



Private Military- and Security Companies and the lack of national legislation

-Hired help or the way to the future?

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Abbreviations

CoC- Code of Conduct

IPOA- International Peace Operations Association

ICRC- International Committee of the Red Cross

ITAR- International Traffic in Arms Regulation

MEJA- Military Extraterritorial Jurisdiction Area

PMC- Private Military Companies

PMSC- Private Military and Security Companies

PSC- Private Security Companies

SF- Special Forces e.g., Special Air Services (UK), Navy Seal (US)

UCMJ- Uniformed Code of Military Justice

UK FCO –Foreign Commonwealth Office

UK GP – Green Paper

UK MoD- Ministry of Defence

US DoD- Department of Defense

US DoJ- Department of Justice

US DoS- Department of State

1.0 Abstract

The purpose of the thesis is to identify viewpoints found within the Private Military Security Company (PMSC) sector, in order to explain why national legislation in the UK and the US is limited. For this aim constructivism was used to analyze four actors: the trade association of US PMSCs called IPOA, Shield a Danish PSC and the governments of the UK and US. Constructivism was chosen because of its focus to look at the background, motives and perceptions of the actors and constructivism's understanding that it is the beliefs and ideas that construct the reality. Having the PMSCs as the point of departure is separating this study from others, that has used comments from the PMSCs as support for the author's own ideas and beliefs.

The PMSC industry as we know it has emanates from the end of the Cold War, where the security situation in many newly founded countries where no longer supported by one of the superpowers. The real boom in the industry however came after 2001 and the war in Afghanistan and later Iraq. Despite their experience with contracting both the US and the UK has limited national legislation on the area, which has meant that criminal offences of contractors have remained unpunished.

The limited legislation can in the case of the US be traced back to the US having elements in the government not supporting legislation because of the current financial situation in the country, the department's structures and a lack of attention paid to the subject until heavy media attention was directed. Nevertheless the US does have legislation on the area and has a pro-regulatory approach to the PMSCs.

In the case of the UK it is a simple matter of lack of political will. Previous governments have not been clear to neither the public, nor the parliament of the UKs utilization of PMSCs. The question of PMSCs has been thought to be too

politically risky to discuss, because of the traditional argument that the state should be the holder of the monopoly of violence.

Looking at the industry itself, the IPOA has a pro-regulatory approach and wants more transparency in the industry. The IPOA nevertheless is at the whim of the US that dictates laws and business practices that hinders the much-desired transparency. The IPOA however does not speak for everyone in the industry. Shield holds a commercial non-regulatory viewpoint and as such does not believe in regulation and argues for the market to decide. Contracts should include the terms and conditions and not be restrained by national legislation that Shield views as too ineffective anyway. Shield does not believe in trade associations as the way to the future either, but agrees with IPOA that greater openness and a change of attitude from the governments will promote a healthier industry.

The four actors' viewpoints represent the challenges that future legislative and industry actors must take into account if they want to improve the industry's image and draft more efficient legislation.

2.0 Introduction

Situations where a Private Military Security Company (PMSC) has acted criminally and carried on unpunished have reached news headlines the last years creating mercenary and devilish images of the PMSC industry in the public. PMSCs have nevertheless been working in areas of contention since the end of the Cold War and have increasingly gained importance in military planning and operations worldwide. Albeit, not publicly proclaimed by governments, PMSC have and are working for national governments, amongst them the case studies of this paper the UK and the US.

Government efforts to legislate PMSCs have been slow and the debate on the companies is only now beginning to enter the public sphere. When looking at the companies' history and how they have evolved it appears clear that these companies are here to stay and perform long-term services for governments, but it is not so clear however how, and if, governments will work with them, and indeed how they want to regulate on the area. The PMSC industry itself also appears fractioned, consisting of different actors with different motives and business ethics. The clear dilemma between the state as the traditional holder of the monopoly of force and the PMSC actors now performing conventional military duties without clear legislation was what initially sparked my interest. Following, it was *why* there was not strong legislation. This last question I felt, as I was digging into the material and conducted the interviews, was symptomatic to how the industry is constructed and how governments choose to handle the industry. This aspect was what I ended up with as the topic of the thesis.

