear that the intention of the United Kingdom and the United States is to attempt to incorporate private military security companies within their legal systems, as well as to regulate their activities.

The UK and US approach is in stark contrast with the perceived intention of the South African government when it drafted the FMA. The effect of the FMA has been to encourage the South African private military security industry to set up shop in other countries. A perfect example of this is Executive Outcomes, which disbanded its operation following the promulgation of the FMA, and its members have since moved into other countries and been employed by different private military security companies.⁸⁵

The South African government does justifiably, it could be argued, have the additional concern of the implications flowing from the involvement of South African Citizens in African conflicts. This is true especially considering the nature of the political and economic relationship between South African and the rest of Africa.⁸⁶ South Africa is impacted to a far greater degree by this than its western partners in the supply of private military security companies and their personnel.⁸⁷ This dissertation would argue that perhaps herein lies the reason for the key difference between South African legislation concerning the private military security industry, and for example the approach adopted by the United States. Both

⁸² Note 26 above, 96.

⁸³ Note 26 above, 97.

⁸⁴ Note 26 above, 97.

⁸⁵ Note 26 above, 98.

⁸⁶ Note 36 above, 215.

⁸⁷ Note 36 above, 215.

attempt to create some mechanism of regulation, however whilst the regulatory mechanism by the United States is designed to be a mechanism to monitor the activities of private military security companies, the regulatory mechanism of South Africa is designed to control the activities of the private military security industry from within South Africa. This is because the South African government wants to be able to manage the impact which its private military security companies and personnel have on the African continent.⁸⁸ The effect of these opposing approaches to the private military security industry is that despite several thousand South African citizens working for private military security companies and plying their trade in Iraq and other conflict areas, South Africa has not been able to prosecute these individuals due to a lack of support from countries such as the United States and the United Kingdom.⁸⁹ Furthermore the ability of companies, such as Executive Outcomes to simply transfer to another country, or for citizens of South African to change their citizenship, means that South Africa no longer has the ability to prosecute what are still in essence South African companies and citizens.⁹⁰ So for example, very soon after the beginning of the Iraq War two South African private military security companies; Meteoric Tactical Solutions and Erinys, were providing protection services without NCACC authorisation, and in the case of Erinys, without even having applied to the NCACC for such approval. Despite this no action was brought against either company.⁹¹

Another policy criticism levelled at the FMA is that its vague and broad description of 'military assistance' is likely to bring within the ambit of the act those many humanitarian actions such as de-mining or providing security for vulnerable NGOs within conflict zones.⁹² In the next breath the FMA does exclude 'humanitarian or civilian activities aimed at relieving the plight of civilians in an area of armed conflict'⁹³ from being prohibited under the act. However the net effect is that these humanitarian services, essential for creating stable countries post conflict⁹⁴, may be used by private military security companies as a

⁸⁸ Note 36 above, 215.

⁸⁹ Note 26 above, 98.

⁹⁰ P W Singer, 'War, profits, and the vacuum of law: Privatized military firms and international law' (2004) 42 *Columbia Journal of Transnational Law* 521, 540.

⁹¹ Note 50 above, 107&108.

⁹² Note 90 above, 540.

⁹³ Note 26 above, 105.

⁹⁴ Note 26 above, 105.

loophole to claim that their activities in countries such as Iraq are legitimate⁹⁵, in effect undermining the efficacy of the FMA's intended purpose.

Additionally the effect of the regulatory system, which requires the NCACC to approve every contract, amounts to the South African government officially sanctioning the actions of each and every private military security company.⁹⁶ The effect of this sanctioning is that the South African government could now be held responsible for the actions of the private military security company.⁹⁷ This means that the South African government, and not the private military security company, are held to account.⁹⁸ This power which is granted to the NCACC, which is an organ of the executive branch of government, amounts to substantial power to determine and put into effect foreign policy and most worryingly without any parliamentary oversight and therefore in violation of the democratic principle of checks and balances⁹⁹ which harkens back to how apartheid legislation gave power to the executive in order to bypass parliamentary oversight.¹⁰⁰ One of the key weaknesses of the FMA, which has already been mentioned, but deserves to be highlighted, is that due to it being a domestic law, with no real international backing it is simply undermined by private military security companies and personnel moving out of the country.¹⁰¹ Furthermore the FMA, in only being applicable to conflict zones, does not consider the situation in countries of general unrest but not conflict. These countries often utilise the services provided by private military security companies in order to prevent this unrest from erupting into full blown armed conflict. In the situation that a South African private military security company was approached to provide its services to such a country the FMA would not cover its actions.¹⁰²

Of concern is that by in effect forcing the private military security industry out of South Africa the South African government has lost the ability to control this industry and the actions of its citizens in warzones.¹⁰³ South Africa has maintained exclusive control over military and political power by not only restrictively regulating the private military security

⁹⁵ R Taljaard, 'Implementing South Africa's regulation of foreign military assistance act' in A Bryden & M Caparini (ed) *Private actors and security governance* (2006) 167, 173.

⁹⁶ Note 95 above, 167&171.

⁹⁷ Note 50 above, 108.

⁹⁸ Note 90 above, 539&540.

⁹⁹ Note 95 above, 167&171.

¹⁰⁰ Note 90 above, 540.

¹⁰¹ Note 95 above, 171.

¹⁰² Note 33 above, 216.

¹⁰³ Note 95 above, 167&169.

industry but also refusing to utilise the services of the private military security industry.¹⁰⁴ This has meant that only the South African government has been able to affect foreign policy decisions that private military security companies such as Executive Outcomes were previously able to do via the governments which they chose to work for.¹⁰⁵ This has however arguably been at the expense of the power increase experienced by the United States and the United Kingdom, who have embraced the private military security industry. This loss of power is most evident in South Africa's loss of control over its own citizens, which has already been highlighted and discussed. Despite its citizens disregarding the FMA, the South African government does not have the ability to bring its own citizens under its control and in line with the FMA. Even if it did have the ability to completely regain this control, the cost of utilising it and in effect halting the activities of South Africans in countries such as Iraq would have too high a price for South Africa in terms of international relations.¹⁰⁶ The effect therefore of the FMA is that the South African government has ceded its control over South African private military security companies and personnel to countries such as the United States and the United Kingdom.¹⁰⁷ Considering the large pool of military skills which South Africa possess, which is clearly demonstrated by the demand for South African private military security personnel by non-South African private military security companies, a move to lessen restrictions on South African private military security companies might actually improve the control which the South African government has over the private military security industry as a whole.¹⁰⁸

2.2. The Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act of 2006

The failure of the FMA to allow for the effective prosecution of those who engage in mercenarism, or who flaunt the requirements of the FMA by not seeking authorisation from the NCACC, was highlighted most by the South Africans who were involved in the attempted coup in Equatorial Guinea in 2005. This incident made the failings and short comings of the FMA abundantly clear.¹⁰⁹ The response from government was to draft the PMA, which whilst

¹⁰⁴ Note 18 above, 128 & 129.

¹⁰⁵ Note 18 above, 153, 156.

¹⁰⁶ Note 18 above, 128 & 129.

¹⁰⁷ Note 18 above, 156.

¹⁰⁸ Note 32 above, 136.

¹⁰⁹ Note 81 above, 152.

being passed by the national assembly in 2006, has still not received the crucial presidential proclamation in order for it to come into effect.¹¹⁰ In terms of the PMA:

No person may within the Republic or elsewhere -

- (a) Participate as a combatant for private gain in an armed conflict;
- (b) Directly or indirectly recruit, use, train, support or finance a combatant for private gain in an armed conflict;
- (c) Directly or indirectly participate in any manner in the initiation, causing or furthering of
 - (i) An armed conflict;
 - (ii) A *coup d'etat*, uprising or rebellion against any government; or
- (d) Directly or indirectly perform any act aimed at overthrowing a government or undermining the constitutional order, sovereignty or territorial integrity of a state.¹¹¹

The PMA does allow for military services to be provided but requires that personnel or private military security companies wishing to provide such services must first seek authorisation from the NCACC.¹¹² Section 9 of the PMA sets out the grounds on which such an authorisation could be refused:

- (a) is in conflict with the Republic's obligations in terms of international law;
- (b) would result in the infringement of human rights and fundamental freedoms in the territory where the assistance or service is to be rendered or the exemption granted;
- (c) endangers the peace by introducing destabilising military capabilities into the region or territory where the assistance or service, or humanitarian aid, is or is likely to be, provided or rendered;
- (d) would contribute to regional instability or negatively influence the balance of power in such region or territory;
- (e) in any manner supports or encourages any terrorist activity or terrorist and related activities, as defined in section 1 of the *Protection of Constitutional Democracy against Terrorist and Related Activities Act*, 2004 (Act No 33 of 2004);
- (f) contributes to the escalation of regional conflicts;
- (g) in any manner initiates, causes or furthers an armed conflict, or a *coup d'etat*, uprising or rebellion against a government; or

¹¹⁰ Note 26 above, 75.

¹¹¹ Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act of 2006 S2(1).

¹¹² Note 26 above, 99.

(h) prejudices the Republic's national or international interests.¹¹³

The PMA defines ‘mercenaries’ as ‘citizens who provide assistance in the form of advice, logistical support, training, and security services or personnel recruitment’.¹¹⁴ This too is, like the FMA, a much broader definition than that provided in the United Nations Mercenary Convention, which defines a mercenary as being essentially motivated by private gain and is employed for that specific conflict. The PMA definition brands anyone involved in any conflict for private gain as being a mercenary¹¹⁵ and, like the FMA still outlaws mercenarism.

Despite its attempt to overcome the limitations of the FMA, there remain several aspects of the PMA which harken back to the FMA, for example that those wishing to provide military services still need to gain permission from the NCACC. The PMA also prevents South African citizens from joining the armed forces of another country without obtaining the prior permission from the South African government.¹¹⁶ That said there are many aspects of the PMA which diverge from the status quo under the FMA. Primarily the PMA is intended to make it easier for the NPA to prosecute mercenaries successfully.¹¹⁷ This is achieved by increasing the jurisdiction scope of the act, in terms of the activities and areas of conflicts where the act is applicable.¹¹⁸ So for example the PMA states that:

‘Any act constituting an offence under this Act and that is committed outside the Republic by-

- (a) a citizen of the Republic;
- (b) a person ordinarily resident in the Republic;
- (c) a company incorporated or registered as such under any law, in the Republic; or
- (d) any body of persons, corporate or unincorporated, in the Republic,

must be regarded as having been committed in the Republic and the person who committed it may be tried in a court in the Republic which has jurisdiction in respect of that offence.’¹¹⁹

The net effect of this section is that any criminal activity by a South African committed outside of South Africa could be prosecuted in a South African court. This section is in direct

¹¹³ Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act of 2006 S9(1).

¹¹⁴ Note 1 above, 251.

¹¹⁵ Note 1 above, 251.

¹¹⁶ Note 1 above, 253.

¹¹⁷ Note 1 above, 253.

¹¹⁸ Note 1 above, 251.

¹¹⁹ Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act of 2006 S11(1).

response to the difficulties which the South African government faced in trying to prosecute the South Africans involved in the Equatorial Guinea in a South African court.¹²⁰

2.2.1. Criticisms of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act

Similar to the FMA the criticisms levelled at the PMA fit broadly speaking fit into two categories: the constitutionality and administrative legality of the PMA, as well as policy considerations surrounding its implementation.

2.2.1.1. Constitutional and administrative law challenges

As with the FMA, the basis for the constitutional challenge lies in terms of section 22 of the Constitution of the Republic of South Africa 1996: the right to freedom of trade, occupation and profession, while the administrative law challenge lies in the limited right of review of the exercise of discretionary powers at the hands of the NCACC. The PMA not only grants the NCACC broad discretionary powers, as was the case under the FMA, but there are also several definitional issues raised by the PMA which create even more problems for private military security companies. In the myriad of definitions set out in the PMA terms like ‘security services’ ‘assistance’ or ‘service’ are all couched in general terms, and nowhere is there any certainly given as to the specific activities which are prohibited, save to say that in most instances these terms will include all the functions and roles of private military security companies. The effect of not having specified what activities make up security services is that in terms of the PMA a person or company that provides a security service to an entity which is not engaged in a conflict zone will be just as guilty as a person or company that provides direct armed support to a combatant.¹²¹ By not differentiating between the legitimate work of private military security companies, and mercenaries, the PMA places an unfair burden on legitimate companies and individuals who now have to constantly distinguish their conduct from that of a mercenary.