2.1 Literature review

PMSCs have been the research topic of academics in the last years. The list of authors who have devoted their time and attention to the subject presents a rather small but committed group of authors. Peter W. Singer has particularly dominated the field and is one that almost every author is referring to. Singers book *Corporate Warriors- the Rise of the Privatized Military Industry* from 2003,

describes the PMSC industry and challenges the traditional moral discussion on the existence of PMSCs. Christopher Kinsey, also shies away from the moral discussion in his book 'Corporate Warriors and International Security- The Rise of Private Military Companies' and tries to explain the industry's history, use and challenges.

Despite Kinsey, Singer and other authors' contributions, there is a lack of research where the companies themselves contribute. Research on the PMSCs perceptions, background, and future capabilities has been virtually absent. Furthermore, the governmental process aspect has been lacking, as if the internal environment in a government does not determine policies. Previous research on PMSCs has been centered around the activities of the companies, and not on the companies themselves. At times comments from the industry have been used to underline an author's point, but academic material with PMSCs views on the legal situation as the focal point is hard to come by. The voice of the PMSCs have been interpreted to fit into an authors' agenda and never just stood alone.

For this thesis' purpose of coming to a real understanding and explanation of why there is a lack of legislation, the PMSC companies' viewpoint has been regarded as absolutely vital. Letting PMSCs and legislators speak, allowing their views to be heard leads to a better understanding about the industry and in the end make for better legislation, both for governments and for the industry. Constructivism is the best theoretical framework for this, as it unlike other theories, focuses on the actors' beliefs, backgrounds and perceptions, something that has been missing in the academic research on PMSCs so far.

2.2 Problem Field

When setting out to do a constructivist analysis it is important to identify the actors, leading to: how is the industry structured? Is it industry a defined group of actors and is it organized in a common organization? It then becomes crucial to look at the legislation and the actors which leads to: what are the analytical actors' general opinion on legislation, and what is the industry's relationship to

the legislator and their employer- the government? If the industry could choose, what kind of legislation would they prefer? And what national legislation exists in the UK and US on the PMSC area? Furthermore, when looking on legislation it is essential to establish to what use the PMSC industry is for the US and UK government, and if the governments are even interested in legislation on the PMSC area.

These questions about the composition of the industry, the motives of the UK and US government, lead to a constructivist actor orientated analysis to identify the actors' viewpoints, in order to explain why, and how, these actors are hindering a more firm legal framework. The problem formulation is therefore:

A constructivist analysis to identify viewpoints within the PMSC industry and the US and UK, with the purpose to explain why national legislation in the UK and the US is limited.

2.3 Key Terms

Following are defined key terms occurring frequently in the thesis. The definitions are essential instruments in order to understand the industry, what components it consists of, and the challenges it faces.

2.3.1 Private Military Companies

Private Military Companies are companies with a business structure, which means a professional management, investors, and with a defined business strategy. PMCs offer services supporting already existing structures. They perform supporting, advising, consulting and training services. PMCs that are members of a trade association are obliged only to work for legitimate recognized governments¹. Typically contracts for a PMC regards training of military personnel. Contractors are often former or retired soldiers from the Special Forces². Company owners and management are also mostly retired soldiers. Recruitment happens via database, via personal recommendations or an application process³. PMCs are subject to international, national and corporate law, and thus pay taxes and are responsible for their employees overseas.

2.3.2 Private Security Companies

PSCs share the same business structure as the PMCs and are also conditioned only to work for legitimate governments. PSC primarily do risk assessments, training of bodyguards and close personal protection. Their services are usually related to foreign diplomats, but can also include protection of economic interests like oil fields, pipes and embassies. PSCs often undertake crime

¹ IPOA CoC: 4.1. Signatories shall only work for legitimate, recognized governments, international organizations, non-governmental organizations and lawful private companies. 4.2. Signatories shall refuse to engage any unlawful clients or clients who are actively thwarting international efforts towards peace. Taken from IPOA website: <http://ipoaworld.org/eng/codeofconduct/87-codecodeofconductv12enghtml.html> (15.06.10)

² Examples of bodyguards and doormen have also happened in Iraq in the first years after the invasion in Afghanistan and Iraq.

³ UK Parliament, Committee of Defence. *Examination of Witnesses (Questions 178-179)*. 01.04.08. Taken from UK Parliament website: <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmdfence/424/8040108.htm> (13.04.10)

prevention and restoration of public order. Employee, owner, recruitment and legal characteristics are shared with PMCs.

2.3.3 Mercenaries

The definition of a mercenary is in layman's terms a soldier who fights for any country, cause or group that pays him. The tradition of using mercenaries goes back to the medieval ages, where Kings, princes and warlords used to pay mercenaries to join their armies to fight. The type of mercenaries that defined the decolonization's military operations in the 1950s and 60s in newly geographically defined African states⁴, were also hired by rulers and militias to gain territory and control. The mercenaries of the 60's were characterized by being a loose group of individuals that worked for anyone who had cash, participated in direct combat, in a non-corporate business structure and with the non-existence of laws and regulation.

2.4 Delimitation

This paper will deal only with PMSCs working for governments, as the PMSCs working for commercial companies work on other terms and under a different set of regulation. For the most part PMSCs that work for commercial companies, will work under national regulation, which means if they work in Afghanistan, they will fall under Afghan law. The terms and tasks of the contract are settled by the parties' lawyers and are negotiated on a case-by-case procedure. The focal point of the thesis is PMSCs working on government contracts thus adhering to their particular government's laws and regulations.

The PMSCs that I am focusing on in the thesis are PMSCs with contractors that are armed and perform tasks for the government that are potentially lethal. I have chosen these kinds of companies because it is these tasks that have brought media attention and controversy to the industry. According to numbers from IPOA 85-95% of the industry consists of companies that perform logistical

⁴ Singer, Peter Warren. *Corporate Warriors – The Rise of the Privatized Military Industry*, London: Cornell University Press, 2003. P.37

duties, such as transport, food, cleaning and building of the bases⁵. It is however the small percentage of contracts where PMSC are armed that has questioned the state's monopoly of violence. It is the small percentage of contracts that has triggered the debate because the release of unregulated companies in an environment that has no legal oversight, can be potentially deadly to the people they encounter.

2.4.1 National vs. International Legislative Level

The following section will explain the choice to focus on legislation on the national level, in this case the UK and US. One could argue that neglecting to include the international aspect as an important aspect is obstructing a holistic understanding of the subject. My reasoning is the fundamental understanding, that no matter how many efforts there has been by the UN and EU these efforts are to be signed and ratified by individual states. Nothing thus happens without the consent of the national government. All PMSCs are registered in a country, it is therefore the most urgent to look at the national government under which rules they adhere.

Another reason to focus on the national level is, that contractors normally work in environments characterized as failed or failing states, where a functioning legal and judicial system is not present. In those circumstances, foreign contractors working on a government contract may be granted immunity, and is thus not subject to be prosecuted in the host country. The jurisdiction then falls under the national law of the home state of the contractor.

International legislative efforts to regulate the PMSC industry includes the International Humanitarian Law, International Human Rights Law, the Additional Protocols I and II from 1972 to Article 47 of the Geneva Convention of 1949, and the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 1949⁶.

⁵ Brooks, Doug. 'Are Contractors Military?' in *JIPO- Journal of International Peace Operations*. Vol,5 no. 5 March-April 2010. P.4.

⁶ Christopher Kinsey, *International Law and the Control of Mercenaries and Private Military Companies, Cultures & Conflicts*, English documents, 2008. URL : <http://conflicts.revues.org/index11502.html>

There are several reasons why these conventions have not been successful in regulating PMSCs. Firstly the original conventions are from a time when the private industry was not as widely used by governments as they are today. Private companies performing duties that traditionally have been reserved for the armed forces are thus not described.

Secondly, the conventions lack clear definitions as to what constitutes mercenaries and PMSCs. The trend has been to juxtapose the two concepts although the two perform different tasks and do not share the same kind of management structure and purpose⁷. This has made it possible for PMSCs to avoid fulfilling the demands for the criteria and avoid prosecution⁸.