Similarly the definition of ‘armed conflict’ is problematic, as it makes provision for section 6 to grant the NCACC the power to arbitrarily, due to the lack of any clear criteria as to what constitutes a conflict area, determine an area to be a conflict area. The effect of this is that by classifying, or reclassifying an area as a conflict zone, the NCACC could make the actions of

¹²⁰ Note 1 above, 253.

¹²¹ Note 81 above, 153.

companies and individuals within that area illegal.¹²² This unregulated power once again creates uncertainty and means that South African private military security companies and personnel will not be able offer assurances of meeting their contractual duties for contracts which they manage to secure.

Further, section 7(c) grants the NCACC the power to ‘at any time withdraw or amend an authorisation so granted’. Whilst the factors stated in section 9, which are to be considered by the NCACC in determining an application in terms of section 7 are once again, as with the FMA, broad. The set of factors are not only wide ranging, but highly subjective, for example; subsection (h) states that authorisation can be withdrawn when an action ‘prejudices the Republic's national or international interests’. Not only is what constitutes a prejudice subjective, but also what a national and international interest includes is also not only subjective but wide ranging.

The impact of the PMA in terms of administrative law is the same as the impact of the FMA in that it does not provide certainty, and creates a long drawn out court process in order to ensure fairness. This ultimately impacts on the right to freedom of trade, occupation and profession, by preventing people involved in the private military security industry within South Africa to compete for contracts¹²³, owing to the amount of time wasted and the uncertainty that their application will be successful. The PMA once again places the burden on individuals and companies to enforce their rights, rather than placing the onus on the NCACC to legitimately limit this right. The PMA, in granting the NCACC the power to withdraw authorisation at any time, as with the FMA, directly inhibits the ability of those involved with the private military security industry to get and keep contracts. This ultimately means that they are not able to work.¹²⁴

Lastly, considering the stance of the South African government towards its previous links with the private military security industry, the wording in section 9(h) ‘prejudices the Republic's national or international interests’ could be interpreted to mean that no company or individual must have their application granted due to the possibility of more negative media for South Africa. This in effect creates provision for the possibility of a blanket ban on

¹²² Note 81 above, 152.

¹²³ Note 81 above, 152.

¹²⁴ Note 81 above, 152.

the private military security industry. This clearly inhibits on the right, as outright bans are only allowed for unlawful professions in terms of *S v Lawrence*.¹²⁵ In order to protect the right the PMA should not create such broad powers so as to allow for the potential blanket banning of a lawful profession. It is clear that the PMA does not meet the requirements of administrative law and can therefore be argued to be unconstitutional.

2.2.1.2. *Policy Challenges*

One of the more policy related criticisms of the bill is that, like the FMA, the bill has the potential to inhibit the good and legitimate work done not only by private military security companies but also by other NGO's who provide humanitarian support in conflict zones.¹²⁶ Groups like the Red Cross and Amnesty International could be prevented from conducting their operations in conflict zones due to section 5 of the PMA, which prohibits South African based humanitarian organizations from providing assistance in countries where there is an armed conflict or in countries where the NCACC has determined that armed conflict is imminent.¹²⁷ Even though the bill does allow for an exemption to be made for South African humanitarian organisations, which would allow them to operate in conflict zones, there are no criteria about what constitutes a humanitarian organisation. Not only does this create problems for these humanitarian organisations but, as has been seen under the FMA, this creates the opportunity for private military security companies operating in conflict zones to claim that they are providing humanitarian services, and further defeat the PMA's ability to control the private military security industry.¹²⁸

The instability which is caused by the NCACC being able to at any time change the status of a conflict zone or deny a previously authorised individual or company further exasperates the situation discussed under the FMA, where South African companies and citizens are more likely to either set up shop outside of South Africa or change their citizenship in order to be able to operate in the private military security industry.¹²⁹ This has the knock on effect of further worsening South Africa's ability to control its citizens and gives more advantage to countries such as the United States and the United Kingdom.¹³⁰

¹²⁵ *S v Lawrence*; *S v Negal*; *S v Solberg* 1997 (4) SA 1176 (CC).

¹²⁶ Note 1 above, 252.

¹²⁷ Note 1 above, 252.

¹²⁸ Note 81 above, 153.

¹²⁹ Note 26 above, 100.

¹³⁰ Note 95 above, 167&169.

Those who defend the PMA argue that South Africa cannot allow for South African citizens and companies to act as mercenaries in Africa and the rest of the world, and in so doing undermine South Africa's reputation as well as destabilise other countries and regions and that therefore the PMA is an essential bill.¹³¹ These supporters fail to see that the unconstitutional nature of the PMA has the effect of further reducing South Africa's ability to regulate, and therefore exert some control over the private military security industry, and that this in fact cedes this power to other countries.¹³² The PMA does not appear to be able to deal with the current problems faced by the FMA and if anything appears to be able to potential make the situation worse.

To date there appears to have been no further development in trying to promulgate the PMA into law and online legal sources indicate that the date of commencement of the PMA is still to be proclaimed.¹³³

2.3. *The South African Defence Review 2012*

In April 2012 the Defence Review Committee, an ad hoc committee formed by the Minister for Defence and Military Veterans¹³⁴ released the South African Defence Review with the purpose of inviting interested parties to discuss the first South African Defence Review since 1998.¹³⁵ The purpose of the South African Defence Review is to map a future for the South African defence forces.¹³⁶ The South African Defence Review is not only designed to support goals and decisions made by the South African government, but is also seen as a much needed up date from the previous 1998 Defence Review. The 2012 review was intended to update the 1998 focus which had been on the integration of the former South African Army and the African National Congress's Umkhonto we Sizwe, as well as moving forward from a history of an apartheid government which had sought to destabilise South Africa's neighbouring countries.¹³⁷ The South African Defence Review speaks to broad issues and responsibilities, such as better accountability within the South African National Defence

¹³¹ Note 1 above, 252.

¹³² Note 95 above, 167&169.

¹³³ Jutastat online law resource: Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act of 2006 accessed at:

<http://jutastat.ukzn.ac.za.ezproxy.ukzn.ac.za:2048/NXT/gateway.dll?f=templates&fn=default.htm>

¹³⁴ T Murihi, 'The South African Defence Review: a contrarian perspective' (2012) Policy Brief 4 *South African Foreign Policy Initiative* 1.

¹³⁵ M Paterson, 'The South African defence review of 2012: Problems, progress, and prospects' (2012) Policy Brief 11 *Centre for Conflict Resolution* 1.

¹³⁶ Note 134 above, 1.

¹³⁷ Note 135 above, 1.

Force (SANDF), as well as the SANDF playing a bigger role within Africa, including peacekeeping on the continent, as well as ensuring better controlled South African borders.¹³⁸

The South African Defence Review also spoke on the issue of private military security companies and how best to deal with South Africa's private military security industry going forward. The South African Defence Review argued that a new debate needs to arise regarding private military security companies, as South African citizens and companies continue to be contracted to provide military and security services.¹³⁹ It noted that there is a need to regulate such companies as well as clearly establish the role of private military security companies in Africa.¹⁴⁰ The South African Defence Review also discussed that the debate needs to include a discussion about the relationship between private military security companies and current and former members of the SANDF. The South African Defence Review also made the important comment that: 'the global involvement of South African private security companies or South African citizens, particularly in defence transformation, peacekeeping and peace building in conflict and post-conflict areas will continue into the foreseeable future'.¹⁴¹ This appears to be a fresher view of the true nature of the private military security industry, especially within the South African and African context and one that concedes that the FMA and PMA may have been misguided in attempting to outlaw the industry in its entirety.

3. CONCLUSION

The FMA arose out of a need to regulate and control the activities of the private military security industry within South Africa. South Africa has however chosen to go about this process with legislation that is widely regarded as being the harshest in the world and which well exceeds the international and regional obligations to outlaw mercenarism.¹⁴² The effect

¹³⁸ Note 135 above, 1.

¹³⁹ South African Defence Review 2012, chapter 3 para 48.

¹⁴⁰ Note 135 above, 6.

¹⁴¹ Note 139 above, 48.

¹⁴² Note 26 above, 102.

of the FMA has been to force South African private military security companies out of South Africa and to encourage them to set up shop in other countries. This movement out of South Africa has meant that the South African government no longer has the ability to control these companies which form part of the private military security industry. Those companies that have remained in South Africa now operate in defiance of the FMA, or as covert operations, both of which are worse than the system before the FMA where government at least had some idea about the actions of companies such as Executive Outcomes.¹⁴³ Furthermore the effect of the FMA as well as the PMA has been to negatively impact upon those private military security companies who offer legitimate and essential military services in order to assist in the stabilising of post conflict countries. As it stands the PMA is likely to further inhibit the ability of South African humanitarian companies from providing their services in conflict zones.¹⁴⁴

The FMA has not been able to prosecute offenders successfully, due in large part to its unconstitutionality and problems arising out of administrative law. The PMA seems to have inherited these problems with the net effect being that South Africans are having their rights trampled while government acts with unrestricted power and without parliamentary oversight.¹⁴⁵

South Africa's approach to the private military security industry highlights the need for a balance between regulation, which allows private military security companies to exist and operate, and some government oversight without banning the private military security industry or at the very least driving them out of your country or underground.¹⁴⁶ The South African government needs to realise that mercenarism per se does not automatically exist within the private military security industry, and that there are potential benefits which can be gained from a viable private security industry.¹⁴⁷ This is hopefully the direction of the renewed debate which the South African Defence Review 2012 was speaking to.

Ultimately the argument is that as counter-intuitive as it may appear the solution for South Africa may lie in the loosening of its regulation over private military security companies, as

¹⁴³ Note 7 above, 59 & 60.

¹⁴⁴ Note 26 above, 102.

¹⁴⁵ Note 26 above, 105.

¹⁴⁶ Note 81 above, 153.

¹⁴⁷ Note 81 above, 153.

this will in fact increase the control which the South African government has over private military security companies and South African citizens operating for these companies.¹⁴⁸ A dialogue with these companies and engaging with them rather than seeking to control them via problematic legislation, may not only allow for better control, but also allow the South African government to utilise these companies for legitimate operations.¹⁴⁹

¹⁴⁸ Note 32 above, 136.

¹⁴⁹ Note 7 above, 59 & 60.

CHAPTER SIX

A WAY FORWARD

Having spent the past five chapters discussing the current situation regarding the legal position and regulation of mercenaries as well as the private military security industry this dissertation will now seek to provide a way forward for future regulatory attempts. With the private military security industry being an ever growing and inevitable reality in future conflict zones and humanitarian efforts, the focus needs to be on how best domestic and international law can deal with this industry.¹ Discussing how best to regulate the private military security industry will therefore be the focus of this chapter. The starting point will be a brief discussion about the lessons learnt from the previous chapters and the various international and domestic legislative attempts, and what should be avoided and potentially what works well and should therefore be built upon. The various negative and positive policy considerations that arise from the private military security industry will then be discussed. This discussion is designed so that when a possible legislative mechanism is proposed, that it prevents as much as possible the negative effects associated with mercenarism and the private military security industry, whilst at the same time allowing the positives currently gained from the private military security industry to be continued. Lastly this chapter will discuss the proposed way forward by looking at the three levels where this legislation should be put into effect, that is; at an international level, the domestic level and lastly within the private military security industry itself in terms of self-regulation.

1. LESSONS LEARNT FROM PREVIOUS CHAPTERS

The lessons learnt and discussed in previous chapters from attempts at regulating mercenarism and the private military security industry will be discussed briefly. This will include lessons learnt from international attempts, as well as the attempts of the United States, the United Kingdom and South Africa.

1.1. *International legislation*

The current conventions at an international level are designed to deal solely with mercenarism rather than private military security companies. These are the 1977 Additional Protocol I to the Geneva Conventions of 1949 (article 47), the United Nations International

¹ D Shearer, 'Outsourcing war' (1998) 112 *Foreign Policy* 68, 76.