Thirdly, international law is by definition negotiated in a large community and the legislative effort agreed upon, is therefore often a diluted version of the original text and will work as some kind of common minimum requirement⁹, this effectively puts it on the national governments to come up with legislation. Often the very countries that have supported UN conventions on mercenaries are the ones that make the most use of contractors for their own benefit, exposing the hypocrisy of the situation, many countries, including the UK, have not supported these conventions exactly for this reason¹⁰.

Another example is the '*UN Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the rights of peoples to self-determination*'. Before the establishment of the Working Group there was a UN Special Rapporteur on the use of mercenaries. The Working Group has since its establishment in 2005 worked towards creating an international convention on the regulation of mercenaries and PMSCs. Since 2005¹¹ they have been collecting

⁷ Please see the definition section for a more detailed description.

⁸ Kinsey, Christopher. *Corporate soldiers and International Security – the rise of Private Military Companies*. New York: Routledge. Page, 2006. 134.

⁹ Kinsey, Christopher. *Corporate soldiers and International Security – the rise of Private Military Companies*. New York: Routledge, 2006. Page. 134.

¹⁰ Chesterman, Simon and Chia Lehnardt. *From Mercenaries to Market – The Rise and Regulation of Private Military Companies*. Oxford: Oxford University Press, 2007. P. 35.

¹¹ UN Working Group. *Introduction*. Taken from UN Working Group's website: <http://www.unwg.rapn.ru/en/1.htm> (19.04.10)

evidence, monitored mercenaries and studied the activities of private companies offering military services. The Working Group will hand in their proposal draft in September 2010, and after that it will be in the hands of the Human Rights Council¹². It does not look promising for a more solid legal definition of mercenaries and PMSCs in the near future also because neither the Human Rights Council, nor the General Assembly differentiates between mercenaries and PMSCs¹³. The slow UN process therefore further stresses the need for national initiative.

A recent example of international effort, is not from the UN Working Group on Mercenaries, but from the Swiss government in collaboration with ICRC and with consultation from civil society and the PMSC Industry, including IPOA. It is called the 2008 Montreux Document and it:

“reaffirms the obligation on States to ensure that private military and security companies operating in armed conflicts comply with international humanitarian and human rights law. The document also lists some 70 recommendations, derived from good State practice. These include verifying the track record of companies and examining the procedures they use to vet their staff. States should also take concrete measures to ensure that the personnel of private military and security companies can be prosecuted when serious breaches of the law occur”¹⁴.

The Montreux document is nevertheless neither legally binding for the signatories, nor did a great deal of countries participate. Only 17 countries participated in the negotiations. These 17 supporting countries are characterized

¹² UNOG. "MERCENARIES: UNITED NATIONS EXPERTS FINAL GO AT NEW INTERNATIONAL CONVENTION DRAFT" 09.04.10. Taken from INOG website: [http://www.unog.ch/80256EDD006B9C2E/\(httpNewsByYear_en\)/8A8C701C0CC1D635C1257700002C4FA7?OpenDocument](http://www.unog.ch/80256EDD006B9C2E/(httpNewsByYear_en)/8A8C701C0CC1D635C1257700002C4FA7?OpenDocument) (19.04.10)

¹³ Chesterman, Simon and Chia Lehnardt. *From Mercenaries to Market – The Rise and Regulation of Private Military Companies*. Oxford: Oxford University Press, 2007. P. 25.

¹⁴ ICRC. *The Montreux Document on Private Military and Security Companies*. April 2008. Taken from ICRC website: <http://www.icrc.org/Web/Eng/siteeng0.nsf/html/montreux-document-170908> (19.04.10)

by being either being home countries of the PMSCs, or the host countries but since 2008 another 17 have communicated their support¹⁵.

A number of academics argue that there is no legal vacuum¹⁶, and that international law does exist, but that it is the states responsibility that they are in fact used¹⁷, thus implying that the states do not. This thesis does not argue if international legislation is existing or not, but rather assumes that the lacking of prosecution speaks for itself in showing that international legislation is not working, thereby supporting the thesis' focus on national law.

2.4.2 A Constructivist View

Constructivist theory often applies the discursive analysis as the framework of the analysis. In this thesis however it will not be applied. The reason being, that the discursive analysis puts the emphasis on the spoken and written word. The way it is placed in the sentence implies the connection. When analyzing the PMSC industry however it is not so much the spoken word that is useful but the actions, context, background and the things that are unspoken and implied that are useful and the focal point of the thesis.