Convention Against the Recruitment, Use, Financing and Training of mercenaries of 1989 and the OAU/AU Convention on the Elimination of Mercenaries in Africa of 1977. It was discussed that one of the biggest criticisms against article 47, the United Nations Convention and the OAU/AU Convention was that their definition of what constituted mercenarism was unworkable², too narrow and potentially created more problems than it solved³. The main reason for this was not only that the six individual elements had flaws as already discussed, but the fact that all six had to be met in order to prove that a person was a mercenary meant that proving all six elements was extremely difficult and more likely, impossible.⁴ Additional problems included a lack of enforcement mechanism⁵, limited jurisdiction⁶ as well as a lack of guidelines as to how states should implement these conventions.⁷ The result is that current international attempts to ban mercenarism are inadequate as well as ineffective.⁸

The private military security industry arose after the UN and OAU/AU Conventions were implemented, as such neither of these conventions cater for a growing and influential actor within conflict zones and on the international arena in general.⁹ Currently therefore the only existing legal mechanism which could apply to private military security companies and their personnel is International Humanitarian Law(IHL).¹⁰ In terms of IHL the four most likely classifications for private military security companies are: armed civilians (Articles 50 and 51 of Protocol I), mercenaries (Article 47 of Protocol I), accompanying supply contractors (Article 4A of the Third Geneva Convention), or members of the armed forces or militias

² E L Gaston, 'Mercenarism 2.0? The rise of the modern private security industry and its implications for the international humanitarian law enforcement' (2008) 49 *Harvard International Law Journal* 221, 232. For the unworkable definition with regards to Article 47.

S Gumedze, 'Towards the revision of the 1977 OAU/AU Convention on the Elimination of Mercenarism in Africa' 16.4 *African Security Review* ISS 22, 24. For the unworkable definition with regards to the OAU/AU mercenary convention.

M-F Major, 'Mercenaries and international Law' (1992) 22 *Georgia Journal of International and Comparative Law* 103, 116. For the unworkable definition with regards to the UN mercenary convention.

³ Note 22 above, 110.

⁴ Note 2 above, 233.

⁵ Note 2 above, 232.

⁶ M-F Major, 'Mercenaries and international Law' (1992) 22 *Georgia Journal of International and Comparative Law* 103, 132.

⁷ Note 6 above, 128.

⁸ P W Singer, 'War, profits, and the vacuum of law: Privatized military firms and international law' (2004) 42 *Columbia Journal of Transnational Law* 521, 531.

⁹ P W Singer, 'War, profits, and the vacuum of law: Privatized military firms and international law' 531; S Gumedze, 'Towards the revision of the 1977 OAU/AU Convention on the Elimination of Mercenarism in Africa' 24.

¹⁰ R Morgan, 'Professional military firms under International law' (2008) 9 *Chicago Journal of International Law* 213, 217&218.

(Article 4A(1) and (2) of the Third Geneva Convention and Article 43 of Protocol I).¹¹ Whilst, as discussed there are strong arguments for private military security company personnel being classified as civilians, there is no one category into which these personnel fit neatly and more significantly they definitely do not fit into the mercenary category.¹²

The first attempt to create international legislation specifically for the private military security industry is the Montreux Document. It provides the clearest statement to date of the relationship between private military security company and states, detailing not only legal norms, but also business, regulatory and administrative practices.¹³ The Montreux Document is important for several reasons; firstly it represents an acknowledgment by a variety of states that international humanitarian law and human rights are applicable to the laws governing conflict zones.¹⁴ Secondly the first part of the Montreux Document reinforces current international law and custom surrounding the relationship between private military security company and state. The Montreux Document is an acknowledgement by states that private military security companies do not operate in a legal vacuum and that states are responsible for their actions.¹⁵ Thirdly the Montreux document identifies the common ground between states with regards to states obligations of the regulation of the extraterritorial conduct of businesses.¹⁶

The second international attempt at filling in the void within international law with regards to the private military security industry is the International Code of Conduct for Private Security Service Providers. The International Code of Conduct for Private Security Service Providers on the other hand is a multi-stakeholder initiative designed to establish principles for the private military security industry which can ultimately be translated into industry standards against which private military security companies can be held accountable.¹⁷ To date over 500 private military security companies have signed the International Code of Conduct for

¹¹ Note 10 above, 218.

¹² Note 2 above, 233.

¹³ J Cockayne, 'Regulating private military and security companies: The content, negotiation, weaknesses and promise of the Montreux document' (2008) 13 *Journal of Conflict and Security Law*. 402.

¹⁴ Note 13 above, 403.

¹⁵ Note 13 above, 403.

¹⁶ Note 13 above, 403.

¹⁷ D Wallace, 'International code of conduct for private security service providers' (2011) 50 *American Society of International Law* 90.

Private Security Service Providers¹⁸ and along with the Montreux Document these two documents represent a strong indication of the trend of acceptance of the private military security industry. This appears to be further justified by the contrasting lack of support for the previous international conventions.¹⁹

It therefore makes sense that whatever legislative system is proposed that it needs to better cater for the private military security industry, whilst at the same time dealing with the previous failures at banning mercenarism.

1.2. United States Legislation

The United States' Foreign Relations Act of 1988 and Neutrality Act of 1794 are both designed to deal with mercenarism. Neither act defines what actually constitutes mercenarism and it has been argued that their limited scope means that they are not as effective as they could be.²⁰ Individuals are also able to sidestep both these acts via a myriad of legal loopholes, which further diminishes their efficacy to actually legislate against mercenarism.²¹

United States' legislation relating specifically to private military security companies is far more expansive, and the three key pieces of legislation are: the Arms Export Control Act (AECA), the Uniform Code of Military Justice (UCMJ) and the Military Extraterritorial Jurisdiction Act (MEJA). The AECA is designed to regulate the import and export of military articles and services by private military security companies.²² The control over defence articles and services is exercised by the International Traffic in Arms Regulations (ITAR) which implements the authority which AECA grants to the President. It is the Bureau of Political-Military Affairs which ultimately is responsible for the licensing of private military security companies.²³ A private military security companies cannot operate until such time as

¹⁸ J Crook, 'Contemporary practice of the United States relating to international law' (2013) 107 *American Society of International Law* 213.

¹⁹ Note 2 above, 232.

²⁰ B Barrie, 'Private military firms and mercenaries: Potential for liability under international law' (2005) 12 *TFLR – International Law* 324, 344.

²¹ Aldri van Jaarsveld *Private military companies as "new peacemakers" in Africa: Is regulation sufficient?* (unpublished Masters of Arts (International Studies, University of Stellenbosch, 2007) 27;

P W Singer, 'War, profits, and the vacuum of law: Privatized military firms and international law' 537.

²² S Franklin, 'South African and international attempts to regulate mercenaries and private military companies' (2008) 17 *TRANSNATIONAL Law & CONTEMPORARY PROBLEMS* 253.

²³ C Ortiz, 'Regulating private military companies: States and the expanding business of commercial security provision' in L Assassi, D Wigan, K van der Pijl (eds) *Global Regulation. Managing Crises After the Imperial Turn* (2004) 212.

it has been duly licenced.²⁴ The mechanism provided under the AECA is generally considered to be an effective one²⁵, although there are concerns regarding the details of the process, and of most concern is the lack of a follow up mechanism to provide oversight of the contracts.²⁶ The AECA also pays no attention to international law policies, but rather the decision of whether or not to grant a contract is based solely on the foreign policy considerations of the United States.²⁷

The UCMJ and MEJA are designed to extend United States jurisdiction to private military security companies and their personnel when these personnel commit offenses outside of the territory of the United States.²⁸ MEJA was created so as to deal with some of the gaps left by the UCMJ²⁹, such as the UCMJ only being applicable to those serving contracts with the Department of Defense.³⁰

One of the biggest criticisms faced by the United States with regards to its regulation of private military security companies was raised by the findings of the Senate Armed Services Committee report, 'Inquiry into the Role and Oversight of Private Security Contractors in Afghanistan' which was approved in 2010. The report highlighted the worrying lack of oversight of private military security companies contracted by the United States government, as well as the lack of training of these private military security companies and the danger which this poses to American troops.³¹ Despite this criticism, and the obvious need for a better mechanism of oversight, the United States model of regulation is widely regarded as being a model for future regulatory attempts.³² The licensing system is a strong indication of the United States' stance on the private military security industry and its desire to continue to

²⁴ Note 22 above, 253.

²⁵ Note 22 above, 253.

²⁶ Note 28 above, 539.

²⁷ Y Sandoz, 'Private security and international law' J Cilliers & P Mason (ed) *Peace, profit or plunder?: The privatisation of security in war-torn African societies* (1999) 217.

²⁸ A Ebrahim, 'Going to war with the army you can afford: The United States, international law, and the private military industry' (2010) 28 *Boston University International Law Journal* 195. For UCMJ

M Underwood, 'Jealousies of a standing army: The use of mercenaries in the American Revolution and its implications for congress's role in regulating private military firms' (2012) 106 *Northwestern University Law Review* 317, 344. For MEJA

²⁹ A Ebrahim, 'Going to war with the army you can afford: The United States, international law, and the private military industry' (2010) 28 *Boston University International Law Journal*, 537.

³⁰ M Scheimer, 'Separating private military companies from illegal mercenaries in international law' (2009) 24 *American University International Law Review* 611, 621.

³¹ J L Gomez del Prado, 'A United Nations instrument to regulate and monitor private military and security contractors' (2011) 1 *Notre Dame Journal of International, Comparative, and Human Rights Law* 1, 27.

³² C Walker & D Whyte, 'Contracting out war?: Private military companies, law and regulation in the United Kingdom' (2005) 54 *International and Comparative law Quarterly* 668.

utilise it.³³ The criticisms which have been discussed can be ameliorated by creating oversight mechanisms and including additional clauses and requirements. It is therefore also the argument of this dissertation that the United States' model of regulation is one which can be used as a starting point for future legislative proposals, and can be adapted to take into consideration concerns already discussed as well as other concerns which may arise.

1.3. United Kingdom Legislation

The only piece of legislation specifically created to regulate the private military security industry within the United Kingdom is the Foreign Enlistment Act of 1870 (the 1870 Act). The 1870 Act sought to outlaw mercenarism, not by offering a definition of mercenarism but rather by criminalising mercenary type activities.³⁴ The 1870 Act has been heavily criticised for hindering British citizens in conducting their work, and inhibiting the development and expansion of the British trade and commercial empire.³⁵ In addition to this the 1870 Act has hardly ever been used to prosecute individuals, and has resulted in even fewer convictions, despite British civilians being involved in several conflicts since its adoption.³⁶ One of the biggest criticisms levelled at the Act, is that the idea of neutrality, upon which the 1870 Act is based, is no longer an acceptable foreign policy in the modern world, and that the purpose behind the legislation, as well as the 1870 Act as a whole is outdated.³⁷ The shortcomings of the 1870 Act were analysed by the Diplock Report.

The Diplock Report found that the 1870 Act was extremely outdated, unusable and therefore in need of updating.³⁸ The Diplock Report ultimately recommended that British citizens should be allowed to conduct mercenary type activities provided that the country they were contracted by was not on a restricted list, which was to be created by the British government.³⁹ It did however recommend that the hiring and training of mercenaries within Britain should remain prohibited.⁴⁰ The Diplock Report has however become outdated, and

³³ Note 31 above, 25.

³⁴ Note 20 above, 343.

³⁵ A Layeb, 'United Kingdom legislative control of mercenary activity, its effectiveness' (1988) 45 *Mil. L. & L. War Rev.* 47, 56.

³⁶ Note 34 above, 343.

³⁷ C Beyani & D Lilly, 'Regulating private military companies: Options for the UK government' (2001) *International Alert* 1, 29.

³⁸ *Ibid.*

³⁹ Note 27 above, 217.

⁴⁰ H.C Burmester, 'The recruitment and use of mercenaries in armed conflicts' Volume 72 *The American Journal of International Law* 37, 37.

does not take into consideration international legal obligations and laws, as well as the private military security industry and the nuanced response that this new actor demands of states in their regulation of mercenary type activities.⁴¹

The most current attempt at legislating the private military security industry is the 2002 Green Paper on 'Private Military Companies; Options for Regulation' (Green Paper). The Green Paper is designed to report on possible options for the United Kingdom in terms of how best to deal with the private military security industry.⁴² The Green Paper argues that there is little point in outlawing the industry not only because of its inevitable growth but also because of the potential benefits which can arise from the regulation and utilisation of the industry.⁴³ The Green Paper also comments that the best way to force disreputable private security companies to change their behaviour is to award lucrative government contracts to reputable private military security companies.⁴⁴ The Green Paper provided six options for the British government to consider when legislating the Private military security industry, these go from banning the industry, to a regulatory mechanism as well as relying on the self-regulation of the industry.⁴⁵ To date none of these recommendations have been taken further and the British private military security industry is governed indirectly by several acts including the Export Control Act of 2002⁴⁶, the Trade in Goods (Control) Order 2003 and the Trade in Controlled Goods (Embargoed Destinations) Order 2004.⁴⁷

The United Kingdom, like the United States, appears to be accepting of the private military security industry, as it has not sought to outlaw the industry and has allowed it to operate, albeit indirectly. It is argued that the recommendations and considerations put forward by the Green Paper are useful to consider when developing a proposal for future regulation of private military security companies.