2.4.3 Representation

Representing the PMSC industry in the thesis is the trade association of US PMSCs the IPOA, and the Danish American PSC Shield. There are two reasons for that. Firstly, the thesis' theoretical framework constructivism investigates the actors' beliefs, background and perceptions. As constructivism is used to understand the actor and not to prove a hypothesis, two PMSC actors were regarded as enough to reach an understanding of the complexity of the subject. The fact that IPOA is the representative of many PMSCs furthermore supports the validity of the choice. Shield represents another viewpoint and background and it is precisely the different viewpoints that validate the need, and relevance,

¹⁵ ICRC. *Participating States of the Montreux Document*. Oct.2009. Taken from ICRC website: <http://www.eda.admin.ch/eda/en/home/topics/intla/humlaw/pse/parsta.html> (19.04.10)

¹⁶ Argued by Peter Singer see: 'War Profits and the Vacuum of Law: Privatizes Military Firms and International Law', *Columbia Journal of Transnational Law*, vol 42 (2004) 532.

¹⁷ Chesterman, Simon and Chia Lehnardt. *From Mercenaries to Market – The Rise and Regulation of Private Military Companies*. Oxford: Oxford University Press, 2007. P.138 and 142.

for the study. Secondly if one is to do a thorough analysis, which the chosen theory demands, the limited scope of a thesis naturally narrows down the number of possible analytical actors. Representing a new academic aspect on PMSCs this thesis is thus, however valid, a precursor for further comprehensive study.

2.5 Methodological considerations

This section is dedicated to explain the choice of the term PMSC, and the process of the data collection.

2.5.1 Mercenaries

Many might feel that there is no difference between PMSCs and mercenaries. Indeed, as we have just learned, even the UN body working on PMSCs is called: *'the UN Working Group on Mercenaries'*. In the definitions section the difference was outlined so that it appears clear to the reader what the exact difference is. Unlike others, this thesis views the PMSCs, as an industry that perform perhaps unusual services, but yet services that are acquired by governments and an industry that has to adhere to national, corporate and international law. I will therefore, in the thesis, not concentrate on the subject of mercenaries but on the PMSC industry working on government contracts.

2.5.2 Data

I will make use of interviews made at the conferences: IPOA¹⁸ 'Risk Management in Conflict and Post-Conflict Zones' April 8-9th 2010 in London where Director J. J. Messner was interviewed, and the ICD International Symposium on Cultural Diplomacy, Berlin May 23rd-30th 2010, where I interviewed Lord Jack McConnell, previous First Minister of Scotland (2001-2007) and Gordon Browns' Special Representative on Peace-building (2008-2010). Another interview was made with the founder and owner of Shield Risk Consulting, a Danish/US PSC in Copenhagen in March 2010.

¹⁸ International Peace Operations Association (IPOA) is the trade association of American PMC and PSCs.

The knowledge from London and Berlin is gathered both as interviews and observations and comments made during presentations and panel discussions. The interview guide was a loosely structured document with the most important questions and issues written down. The conversations were consequently more free. In the process of planning the interviews, I gave the use of a dictaphone some thought. The negative image portrayed of PMSCs in the media, naturally leads to a lack of interest in talking to any journalist. I therefore concluded that the dictaphone would make them hesitant to participate in an interview. I therefore chose to rely on handwritten notes.

The interview with the Director of the IPOA, Messner, was planned and settled before the conference and he declined to see notes after the interview. The one with Lundsgaard at Shield Risk Consulting (Shield) shared the main questions with IPOA but included more specific questions about Shield. After the interview, all notes were sent to Shield for comments. The interview with McConnell shared the same framework as the others. The entire thesis was sent to him for comments.

As it turns out getting people to talk, has not been as hard as expected. All interviews and conversations were filled with interesting insights and controversial stories, that could potentially change the public debate, but when it came to what people wanted to be cited for, it was a different story. Some quotations in the thesis are therefore anonymous¹⁹. The cautiousness by some interviewed can in part be explained by a fear of releasing information that may be used against them, or revealing operational procedures that potentially could pose a threat to the security of their staff²⁰.