⁴¹ E Kwakwa, 'The current status of mercenaries in the law of armed conflict' (1991) 67 *Hastings Int'l & Comp. L. Rev.* 67, 82;

C Beyani & D Lilly, 'Regulating private military companies: Options for the UK government' 29.

⁴² D Whyte, 'Lethal regulation: State-corporate crime and the United Kingdom government's new mercenaries' (2003) 30 *Journal of Law and Society* 586.

⁴³ Note 42 above, 587.

⁴⁴ Note 32 above, 660&661.

⁴⁵ P Jackson, 'War is much too serious a thing to be left to military men: Private military companies, combat and regulation' (2002) 5 *Civil Wars* 30, 41.

⁴⁶ Note 32 above, 657.

⁴⁷ E Krahmann, 'Private military services in the UK and Germany; Between partnership and regulation' 288.

1.4. South African Legislation

The South African response to mercenarism and the private military security industry is considered the harshest approach in the world.⁴⁸ Currently the Regulation of Foreign Military Assistance Act of 1998 (FMA) governs how the South African government interacts with mercenaries and private military security companies and their personnel. The FMA requires potential private military security companies to first gain authorisation from the National Conventional Arms Control Committee (NCACC), a body established in terms of the FMA, to offer 'military assistance', and once granted each subsequent agreement must be agreed to by the NCACC.⁴⁹ The FMA has been heavily criticised owing to concerns around its constitutionality which are founded on vague and excessive powers being granted to the NCACC, and result in citizens of South Africa not being able to gain legitimate employment.⁵⁰ Other concerns are that the FMA has yet to produce a successful conviction⁵¹ and that despite the harsh legislation there are thousands of South African citizens who are employed as personnel for private military security companies who are not being prosecuted or even threatened with prosecution.⁵²

The Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act of 2006 (PMA) is a response to the failure of the FMA to produce convictions and prevent South African citizens and companies from operating as mercenaries and within the private military security industry.⁵³ There remain several aspects of the PMA which harken back to the FMA, for example that those wishing to provide military services still need to gain permission from the NCACC. The PMA also prevents South African citizens from joining the armed forces of another country without obtaining the prior permission from the South African government.⁵⁴ That said there are many aspects of the PMA which diverge from the status quo under the FMA. Primarily the PMA is intended to make it easier for the NPA to successfully prosecute mercenaries.⁵⁵ This is achieved by increasing the jurisdiction scope of the act, in terms of the activities and areas of conflicts

⁴⁸ S Bosch & M Maritz, 'South African private security contractors active in armed conflicts: Citizenship, prosecution and the right to work' (2011) 14 *Potchefstroom Electronic Law Journal* 71, 102.

⁴⁹ Note 23 above, 215.

⁵⁰ See the chapter on South Africa for a full discussion surrounding this issue.

⁵¹ Note 51 above, 101&102.

⁵² Note 50 above, 107&108.

⁵³ JJ Messner, 'Working towards effective legislative and regulatory solutions for the private security industry in Africa' (2008) 147 *ISS Monograph Series* 145, 152.

⁵⁴ Note 22 above, 253.

⁵⁵ Note 22 above, 253.

where the act is applicable.⁵⁶ The PMA ultimately however suffered from very similar criticism as the FMA, especially with regards to questions surrounding its constitutionality.⁵⁷ Potentially as a result of these concerns the PMA has not yet been passed into law by the president of South Africa.⁵⁸

More recently the South African Defence Review of 2012 appears to indicate a change in attitude towards the private military security industry by at the very least the Defence Review Committee who wrote the review. The South African Defence Review argued that there was a need to refresh the debate around private military security companies within South Africa, especially in terms of their regulation and what role they should play within the African continent.⁵⁹ The South African Defence Review appears to be a fresher view of the true nature of the private military security industry, especially within the South African and African context and one that concedes that the FMA and PMA may have been misguided in attempting to outlaw the industry wholesale.

The harsh nature of the South African legislation, as already argued and discussed in the South African chapter does not appear to have benefitted South Africa in any regard. It is argued that the lesson which needs to be learnt from South Africa is that there is a need to treat mercenaries and private military security companies separately. It is also important to note that even a harsh stance is not able to be enforced when that stance is not shared by other countries. The acceptance and utilisation of the private military security by the United States and the United Kingdom means not only that South Africa receives no support in attempts to prosecute and limit their citizen's involvement in the industry⁶⁰, but also that power over the industry and the ability to regulate it is lost to these countries.⁶¹ The ultimate lesson to be learnt from South Africa is that as counter-intuitive as it may appear the solution for the effective legislation of private military security companies may lie in the loosening of restrictive regulation over private military security companies, as this will in fact increase the control which governments have over private military security companies and citizens

⁵⁶ Note 22 above, 251.

⁵⁷ See the chapter on South Africa for a full discussion surrounding this issue.

⁵⁸ Note 51 above, 98.

⁵⁹ M Paterson, 'The South African defence review of 2012: Problems, progress, and prospects' (2012) Policy Brief 11 *Centre for Conflict Resolution* 1, 6.

⁶⁰ D Avant, 'The privatization of security and change in the control of force' (2004) 5 *International Studies Perspectives* 156.

⁶¹ D Avant, 'Private security companies' (2005) 10 *New Political Economy* 121, 128 & 129.

operating for these companies.⁶² A dialogue with these companies and engaging with them rather than seeking to control them via problematic legislation, may not only allow for better control, but also allow governments to utilise these companies for legitimate operations.⁶³

2. POLICY CONSIDERATIONS

This dissertation will now analyse the concerns and benefits surrounding the private military security industry. The lessons learnt from this section, like those from the previous section will be used to argue for a proposed way forward for the legislation of private military security companies.

2.1. *Concerns surrounding the private military security industry*

There are several concerns and negative consequences around the utilisation of the private military security companies. The purpose of this section is to identify those and then ensure that they are at the very least mitigated by the proposed way forward.

2.1.1. *Lack of prosecution of private security military companies and their personnel*

One of the concerns surrounding private military security companies is summed up by the events on July 18 2006 when a personnel of Triple Canopy, which is an American private military security company, whilst on duty during an escort mission opened fire on an unthreatening civilian truck. Neither the person who opened fire, nor any of the other personnel, stopped to check on the condition of the driver. On the return trip back to base the same individual opened fire on a civilian taxi which again had posed no threat to anyone or the mission, from reports later that week it appeared as if the taxi driver had been killed.⁶⁴ The individual was reported by his fellow employees and subsequently fired. Whilst Triple Canopy reported the incident to the United States Army no criminal charges were brought against the individual.⁶⁵ This incident, which is not unique, highlights a lack of consequences for the criminal activities of personnel of private military security companies.⁶⁶ Had the individual in question been a soldier in the United States Army he would have faced potential

⁶² D Brooks, 'Messiahs or mercenaries? The future of international private military services' (2000) 7 *International Peacekeeping* 129, 136.

⁶³ K O'Brien, 'PMCs, myths and mercenaries: The debate on private military companies' (2000) 145 *The RUSI Journal* 59, 59 & 60.

⁶⁴ Note 10 above, 213&214.

⁶⁵ Note 10 above, 214.

⁶⁶ C Lumina, 'Counting the cost: The impact of corporate warfare on the human rights of women and children in Africa' (2008) 147 *ISS Monograph Series* 101, 101.

domestic as well as international prosecution, and had his superiors even tacitly been in agreement with his actions, they too would have faced prosecution under international law.⁶⁷ The problem is not necessarily that there is a lack of human rights law, all combatants fall under the Geneva Conventions and states are party to various human rights conventions, the problem is that governments do not provide sufficient oversight mechanisms to ensure that the responsibilities under these conventions are enforced.⁶⁸

2.1.2. *Human rights violations*

The above story is not unique and death of 17 unarmed civilians, including women and children by the private military security company Blackwater on September 16 2007 highlights another concern about private military security companies other than just a lack of accountability, that being of human rights abuses.⁶⁹ Random and unprosecuted killings⁷⁰ are not the only human rights abuses which private military security companies are accused of⁷¹; L-3 Services which provided translators for US military prisons in Iraq has been accused by 72 Iraqi civilians of a range of criminal activity from torture and assault to inhuman and degrading treatment.⁷² There have also been media reports of private military security companies being involved in the arbitrary detention of Iraqi and Afghanistan citizens, supposedly in conjuncture with the Central Intelligence Agency (CIA).⁷³

2.1.3. *Undermining state monopoly over the use of force*

It has already been noted in this dissertation that states are considered to have a monopoly on the use of force and that private military security companies are considered as undermining this monopoly.⁷⁴ The reason that this shift causes concern is that the idea of states having a monopoly on force is the premise of the UN Charter. The thinking behind the UN Charter, in part, is that because states have this monopoly if the UN Charter is able to limit when states can utilise this force, that it can therefore limit wars and conflicts.⁷⁵ Changing this dynamic means that the UN Charter is potentially not as effective as it was before and that were states

⁶⁷ Note 10 above, 214.

⁶⁸ Note 1 above, 68, 77.

⁶⁹ Note 31 above, 17.

⁷⁰ Note 31 above, 18.

⁷¹ Note 66 above, 101.

⁷² Note 31 above, 18.

⁷³ Note 31 above, 19.

⁷⁴ E Krahmann, 'Security governance and the private military industry in Europe and North America' 259.

⁷⁵ Z Salzman, 'Private military contractors and the taint of a mercenary reputation' (2008) 40 *International Law and Politics* 854, 861.

could be held accountable to the UN when they violated the UN Charter, that the same does not apply to private military security companies.⁷⁶ One of the reasons why there hasn't been an international movement to ban private military security companies by states whose monopoly on power is being undermined, is that the major employers of private military security companies are states themselves.⁷⁷ There are therefore those who argue that private military security companies are an extension of the states' use of force rather than an undermining factor of the states' monopoly over force.⁷⁸ Whilst this may well be true for private military security companies hired by states, these companies are also hired by non-government actors, such as humanitarian organisations and because they operate outside the control of the state that they do pose a threat to this monopoly of force.⁷⁹ Of additional concern are those private military security companies hired by criminal organisations, such as those hired by the Mexican drug cartels, and their effect on undermining a states' monopoly over force.⁸⁰ This ability to work for criminal organisations however is currently possible because of the lack of regulation over the private military security industry.⁸¹ The difficulty which does arise however is how governments and regulation mechanisms decide between legitimate and illegitimate or criminal clients. This is a difficult decision especially when private military security companies are focused on making profit and therefore increasing their cliental base as much as possible.⁸² A states' monopoly over the use of force is often most undermined in developing countries, where private military security companies can in fact hold a large influence over government decision and have been known to use this to gain access to natural resources.⁸³

2.1.4. *Private military security companies leaving over-regulated countries*

The problem which existed in South Africa, with private military security companies and personnel simply dissolving and operating from a country which allows them to operate or changing their citizenship, is a problem which will always plague states that place too much

⁷⁶ Note 75 above, 861.

⁷⁷ Note 75 above, 862.

⁷⁸ K Bjork & R Jones, 'Overcoming dilemmas created by the 21st century mercenaries: Conceptualising the use of private security companies in Iraq' (2005) 26 *Third World Quarterly* 777, 781.

⁷⁹ Note 75 above, 862.

⁸⁰ Note 75 above, 863.

⁸¹ Note 75 above, 863..

⁸² A Leander, 'The market for force and public security: The destabilizing consequences of private military companies' (2005) 42 *Journal of Peace Research* 605, 613.

⁸³ Note 78 above, 781.

regulation and accountability on their private military security companies and personnel.⁸⁴ This problem can be added to when companies have the ability to dissolve entirely and not merely relocate but also form as a complete new and fresh company elsewhere without any record of their previous activities.⁸⁵ This is a concern for states, because as has been noted in the South African chapter, this means that governments lose control over these companies and their own citizens which can also create a negative international perception about that country.⁸⁶

2.1.5. *Undermining democratic values*

The hiring of private military security companies via contracts also has the ability to undermine the democratic values of checks and balances within government. This occurs because it is the executive branch of government which enters into contracts and often without the need for debate or revealing the details of the contracts entered into.⁸⁷ This can allow for decisions regarding the use of a states' monopoly on force to bypass parliamentary discussion. This monopoly on power can then shift from a monopoly controlled by a government to one controlled by the executive.⁸⁸ This lack of parliamentary discussion and public knowledge means that there is very little to no accountability for the actions of the executive. The reason that there is less discussion is that whilst parliament or Congress (in the case of the United States) may approve the budget for the military they have no say in the awarding of these contracts.⁸⁹ Accountability is crucial in that it is a key mechanism of the checks and balances which prevents people in power within a democracy from abusing that power.⁹⁰ The decision to be involved in conflict is also less likely to receive public backlash when private military security companies are used rather than citizens via the military and this too could have the effect of the public being less concerned when the executive enters into conflict zones.⁹¹ The public are also less likely to be aware of the actions of government contractors, especially in contrast to the awareness of soldiers.⁹²

⁸⁴ Note 75 above, 865.

⁸⁵ Note 82 above, 614.

⁸⁶ Note 62 above, 136.

⁸⁷ Note 75 above, 867.

⁸⁸ Note 75 above, 867.

⁸⁹ Note 60 above, 155.

⁹⁰ Note 75 above, 868.

⁹¹ Note 75 above, 868.

⁹² Note 60 above, 155.

2.1.6. *Different motives*

An additional concern is that the incentives of governments and private military security companies differ. Governments are concerned with conflict resolution, whilst private military security companies are concerned with making money.⁹³ This may lead to the situation where these companies, in the interest of ensuring continued profits, create continual need to their involvement.⁹⁴ This does however clash with another basis of private business; reputation. If a business is not able to perform then this decreases their chances of being awarded future contracts and so the net effect of the profit motivation of private military security companies could well mean better conflict resolution.⁹⁵ This loyalty to shareholders and profit making has also had other negative consequences. This loyalty and especially the influence which private military security companies can have in developing nations often allows for abuse to occur as was the case when Executive Outcomes used its influence in several African countries, including Angola, to gain access to resource rights for the Branch-Heritage Group.⁹⁶

2.1.7. *Influence of risk analysts*

The growth of the private military security industry has also meant that private military security companies no longer merely provide military assistance, services and goods on the ground but are also concerned with risk analysis and provide advice regarding security concerns for governments and non-government organisation alike.⁹⁷ The effect of this is that whilst what can be considered a risk is a subjective question, for a private military security company analyst the more opportunities for services to be provided (in other words the more security threats which exist) the more work and profit the company stands to make.⁹⁸ This is further compounded by governments who constantly outsource their military and security needs to private military security companies. This has the result of governments becoming more reliant upon the analysis provided by these companies and undermines the development of government analysis.⁹⁹

⁹³ Note 74 above, 258&259.

⁹⁴ Note 75 above, 872.

⁹⁵ Note 75 above, 872.

⁹⁶ F Mathieu & N Dearden, 'Corporate Mercenaries: The threat of private military and security companies' 747.

⁹⁷ Note 82 above, 612.

⁹⁸ Note 82 above, 612.

⁹⁹ Note 74 above, 259.

2.1.8. *Shift in focus*

The proliferation of the private military security industry could also have the unwanted effect of incentivising government to invest in and people to join private military security companies rather than government armies and police forces. This is perfectly illustrated by the example used earlier in this dissertation with the vast number of police force members leaving the Durban police force in order to earn better salaries from private military security companies.¹⁰⁰ This effect does not assist in the stabilisation of countries which need to be able to eventually protect themselves.¹⁰¹

2.1.9. *Overcharging of services*

Increasingly private military security companies have been accused of overcharging governments for their services, as was the case when the US Defense Contract Audit Agency established that the private military security company; Kellogg, Brown and Root, had overcharged the United States Army by as much as \$108 million for fuel imports and \$160 million for the provision of meals.¹⁰² Whilst the competition created by the private sector means that there are instances when money can be saved within the constraints of military contracts there is often no room for competition to exist.¹⁰³

2.2. *Benefits arising from the private military security industry*

This section will now analyse the benefits which the private military security industry can provide for governments, conflict zones and non-government organisations. The purpose of this is to try and mitigate the potential harms discussed above but also add to the justification of the proposed way forward, and highlight the aspects of the private military security industry which should be maintained when establishing the proposed way forward.

2.2.1. *Importance for deployed armies*

One of the main benefits derived from private military security companies is the important role which they play within modern armies. The armies from countries such as the United States, Australia, Canada and the United Kingdom rely heavily upon the private military security industry in order to not only operate but also deploy their armed forces.¹⁰⁴ These

¹⁰⁰ Note 22 above, 247.

¹⁰¹ Note 82 above, 616.

¹⁰² Note 74 above, 260.

¹⁰³ Note 60 above, 155.

¹⁰⁴ Note 75 above, 859.

services range from providing training in the operation and maintenance of nuclear submarines by the British, to the Canadian government contracting out the transporting of their troops, to the United States who has awarded over 3000 contracts between 1994 and 2002 to various private military security companies for various roles.¹⁰⁵ The strength of private military security companies lies in part in their ability to rapidly provide ‘surge’ forces for state armies when faced with a large enemy without having to wait for all the bureaucratic red tape of deploying more soldiers.¹⁰⁶ They also have the ability to deploy very specifically qualified and trained personnel due to the wide range of personnel and therefore services available to them and who are seeking employment after completion of their military career.¹⁰⁷

2.2.2. *Importance for non-governmental organisations*

Private military security companies also have a role to play in their assistance of non-governmental organisations (NGOs) as well as humanitarian organisations who have increasingly begun to rely on the security services provided by private military security companies in order to effectively continue their operations in certain countries.¹⁰⁸ The services provided to NGOs by private military security companies not just physical protection but also training in security matters such as emergency procedures and evacuation policies.¹⁰⁹ The positive effect which Executive Outcomes provided in Angola and Sierra Leone has already been discussed but not only benefitted those countries but also allowed NGOs to conduct their work, so much so that when Executive Outcomes withdrew the NGOs operating in those countries became restricted.¹¹⁰ The speed with which personnel of private military security companies can be deployed along with the vast variety of services which they can perform¹¹¹ is an additional bonus to NGOs who operate in often rapidly changing circumstances.¹¹² Based on this there are those who argue that the private military security industry could greatly benefit United Nations peacekeeping missions, especially due to massive cost savings if not for any of the other reasons discussed above.¹¹³

¹⁰⁵ Note 75 above, 859.

¹⁰⁶ Note 61 above, 126.

¹⁰⁷ Note 61 above, 126.

¹⁰⁸ C Spearin, ‘Private security companies and humanitarians: A corporate solution to securing humanitarian spaces?’ (2001) 8 *International Peacekeeping* 20, 21&26.

¹⁰⁹ Note 108 above, 28.

¹¹⁰ Note 108 above, 30.

¹¹¹ Note 62 above, 131.

¹¹² Note 61 above, 127.

¹¹³ Note 1 above, 79.

2.2.3. *Breaking cycles of violence*

Private military security companies also have the potential to be utilised to break cycles of violence and assist governments in regaining control over unstable situations. A good example of this is the work done by Executive Outcomes in Angola and Sierra Leone, where they were able to restore order within those countries as well as train up government forces so as to be able to maintain the peace once Executive Outcomes pulled out.¹¹⁴ Another example where Executive Outcome could have played an equally important role was during the genocide in Rwanda. This was a situation where the world was in agreement that intervention was needed but where no country was willing to provide troops.¹¹⁵ When the threat of genocide was nearing, Executive Outcomes drafted a plan to have troops in Rwanda within two weeks at a cost of \$600 000 per day. The eventual plan followed by the United Nations and the utilisation of their troops not only arrived much later than the Executive Outcome troops would have arrived but also cost \$3 million per day.¹¹⁶ The ability of private military security companies like Executive Outcome to stabilise regions and break cycles of violence is crucial, especially when in circumstances like Rwanda there are no willing troops despite there being an agreement that action is required, and where the subsequent time delays cost people their lives and destabilises countries and regions.¹¹⁷ Their potential benefit was even noted by Kofi Annan who stated that, 'in the face of mass murder' the use of private contracts 'is an option that cannot be relinquished'.¹¹⁸ Kofi Annan's decision to ultimately not utilise private military security companies in Rwanda is because he felt that the world was not ready for the privatisation of the peace process and comment which has to some indicated that better regulation and control might lay the path for more efforts like those of Executive Outcomes in Angola and Sierra Leone.¹¹⁹ The ability of private military security companies to train the armies of developing countries is especially important when considering that within Africa for example it is the armed forces of developing African countries which are known for committing human right violations. Private military security companies therefore not only provide a good substitute for these weak forces but also have the ability to train

¹¹⁴ Note 82 above, 607&608.

¹¹⁵ Note 82 above, 607.

¹¹⁶ Note 51 above, 73.

¹¹⁷ Note 82 above, 608.

¹¹⁸ Note 82 above, 608.

¹¹⁹ D Mayer, 'Peaceful warriors: Private military security companies and the quest for stable societies' (2009) 89 *Journal of Business Ethics* 387, 394.

these forces and prevent future abuses of power.¹²⁰ More recently the efforts of private military security companies in Iraq and Afghanistan have shown the ability of these companies to contribute to the creation of peace and stability.¹²¹ The use of private military security companies can also prevent the outbreak of cycles of violence as was witnessed in the Balkans when the United States licensed a private military security company to train the Croatian army and so without deploying a single American troop or spending any money the United States had been able to push the Serbs to the negotiation table the result of which were the Dayton Accords.¹²² Similarly the United States have utilised these companies to provide a 'surge' force to the Iraqi police force during times of unrest. This also has the benefit of allowing the United States Army to use its troops for other missions.¹²³

2.2.4. *The corporate nature of private military security companies*

There has also been, from its beginning, a strong force within the private military security industry to gain and maintain respectability within the international community and to separate itself from the conduct and perception surrounding mercenarism.¹²⁴ This respectability is gained from the understanding that private military security companies are corporations and therefore act as any other corporation would and that because they are incentivised to maintain this respectability in order to gain future contracts that they may even have less reason to commit crimes during conflict as they are not motivated by ideologies or nationalism in the way soldiers are.¹²⁵ In fact it is argued that due to the competitive nature of the private military security industry that committing human right violations is the best way for private military security companies to ensure that they are no longer considered for future contracts.¹²⁶ This is the same logic used to explain why the interests of the state and of the private military security company are the same and why it makes no sense for a company to undermine the interest of the state, as this too will undermine the potential for future contracts.¹²⁷ There is in fact, or at least it has been argued, no reason for private military security companies to behave any worse than other actors within conflict zones.¹²⁸ In fact private military security companies have been very involved

¹²⁰ Note 82 above, 609.

¹²¹ C Kinsey, 'Regulation and control of private military companies: The legislative dimension' 84.

¹²² Note 60 above, 154&155.

¹²³ Note 60 above, 155.

¹²⁴ Note 82 above, 608.

¹²⁵ Note 82 above, 608.

¹²⁶ Note 82 above, 608&609.

¹²⁷ Note 82 above, 609.

¹²⁸ Note 108 above, 30.

in attempts to regulate their industry, Sandline has proposed several mechanisms to ensure private military security companies are held to account in terms of human right conventions and Executive Outcomes submitted 36 proposals when the South African government was in the process of drafting the FMA.¹²⁹ The corporate nature of private military security companies is a key and important factor which distinguishes them from mercenaries. Whilst mercenaries are not concerned with their reputation and therefore how they act, private military security companies are, as already mentioned, highly concerned with their reputation as they rely upon this for future job opportunities.¹³⁰ This means that it is important that a distinction is always made between mercenaries and private military security companies and their personnel; their different motives mean that they act differently and are incentivised to act differently in the international arena.¹³¹

2.2.5. *Costs*

Whilst there are instances when the services provided by private military security companies are in fact cheaper than what it costs the military to run those services for themselves, ideally where there exists strong competition.¹³² A common criticism of the industry is that it is often more expensive. The reality however is that the prime motivation behind a government's decision to employ a private military security company is not financial but rather employing a private military security company means that that government can achieve more in a conflict zone without having to increase the size of its force.¹³³ It also means that specialised and experienced people can be brought into conflict zones immediately. Additionally it is at times unlikely that the services of private military security companies will be cheap, especially when demand is at its peak as there is often too much demand and the resultant sellers' market means that prices will increase. There is also the high cost of insurance which needs to be included in the cost of these services and sometimes can be as high as 40cents in every dollar.¹³⁴ The one instance where the costs to employ a private military security company always appear to be cheaper is when the employer is the United Nations. The example of the potential cost savings by Executive Outcomes in Rwanda has already been highlighted, but additionally in Sierra Leone Executive Outcomes was able to

¹²⁹ Note 108 above, 30.