Other material was taken from government websites, academic books and research papers.

¹⁹ If interested in the source, I kindly ask you to address this matter with me privately

²⁰ Kinsey, Christopher "Private security and corporate social responsibility".

In Alexandra, Andrew, Deane-Peter Baker and Marina Caparini. *Private Military and Security Companies – Ethics, policies and civil-military relations*. London: Routledge, 2008. P. 79.

Given the thesis's constructivist theoretical framework, the qualitative approach seemed an obvious choice since constructivism suggests that the study field²¹ is made up by cultural constructions created entirely by the field itself, also illustrated by a quote in Peter Dahler-Larsen's book: *"to seek to understand the social world as it is for those people whose social world it is is possible only if one practices the art of listening to them in their own terms and attends to the social world they construct for themselves"*²². The wish to understand the actor, its problems, motives and background is the basic motive for the qualitative method. It was therefore only natural to have a qualitative aspect in the thesis. The disadvantage of the qualitative approach is the danger of a subjective interpretation of the interviews in the analysis, and the carefulness one has to demonstrate in formulating the questions. Asking questions that do not lead to the interviewers' answers and does not corner the interviewed –unless intentional- is one of the dangers when conducting interviews.

2.6 Method

The method section will outline the chronological order of the thesis.

Preceding this section, the abstract, introduction, literature review, problem formulation, definitions and what is considered the limits, and methodological considerations have been explained. This renders the reader more aware of the actual content, goal and effectiveness of this study and allows for a clearer understanding of any reached conclusion. For a graphical explanation, please see the appendix.

Hereafter is the theory section, where the chosen theory, constructivism will be introduced and offered critique. Alternatives to the chosen theory are also explained and given critique. The aim of this thesis is to find the actors' main viewpoints to explain the lack of regulation on the PMSC area. It is thus natural to look at the analytical actors.

²¹ Translated from: 'Undersøgelsesfeltet'. For more information please see: Dahler-Larsen, Peter. *At Fremstille Kvalitative Data*. Odense: Odense Universitetsforlag, 2002, P. 26.

²² Dahler-Larsen, Peter. *At Fremstille Kvalitative Data*. Odense: Odense Universitetsforlag, 2002. P. 26.

The four analytical actors are: IPOA, Shield and the UK and US. All four will be introduced and analyzed with the constructivist theoretical framework. The analytical section will include a short post Cold War historical introduction to PMSCs. This, will the give the reader an introduction to PMSCs role in conflicts and why these companies are relevant to discuss. The introduction to the US and UK debate will also include a section on how the U.S. and UK have utilized private companies in their military actions and which arguments are put forward in the legislative debate. The analysis will be conducted with outset on the data gathered. The analysis will be a guiding light to an understanding and identification of the viewpoints and the major differences that hinders a development of regulation on the PMSC area.

3.0 Theory

This section will introduce different theoretical approaches to the subject, explain the reasoning behind the chosen constructivist theory and subsequently offer its main critiques.

3.1 Theoretical Approaches

Constructivist theory and its alternatives have their strengths and weaknesses, which are worth considering. I will present two other options and why they were rejected for the purpose of this thesis.

Realism is the classical theory to choose when it comes to analyzing power structures. The realist assumption is that the international system is ruled by anarchy and as such it is all about the survival of the state, the power of the interests. Realism and its variations like neorealism²³ are all characterized by three elements: statism, survival and self-help. Statism suggests that the state is the only authority to enforce law and order. Survival is the cornerstone of realism, where the main goal for the state is to survive and to expand its power. In its pursuit for power the leader must, in true Machiavellian fashion, be both the man and the beast²⁴. The obtaining of power is by self-help in realism, as realists regard international organizations too weak to protect the state, should there be any aggressors. Nevertheless it is acknowledged that being a strong state naturally makes weaker states feel threatened, hence joining forces with other states in order to create a balance of power becomes an option²⁵. In that case the survival of the state comes before the principle of self-help and a strong state will form alliances to secure the survival. In the academic world, amongst them Thomas Adams in his piece "The New Mercenaries and the Privatization of

²³ Baylis, John, Smith, Steve. *The Globalization of World Politics, An Introduction to International Relations*. New York: Oxford University Press, 2001. P. 185.