¹³⁰ Note 62 above, 131.

¹³¹ Note 62 above, 131.

¹³² Note 60 above, 155.

¹³³ Note 61 above, 127.

¹³⁴ Note 61 above, 127.

operate \$10 million per month cheaper than a United Nations peace keeping force would have.¹³⁵

2.2.6. *Reasons not to ban the private military security industry*

The importance and increasing size of the private military security industry means that arguments for the banning of the industry would not only undermine all the benefits discussed above, but would also have the effect of decreasing accountability by pushing the industry underground.¹³⁶ The benefits to governments who utilise the services of the private military security industry appear to at the moment outweigh any harm caused by the industry and therefore indicates that a complete ban is highly unlikely. This is not only evident by the continued use of the industry by governments but also by the saving offered to government as well as not having to keep specialised individuals on full time pay as they can acquire such services from a private military security company. In addition there are the benefits of not having to increase military presence in conflict zones which has been discussed above.¹³⁷ It is also strange that most of the criticisms levelled against the private military security industry are not based on actual harms which currently exist, but rather on potential harms which may occur should the industry continue to operate.¹³⁸ Therefore the complete banning of the private military security industry is not a viable option and will not be considered by this dissertation as an option for future regulatory attempts.

Having analysed the criticisms and benefits of the private military security industry and noting the issues which need to be remembered when proposing a way forward this chapter will now move onto discussing this proposed way forward for the industry.

¹³⁵ Note 62 above, 131.

¹³⁶ C Holmqvist, 'Private security companies: The case for regulation' 42.

¹³⁷ N Stinnett, 'Regulating the privatization of war: How to stop private military firms from committing human rights abuses' (2005) 28 *Boston College International and Comparative Law Review* 211, 220.

¹³⁸ Note 62 above, 135.

3. PROPOSED WAY FORWARD FOR THE PRIVATE MILITARY SECURITY INDUSTRY

Having discussed the lessons learnt from previous and current attempts to legislate the private military security industry, as well as discussing which criticisms to attempt to address whilst maintaining the benefits which arise from the industry in its current form this dissertation will now discuss how best to legislate this industry going forward. This dissertation proposes that there are three levels at which this needs to occur and as such these three levels will each be looked at in turn. They are regulation at an international and domestic level as well as the level of self-regulation.¹³⁹

3.1. *International regulation*

Due to the international and global nature of the private military security industry, and the inability of governments to regulate actions outside of their own sovereign state, there is clearly a need for international regulation of private military security companies in some way shape or form.¹⁴⁰ The current system of a patchwork of national regulation is currently insufficient to deal with this global industry.¹⁴¹ It is insufficient on two levels; firstly it is unable to have jurisdiction over the international conduct of these companies, and second the enforcement of these regulations is difficult without international support.¹⁴² This is especially true when one considers that in one contract there can be citizens and companies represented and involved in delivering on that contract from several different countries.¹⁴³

There is an incentive for states to get involved in the creation of a regulatory system at an international level owing to the potential backlash should they choose to reap the benefits of the industry without seeking to regulate it or become accountable for the actions of private military security companies and their personnel. The first back lash is that it is unlikely that local and international opinion will be favourable towards a government which fails to act against citizens and companies registered within it which commit human right violations.¹⁴⁴

¹³⁹ A Bearpark & S Schulz, 'The private security challenge in Africa: Problems and options for regulation' (2007) 139 *ISS Monograph Series* 73, 81.

¹⁴⁰ Note 53 above, 148&149;

Nihat Dumlupinar *Regulation of private military companies in Iraq* (Thesis, Naval Postgraduate School, 2010) 86.

¹⁴¹ Note 23 above, 211.

¹⁴² E Gaston, 'Mercenarism 2.0? The rise of the modern private security industry and its implications for international humanitarian law enforcement' 241.

¹⁴³ Note 53 above, 149.

¹⁴⁴ Note 10 above, 239.

There is also the very strong possibility of a state being held accountable for their actions if it can be proven that they at the very least tacitly agreed to the actions of the private military security company or their personnel.¹⁴⁵ Whilst states may claim that the regulation of private military security companies should remain in the domestic arena, these states do not take account of the fact that due to the multi-national composition of most private military security companies that there will be competing claims for jurisdictional rights regarding these companies and their personnel.¹⁴⁶ There is therefore a need for some form of agreement between states as to how best resolve these claims; regulation at an international level is clearly the best solution.¹⁴⁷ Countries which currently dominate the private military security industry such as the United States and the United Kingdom also have an additional incentive to create legislation for the industry. Their dominance of the market means that they are currently in a good position to create regulatory mechanisms which favour how they currently operate. In time however and with the possible rise of other countries, such as Russia and China, supplying personnel to the industry this advantage may no longer exist and they may have to settle for a mechanism which does not benefit them as much as the system does now.¹⁴⁸ There are also moves being made within local domestic markets to distinguish between mercenaries and private military security companies. The effect has been that whilst there is still a concern around mercenarism and therefore a desire to ban them there has also been an acceptance of the private military security industry and a wish to regulate rather than ban this industry.¹⁴⁹

The regulatory mechanism itself needs to comprise of two parts. The first is a convention on the regulation of the private military security industry¹⁵⁰ and the second is a committee formed under that convention.¹⁵¹

The convention itself has the aim of ensuring that all private military security companies and their personnel are liable in terms of international law, and have to comply not only by the

¹⁴⁵ See under the USA Chapter (page 57) for a discussion surrounding liability for states where private military security companies act as *de facto* agents. Also see the South African Chapter (page 84) for a discussion about the dropping of charges against accused mercenaries owing to evidence that they had acted with the tacit approval of the South African government.

¹⁴⁶ Note 10 above, 240.

¹⁴⁷ Note 10 above, 240.

¹⁴⁸ Note 10 above, 241.

¹⁴⁹ Note 142 above, 222.

¹⁵⁰ Note 30 above, 640.

¹⁵¹ Note 30 above, 641.

rules of war but also by human right conventions.¹⁵² The convention should also address the question of the status of private military security personnel during times of war and most importantly what their status is once captured. It is the suggestion of this dissertation that as they currently best fit under the civilian category¹⁵³, as such they do not enjoy prisoner of war status. However owing to the more direct nature of their involvement that it would be more appropriate if they were either declared as acting as combatants or a separate category is created.¹⁵⁴ The convention should also create a list of good business practices and norms for the operation of private military security companies in a similar fashion to those created by the Montreux Document and the International Code of Conduct for Private Security Service Providers. One of the more practical areas for the convention to focus on is the enforcement of the use of either a uniform or some recognisable insignia for personnel of private military security companies to wear, so as to identify themselves as part of the conflict, even if they are not state enrolled combatants.¹⁵⁵ The only involvement that the convention would have with states is requiring signatories to adopt its standards and act as enforcement mechanisms in holding their own and other private military security companies to account.

The convention should also create a committee with the sole purpose of granting licences for private military security companies.¹⁵⁶ This should be licence which acknowledges that the private military security company in question is a legitimate company which abides by international conventions as well as good business practices.¹⁵⁷ The licence is renewed on a regular and potentially yearly basis by a report submitted by the company¹⁵⁸, as well as any reports created on the company by the committee itself so as to allow the committee to determine whether or not the company still upholds good practice in terms of international law and business practices, as well as being transparent and accountable.¹⁵⁹ The committee can also create and ask for reports on those in the employ of the private military security company in order to determine that former mercenaries or human right violators are not operating within the company.¹⁶⁰ The criteria should be based only on these two criteria and

¹⁵² Note 30 above, 642.

¹⁵³ See page 26 For a full discussion as to how this conclusion is reached.

¹⁵⁴ Note 142 above, 243.

¹⁵⁵ Note 30 above, 643.

¹⁵⁶ Nihat Dumlupinar *Regulation of private military companies in Iraq* 87.

¹⁵⁷ M Scheimer, 'Separating private military companies from illegal mercenaries in international law' 641; C Holmqvist, 'Private security companies: The case for regulation' (46).

¹⁵⁸ Note 31 above, 3.

¹⁵⁹ Note 28 above, 545.

¹⁶⁰ M Scheimer, 'Separating private military companies from illegal mercenaries in international law' 642;

not vague ideals as the negative consequences of this are best summed up by the problems facing the South African FMA and PMA.¹⁶¹ This committee could be assisted in this task by expanding the duties of existing bodies within the United Nations such as the UN Special Rapporteur and the UN Register of Conventional Arms.¹⁶² The committee does not rule on each and every contract as this will have the effect of dramatically overloading and therefore slowing down the entire private military security industry and with rapid deployment being a key advantage of this industry it seems counterintuitive to undermine this.¹⁶³ It is also argued that as the awarding of individual contracts is done by states and NGOs themselves that it is best to leave this in the arena of domestic law. The corporate nature of private military security companies and their desire to create a strong reputation means that they are likely to buy into and accept this licensing mechanism.¹⁶⁴ Further evidence for this is and the number of companies which are currently signatories to the International Code of Conduct for Private Security Service Providers.¹⁶⁵

There are several benefits of the convention and committee system. By bringing private military security companies and their personnel under international law and clarifying their position it makes their prosecution for the violation of human rights and rules of war and lot easier and in the process dealing with one of the biggest concerns surrounding the private military security industry. The international nature of the convention also means that companies can no longer relocate in order to avoid regulation as wherever they exist they will still be required to conform to the convention.¹⁶⁶ The licensing mechanism also has the advantage of dealing with mercenarism. The effect of requiring a licence in order to operate and therefore the operation of any military or security service without a licence being an offence means that mercenaries, who will not be able to acquire licences as they do not comply with international law and business practices.¹⁶⁷ This makes the prosecution of mercenaries much simpler as the question is merely whether or not a licence exists rather

C Holmqvist, 'Private security companies: The case for regulation' 46.

¹⁶¹ See page 86 for the FMA and page 98 for the PMA for a full discussion on this.

¹⁶² Note 50 above, 116.

¹⁶³ Note 61 above, 126.

¹⁶⁴ Note 142 above, 242.

¹⁶⁵ J Crook, 'Contemporary practice of the United States relating to international law' 213.

¹⁶⁶ A Irvin, 'Rethinking the role and regulation of private military companies: What the United States and United Kingdom can learn from shared experience in the war on terror' 463.

¹⁶⁷ M Scheimer, 'Separating private military companies from illegal mercenaries in international law' 642&643; C Holmqvist, 'Private security companies: The case for regulation' 46. Nihat Dumlupinar *Regulation of private military companies in Iraq* 87.

than whether or not they fulfil 6 complicated requirements¹⁶⁸ as is the current situation. Another benefit of a convention, as with any codified law is that it provides certainty which is especially important during conflict when very little else is certain.¹⁶⁹ Whilst it is acknowledged that such a system will take time to develop and for states to reach agreement, this does not deter from the importance of an international regulatory system existing and if the trend shown by all three countries¹⁷⁰ and international discourse¹⁷¹ is towards regulation then there should not be much conflict regarding this development.¹⁷² The convention would also be a clear declaration from the United Nations regarding its stance on private military security companies and as the guardian of international peace and security this would carry a lot of weight and lend much needed support for further regulations of the private military security industry at domestic levels.¹⁷³ A firm international stance would also clear up current inconsistencies which exist within domestic regulation of private military security companies; such as the acceptance and regulation of the United States legislation and the ban on the industry as seen in South African legislation.¹⁷⁴

3.2. Domestic regulation

There are many reasons as to why states would wish to enact legislation in order to regulate private military security companies. The first of these is founded in their monopoly over the use of violence which means that any actor which has the ability to affect this monopoly should be regulated and have the state exercise some degree of control over these actors. The regulation of the private military security industry is arguably the best way for states to maintain their monopoly on violence.¹⁷⁵ Private military security companies also have the ability to affect power dynamics within regions as well as create a negative international image for a state if a private military security company based in their country abuses their power; both these reasons are additional incentives for states to regulate private military security companies at a domestic level.¹⁷⁶ The continued use of private military security

¹⁶⁸ Note 6 above, 110.

¹⁶⁹ Note 10 above, 243.

¹⁷⁰ The United States system has always been a regulatory one whilst the Green Paper in the United Kingdom strongly recommends a regulatory system and the Defence Review in South Africa also appears to indicate a change in approach towards acceptance of the private military security industry.

¹⁷¹ As evidenced by the Montreux Document and the International Code of Conduct for Private Security Service Providers

¹⁷² Note 10 above, 243.

¹⁷³ Note 136 above, 45.

¹⁷⁴ Note 142 above, 243.

¹⁷⁵ Note 53 above, 148.

¹⁷⁶ Note 53 above, 148.

companies is unlikely to stop due to the many benefits gained by the use of this industry. It is therefore important for states, who benefit from these companies and their services the most, to regulate them.¹⁷⁷ It is therefore within the ability of governments to ensure that private military security companies are held to account in terms of their contractual obligations, that they remain professional and uphold codes of conduct.¹⁷⁸

Regulation at a domestic level should consist of the adoption of all international conventions surrounding private military security companies and most notably the convention proposed above. It should also consist of the creation of national legislation and the formation, under that piece of legislation, of a committee to authorise contracts issued to private military security companies.¹⁷⁹

The adoption of the international convention discussed above, or of similar such conventions is essential.¹⁸⁰ This is because in order for the licensing system to work best it will require the input of all states and especially those from which private military security companies originate. Their assistance is required in ensuring that private military security companies become licensed, that as governments they only utilise the services of licensed companies and that they are involved in reporting and holding to account those companies which violate the conventions and any of the norms created in the convention.¹⁸¹

The creation of legislation specifically to deal with private military security companies is so that governments can control the issuing of contracts as well as the extension of its jurisdiction so as to include the criminal conduct of its citizens when they are outside of their borders. The extension of the jurisdiction of the state can follow a similar format as the UCMJ and MEJA as found in the United States.¹⁸² This is of benefit to the state in that it, rather than another country has control over its own citizens and allows it to hold its own citizens to account for their actions. With nations around the world creating regulatory mechanisms for private military security companies the difficulty confronted by attempts such as the UCMJ and MEJA should be dealt with as the authorities of states will have

¹⁷⁷ L Jume, 'Mercenarism: Looking beyond the current international and regional normative regimes' (2008) 147 *ISS Monograph Series* 197, 215.

¹⁷⁸ Note 177 above, 216.

¹⁷⁹ Note 31 above, 3.

¹⁸⁰ Note 30 above, 645.

¹⁸¹ Note 139 above, 82.

¹⁸² Note 37 above, 36.

assistance in holding personnel of private military security companies and their citizens to account and enforcing international conventions.

The piece of domestic legislation will also setup a committee to deal with the authorisation and issuing of contracts to private military security companies.¹⁸³ Initially this committee will also need to license private military security companies¹⁸⁴ until such time as the international licensing committee is established and running. The committee will be focus on the issuing of contracts on behalf of the government in a similar fashion to the NCACC in South Africa and the ITAR in the United States as well as authorising the acceptance of contracts by private military security companies which are based within their country.¹⁸⁵ The use of contracts is important as they allow the government to place a legal burden on private military security companies to provide data concerning their operations whilst completing the contract and ultimately this allows for more transparency as well as accountability.¹⁸⁶ The criteria for this committee is similar to the criteria for licensing companies in that so far as there is no strong potential for the contract to involve the violation of any international convention, especially concerning the laws of war and human rights then the contract must be granted.¹⁸⁷ The criteria should also include a list of allowed¹⁸⁸ and prohibited¹⁸⁹ activities in order to ensure that these international conventions are upheld and that companies do not provide support to drug cartels for example.¹⁹⁰ These criteria must be applied to every contract and once acceptance is granted it cannot be revoked so as to prevent the constitutional challenges facing the FMA and PMA.¹⁹¹ These contracts also need to be considered and decided upon as quickly as possible, even with the possibility of the contract being automatically awarded after a certain period of time so as to ensure that private military security companies are still able to operate with the speed necessary in order to remain competitive.¹⁹² Whilst the need for governments to maintain as much control over their monopoly of violence is important it

¹⁸³ Note 37 above, 37.

¹⁸⁴ Nihat Dumlupinar *Regulation of private military companies in Iraq* 81.

¹⁸⁵ Note 50 above, 117.

¹⁸⁶ Note 74 above, 263.

¹⁸⁷ Note 37 above, 35.

¹⁸⁸ For example; training, support, security services and intelligence gathering.

¹⁸⁹ For example; direct participation, training of mercenaries and assisting states which are not recognised internationally

¹⁹⁰ C Beyani & D Lilly, 'Regulating private military companies: Options for the UK government' 35&36;

F Schreier & M Caparini, 'Privatising security: Law, practice and governance of private military and security companies' 137.

¹⁹¹ For a more detailed discussion on the constitutionality of the FMA and PMA see page 89 for the FMA and page 101 for the PMA.

¹⁹² Note 61 above, 126.

cannot be abused to prevent companies from performing their jobs or else the problematic situation which exists within South Africa will merely reoccur.¹⁹³ Whilst the existence of all these criteria and checks and balances may appear to hamper companies within the private military security industry the ultimate effect is that the certainty created by these criteria means that companies are able to focus on providing their services.¹⁹⁴ There is also the additional check and balance of the international licensing mechanism which provides a *prima facie* case of the company operating legitimately and within international conventions. The perception in the international community is that the country from which a private military security company originates is responsible for the actions of that company, as was clearly the case with South Africa and Executive Outcomes, it is because of this that countries need to create criteria, committees and regulatory mechanisms.¹⁹⁵ The committee will also have to provide reports to parliament about which contracts have been given approval and which contracts have been issued on behalf of government, as is proposed by the Green Paper.¹⁹⁶ This is designed to ensure that the executive are not able to operate in the shadows and undermine the democratic system of checks and balances.¹⁹⁷

Due to the global nature of the international and domestic regulations the ability to enforce these mechanisms will be greatly increased, as already discussed, due to the buy in of all actors who will be able to monitor the actions of private military security companies on a contract by contract and report by report basis.¹⁹⁸ There does however exist from for national legislation to include monitoring requirements for contracts granted by the committee discussed above.¹⁹⁹ These could include the use of foreign offices and embassies in other countries, the military if the private military security company is being deployed alongside a countries armed forces or a diplomatic mission to ensure that the private military security company is adhering to the contract as well as other international conventions.²⁰⁰ The use of contracts to require companies to provide reports after the completion of a contract, as discussed above²⁰¹, also has the effect of acting as a monitoring mechanism.

¹⁹³ See the South African Chapter for more information.

¹⁹⁴ Note 62 above, 137.

¹⁹⁵ F Schreier & M Caparini, 'Privatising security: Law, practice and governance of private military and security companies' 117.

¹⁹⁶ Note 32 above, 669.

¹⁹⁷ Note 195 above, 129.

¹⁹⁸ Note 195 above, 128&129.

¹⁹⁹ Nihat Dumlupinar *Regulation of private military companies in Iraq* 81.

²⁰⁰ Note 195 above, 138&139.

²⁰¹ Note 74 above, 263.

One of the effects of this domestic legislation is that the regulation of the private military security industry provides legitimacy for the companies and personnel which operate within it.²⁰² This legitimacy, which as has already been noted is a key motivation for private military security companies, is gained via government control and these companies being under the control of not only the government but also international conventions.²⁰³ This deals with several of the biggest concerns raised about private military security companies; that being them not being held accountable and undermining the states' control over the use of violence.²⁰⁴ Private military security companies are also incentivised to get on board with domestic regulation. This is because effective regulation ensures better competition between various private military security companies. Regulation prevents smaller, cheaper and less reputable companies from effectively operating. These companies are normally able to undercut the larger, better known companies by not having to concern themselves with ethics and good practice. Better regulation would mean that reputable companies would be on equal footing and not have to be concerned about being undercut by less reputable companies.²⁰⁵ This benefits not only the companies, but also benefits the regions and states within which they operate.²⁰⁶

3.3. *Self-regulation*

The last level of regulation which it is proposed should exist is that of self-regulation.²⁰⁷ Even before companies started regulating their activities private military security companies began a trend towards the formation of associations and professional companies.²⁰⁸ The reason for this is so as to distance themselves from the illegitimate activities of mercenaries and to present a more acceptable front for their provision of security and military services.²⁰⁹ In her article McCoy argues that there are three ways in which organisations promote themselves as professional institutes;

²⁰² Note 136 above, 43.

²⁰³ Nihat Dumlupinar *Regulation of private military companies in Iraq* 81.

²⁰⁴ Note 23 above, 211.

²⁰⁵ Note 53 above, 149-150.

²⁰⁶ Note 53 above, 149-150.

²⁰⁷ Note 136 above, 46.

²⁰⁸ S Gumedze, 'The elimination of mercenarism and regulation of the private security industry in Africa' 4.

²⁰⁹ K E McCoy, 'Organisational frames for professional claims: Private military corporations and the rise of the military paraprofessional' (2012) 59 *University of California Press* 322, 338.

- (1) by providing a stage or setting that makes professional claims credible;
- (2) by supplying a rationale that makes professional practice acceptable; and
- (3) by extending guarantees that professional promises will be institutionalised and upheld.²¹⁰

The first two are catered for by the companies themselves, this by forming professional groups and companies²¹¹ and highlighting the good work that they do and the important role they play in ensuring human rights and providing stability within regions. This is done by highlighting the defensive nature of private military security companies.²¹² The third way; the creation of guarantees, has been somewhat achieved by companies establishing internal checks and balances and criteria. This is used to judge their actions and hold themselves accountable.²¹³ These internal processes however lack the objectivity and authority of regulations passed by states and has therefore not been a particular success.²¹⁴ This presents a perfect opportunity for states as well as regional bodies to step in and provide the necessary authority to create regulations and standards by which these companies can hold themselves to account.²¹⁵ There is a clear desire from private military security companies to be regulated and have standards set in order to create the image of a professional corporation. Thereby distancing themselves from the stigma that used to be attached to private military companies and that it still attached to mercenaries.²¹⁶

Applying this rational of self-regulation and understanding the motivation for private military security companies to adopt a self-regulatory model, especially with a lack of international and domestic legislation there is a need to analyse the practical application of this for the private military security industry.

Self-regulation refers to mechanisms which can include not only licensing of companies but also the creation of standards of training or operation or guidelines.²¹⁷ With the private military security industry in particular the main mechanism utilised has been the creation of a

²¹⁰ Note 209 above, 338.

²¹¹ Note 209 above, 330.

²¹² Note 209 above, 332.

²¹³ Note 209 above, 333.

²¹⁴ Note 209 above, 337.

²¹⁵ S Gumedze, 'Pouring wine into new bottles? The debate around mercenaries and private military and security companies' (2008) 147 *ISS Monograph Series* 21, 37.

²¹⁶ Note 209 above, 329.

²¹⁷ Note 74 above, 262.

code of conduct focused on ethics as well as the creation of standards for security services.²¹⁸ Whilst initially the movement to self-regulate was slow²¹⁹ in more recent times and following the drafting of the International Code of Conduct for Private Security Service Providers and the widespread and rapid support that it received there has been more support for self-regulation.²²⁰ The biggest and most damaging flaw with self-regulation however is that without the backing of a government or an international organisation such as the United Nations these codes of conduct and service standards carry very little to no weight.²²¹ These standards and codes however fail to make up for a lack of international and domestic regulation.²²² The solution to this problem is with the proposed way forward of this dissertation including the regulation of the private military security industry at an international and domestic level these methods of self-regulation now have the backing of an international convention as well as domestic legislation, the benefit of being able to promote a private military security company as upholding one code of conduct or another now has substantial weight when governments and NGOs are searching for a potential private military security company.²²³ self-regulation also benefits other actors within the international arena as companies now hold themselves accountable to various standards²²⁴, most of which are in line with international conventions on human rights as well as codes of good business practice.²²⁵ Self-regulation has an ability to increase accountability within an approach to the private military security industry which involves regulation at an international, domestic and now industry level.²²⁶

4. CONCLUSION

At the outset this chapter set the task of taking into account the lessons learnt from current legislative attempts at regulating the private military security industry as well as attempting to address the concerns which exist around the industry as well as the whole time maintaining the benefits which have allowed this industry to flourish. The legislative mechanism which is proposed is a layered regulatory mechanism which grants overall control and accreditation to

²¹⁸ Note 74 above, 262.

²¹⁹ Note 74 above, 262.

²²⁰ J Crook, 'Contemporary practice of the United States relating to international law' 213.

²²¹ Note 74 above, 262.

²²² Note 74 above, 263.

²²³ Note 136 above, 47&48.

²²⁴ Note 136 above, 49&50.

²²⁵ Note 215 above, 37.

²²⁶ Note 139 above, 82.

an international committee founded in an international convention which upholds the values of conventions on human rights as well as the laws of war. At a national level the regulatory mechanism establishes legislation which not only adopts the international values of the international convention but also extends the jurisdiction of nations in so far as their ability to prosecute their citizens is concerned. The domestic legislation also creates a committee which has control over the individual contracts of private military security companies. Lastly there is a level of self-regulation created within the private military security industry itself which is formed via various codes of conducts and standards.

This mechanism it is argued learns from the lessons of previous international attempts by abandoning burdensome and difficult definitions of mercenaries²²⁷ and by simply refusing to grant licenses to companies which do not conform to international standards is able to prosecute these companies with greater ease. The regulatory and extended jurisdiction mechanism adopted by the United States²²⁸ and proposed in the United Kingdom's Green Paper²²⁹ is also utilised whilst the lesson learnt from South Africa's FMA and PMA is the need to strike a balance between over and under regulation.²³⁰

The benefits which the private military security industry brings to governments, NGOs and developed and developing nations alike have been maintained by adopting a legislative mechanism which regulates rather than bans and whilst there may be additional administrative burdens there are attempts to not compromise the speed of the industry.

The concerns have also been addressed. The biggest concern arising out of a lack of prosecution and abuse of human rights is addressed by creating an international licensing system and by ensuring that countries extend their jurisdictions whilst also bringing private military security companies under the norms of international conventions on human rights. The monopoly on violence is still held by the state via a mechanism which not only allows control over each contract but also prevents too much power being held by the executive by

²²⁷ Note 6 above, 110.

²²⁸ Note 22 above, 253;

A Ebrahim, 'Going to war with the army you can afford: The United States, international law, and the private military industry' 195. For UCMJ

M Underwood, 'Jealousies of a standing army: The use of mercenaries in the American Revolution and its implications for congress's role in regulating private military firms' 344. For MEJA

²²⁹ Note 42 above, 587

²³⁰ Note 51 above, 102.

ensuring that parliamentary oversight exists. The international nature of the regulation means that companies can no longer dissolve and reappear with a clean slate in another part of the globe and by ensuring self-regulation, which includes best business practices, and understating the competitive nature of the industry the concerns around pricing are better understood and controlled. Whilst the motives of private military security companies and states may well be different it has been argued that they ultimately have the same effect and with government being forced to get more involved within the industry the concern regarding the privatisation of risk analysis is also potentially seen to.

It is therefore the opinion of this dissertation that the multi-layered regulatory mechanism proposed above is the best way forward for the private military security industry as well as states, NGOs and developed and developing countries alike.

CHAPTER SEVEN

CONCLUSION

This dissertation began by discussing the development of mercenarism throughout history.¹ It began in ancient times and progressed through to the rise of the modern state, with its state funded and raised armies, and explored how the decline of these armies has allowed for the return of mercenarism as well as the development of corporate mercenaries, or as they have become known today; private military security companies. Each chapter then in turn discussed the history of mercenarism and private military security companies within three particular countries which were selected. These three countries have been chosen because they represent unique responses or at least stages of response to the rise of the private military security industry. The system in the United States is widely regarded as being a model for future regulation², whilst the South African system is seen as being the harshest in the world³ and the United Kingdom is in limbo and has yet to adopt a system of its own.⁴ Within each domestic jurisdiction how the private security industry emerged was explored, as well as the development of legislation in response to mercenarism and the private military security industry. The question asked by this dissertation however was not whether or not the private military security industry would continue to grow, in fact this dissertation not only took the view that the industry was not only a potential good⁵ but also an inevitable force within modern conflict zones.⁶ The question which this dissertation sought to answer was twofold; firstly it sought to analyse whether current international and domestic attempts to regulate mercenarism and the private military security industry were effective. By effective is meant whether or not the states from which these companies and individuals originate are able to control their activities and prosecute any wrong doing. And secondly if they were not effective, or not as effective as they needed to be, how was the best way to go forward with regulatory attempts.

¹ See page 1 of this dissertation.

² C Walker & D Whyte, 'Contracting out war?: Private military companies, law and regulation in the United Kingdom' (2005) 54 *International and Comparative Law Quarterly* 651, 668.

³ S Bosch & M Maritz, 'South African private security contractors active in armed conflicts: Citizenship, prosecution and the right to work' (2011) 14 *Potchefstroom Electronic Law Journal* 71, 102.

⁴ E Krahmann, 'Private military services in the UK and Germany; Between partnership and regulation' (2005) 14 *European Security* 277, 288.

⁵ See page 123 for a full discussion around the benefits which can be gained from the private military security industry.

⁶ D Shearer, 'Outsourcing war' (1998) 112 *Foreign Policy* 68, 76.

At an international level not only were the attempts to define and ban mercenarism widely agreed to have amounted to a clear failure, but there was no convention dealing specifically with the private military security industry.⁷ There were however attempts to regulate the private military security industry emanating from within the United Nations and other regional body such as the OAU/AU.⁸

From a domestic perspective the United States is developing as effective a regulatory system with international jurisdiction as possible, so as to hold its citizens accountable for any criminal activity which occurred outside of the United States⁹, although there are still some concerns which still exist¹⁰. South Africa had a regulatory system which had the net effect of banning the private military security industry¹¹, and raising constitutional and administrative law challenges¹², but which most importantly has yet to yield a successful prosecution.¹³ The Regulation of Foreign Military Assistance Act of 1998 and Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act of 2006 (which it must be recalled has still not entered into force 7 years after its being tabled), also have the effect of reducing the control which the South African government has over its citizens and companies which operate within the private military security industry.¹⁴ Currently the private military security industry in the United Kingdom is regulated

⁷ E L Gaston, 'Mercenarism 2.0? The rise of the modern private security industry and its implications for the international humanitarian law enforcement' (2008) 49 *Harvard International Law Journal* 221, 232. For the unworkable definition with regards to Article 47.

S Gumedze, 'Towards the revision of the 1977 OAU/AU Convention on the Elimination of Mercenarism in Africa' 16.4 *African Security Review* ISS 22, 24. For the unworkable definition with regards to the OAU/AU mercenary convention.

M-F Major, 'Mercenaries and international Law' (1992) 22 *Georgia Journal of International and Comparative Law* 103, 116. For the unworkable definition with regards to the UN mercenary convention.

⁸ These include the Montreux Document and the International Code of Conduct for Private Security Service Providers

⁹ Note 2 above, 668.

For increase in jurisdiction:

A Ebrahim, 'Going to war with the army you can afford: The United States, international law, and the private military industry' (2010) 28 *Boston University International Law Journal* 182, 195. For UCMJ

M Underwood, 'Jealousies of a standing army: The use of mercenaries in the American Revolution and its implications for congress's role in regulating private military firms' (2012) 106 *Northwestern University Law Review* 317, 344. For MEJA

¹⁰ These include a lack of oversight by Congress in the awarding of contracts to private military security companies, a lack of continual oversight of contracts once awarded and the lack of prosecutions against private military security personnel who commit offences in Iraq and Afghanistan.

¹¹ Note 3 above, 102.

¹² See the chapter on South Africa for a full discussion surrounding this issue.

¹³ D Avant, 'The privatization of security and change in the control of force' (2004) 5 *International Studies Perspectives* 153, 156.

¹⁴ *Ibid.*

indirectly¹⁵, and the Green Paper has not developed since being first introduced in 2002, although it does appear to promote the regulation of the industry rather than its banning.

The significance of the lessons learnt from the analysis of international and domestic legislative systems is that there is a need to create a unified approach to mercenarism as well as the private military security industry and that in all instances there is a need for more effective regulation. The significance is also that the lessons learnt from these various attempts were able to be used when proposing a regulatory system for going forward.

The second question which this dissertation set out to answer was what should this regulatory and legislative mechanism look like? In the previous chapter this was answered by first acknowledging the starting point which has been created by the various domestic and international approaches discussed previously, as well as discussing the concerns and benefits arising out of the private military security industry. This was done so as to ensure that the regulatory mechanism which was eventually proposed learnt from previous lessons, addressed the concerns surrounding the industry, whilst also allowing the benefits gained from the industry to remain. The proposed legislative mechanism was a three level approach which instituted an international convention and international licensing body, as well as domestic legislation and a domestic committee to award and confirm contracts, and lastly at an industry level the benefits of self-regulation were also acknowledged. The significance of this proposed regulatory mechanism is that it most importantly acknowledges that the majority of the concerns surrounding the private military security industry can be dealt with via a better regulated industry from an international and domestic level, with the extension of domestic and international jurisdiction to cover the activities of the personnel of private military security companies. It is also significant in that it acknowledges that current efforts need to be updated and improved upon, and that not only is the private military security industry here to stay, but that with sufficient control over their actions they have the potential to create benefits not only for states but also for humanitarian efforts around the globe.¹⁶

In conclusion this dissertation has acknowledged that at the heart of the concerns around the private military security industry is a lack of control and accountability, created by a lack of

¹⁵ Via Acts such as; the Export Control Act of 2002, the Landmines Act of 1998 and The Anti-Terrorism, Crime and Security Act of 2001. These are indirect as they were created to deal with other issues and were not created for the purpose of regulating the private military security industry.

¹⁶ See page 123.

effective legislation and regulation. The proposed mechanism to deal with this problem is designed to be a solution to this problem, which will allow all international actors to benefit from the rise of one of the newest actors in the international arena; private military security companies.

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08 November 2013

Mr Matthew B Kimble (209508682)
School of Law
Howard College Campus

Protocol reference number: HSS/0956/013M

New project title: A comparative analysis of the domestic regulatory systems aimed at eradicating the practice of mercenarism without criminalising the legitimate private military and security industry

Dear Mr Kimble,

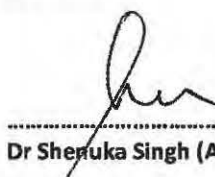
Approval - Change of Project Title

I wish to confirm that your application in connection with the above mentioned project has been approved.

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach/Methods must be reviewed and approved through an amendment /modification prior to its implementation. In case you have further queries, please quote the above reference number. Please note: Research data should be securely stored in the discipline/department for a period of 5 years.

Best wishes for the successful completion of your research protocol.

Yours faithfully


.....
Dr Shenuka Singh (Acting Chair)

/ms

cc Supervisor: Mrs Shannon Bosch
cc Academic leader Research: Professor Marita Carnelley
cc School Administrator: Mr Pradeep Ramsewak

Humanities & Social Sciences Research Ethics Committee

Dr Shenuka Singh (Acting Chair)

Westville Campus, Govan Mbeki Building

Postal Address: Private Bag X54001, Durban 4000

Telephone: +27 (0) 31 260 3587/8350/4557 Facsimile: +27 (0) 31 260 4609 Email: ximbap@ukzn.ac.za / snymanm@ukzn.ac.za / mohungu@ukzn.ac.za






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9 September 2013

Mr Matthew Blain Kimble 209508682
School of Law
Howard College Campus

Dear Mr Kimble

Protocol reference number: HSS/0956/013M

Project title: A Comparative analysis of the Domestic Regulatory Systems aimed at eradicating the practice of Mercenarism in light of the International Law prohibition against Mercenarism

NO- RISK APPROVAL

In response to your application dated 28 February 2013, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol has been granted **FULL APPROVAL**.

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment /modification prior to its implementation. In case you have further queries, please quote the above reference number. Please note: Research data should be securely stored in the discipline/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully

Dr Shenuka Singh (Acting Chair)
Humanities & Social Science Research Ethics Committee

/pm

cc Supervisor: Mrs Shannon Bosch
cc Academic Leader: Professor M Carnelley
cc School Admin.: Mr Pradeep Ramsewak

Humanities & Social Sciences Research Ethics Committee
Dr Shenuka Singh (Acting Chair)
Westville Campus, Govan Mbeki Building

Postal Address: Private Bag X54001, Durban, 4000, South Africa

Telephone: +27 (0)31 260 3587/8350/4557 Facsimile: +27 (0)31 260 4609 Email: ximbap@ukzn.ac.za / snymanm@ukzn.ac.za / mohunp@ukzn.ac.za
Website: www.ukzn.ac.za

Founding Campuses: Edgewood Howard College Medical School Pietermaritzburg Westville