²⁴ This also means, that although trying to act according to Christian values, the leader can and should cheat, lie and fight to reach his aims, which supports the common view that realism has a negative view on human nature. Machiavelli, Niccoló. *The Prince*. Trans. W.K. Marriott. 1515. The Constitution Society, (online book) <http://www.constitution.org/mac/prince.pdf>

²⁵ Baylis, John, Smith, Steve. *The Globalization of World Politics, An Introduction to International Relations*. New York: Oxford University Press, 2001. P. 144.

Conflict”²⁶, call the PMSCs the ‘covert wings of government’ and argues that governments have no interest for regulation. P. Singer who has written extensively on the subject, argues that the government is creating legislation that is impossible to uphold²⁷.

Liberalism is another alternative. The liberal theory is centered on the premises that power is given to the state by the people and as such is not static and limited. In liberalism the state is not the primary focus. Liberalism suggests that states only exist because of the support of the people, which is unlike the realists who believe the state is the single actor. Liberalism believes that power and force is not legitimate no matter its reasons, and is known for its positive view of human nature. Where realism does not believe in international institutions that are actors themselves in world politics. Liberalism believes that states are interdependent and progress is made through cooperation. Collective security will replace the realist notion of self-help. The liberalists are also commonly known for the notion of the ‘invisible hand’, which is a natural harmonization of interests where states and people make rational decisions in which national and international interests correlate.

On the PMSC area, one can find academics and other groups that support international law as the only way of successfully creating legislation on the PMSC area. Kevin O’Brien in ‘What should and what should not be regulated?’²⁸ writes that it would “*..be desirable for governments to pursue at the international level the same approach advocated here for the national level, with a comparable international regime and separate authority*”. Furthermore that “*it would be unfair to, and commercially unproductive for, PMCs to have to deal with broadly*

²⁶ Adams, Thomas. ‘The New Mercenaries and the Privatization of Conflict’. *Parameters*, vol 29 (2)1999.

²⁷ Alexandra, Andrew, Deane-Peter Baker and Marina Caparini. *Private Military and Security Companies – Ethics, policies and civil-military relations*. London: Routledge, 2008. P. 182.

²⁸ O’Brien, Kevin. ‘What should and what should not be regulated?’ in Chesterman, Simon and Chia Lehnardt. *From Mercenaries to Market –The Rise and Regulation of Private Military Companies*. Oxford: Oxford University Press, 2007. P.47.

different regulatory regimes in allied Western countries. Any standardized approach to national regulation in this sense should be encouraged strongly"²⁹

3.1.1 Critique of Different Approaches

After the brief introduction to the alternative theories it seems only fitting to argue why these were not chosen.

If one were to use realism as the analytical tool, the result would be given. In the context of PMSC working on government contracts, the realist argument for why there is a lack of legislation would be, that the government wants the PMSCs to do their dirty work in order for the state to survive and as such, the state is not interested in legislation that could hinder that utilization. Realists would thus not encourage any further dialogue with the IPOA, although perhaps publicly claiming to be working for more legislation. From a realist point of view the IPOA is no more than an organization trying to get ahead of other companies in search of their own survival. The conclusion of the thesis would then be that the government is not really interested in legislation, because they want to ensure their own survival first. That does not however correlate or explain the actual efforts made by governments, and international institutions, nor the efforts made by the IPOA- the industry itself, to create legislation on the area. Robert Cox's famous quote that 'theory is always for someone and for some purpose' underlines that any conclusion reached in the thesis would be a realist one, because in all cases realism would try to assure the survival and the maximization of power.

Liberalism with its emphasis on the international cooperation does not fully encapsulate the topic either. International legislation has not yet been proven effective, and O'Brien advocates for a national legislation as well, although a standardized one. Finding a standardized international common ground in correlation with national and international interest, does not seem very likely though, as it would include the countries affected but also the exporting

²⁹ O'Brien, Kevin. 'What should and what should not be regulated?' in Chesterman, Simon and Chia Lehnardt. *From Mercenaries to Market –The Rise and Regulation of Private Military Companies*. Oxford: Oxford University Press, 2007. P.47.

countries of PMSC services. The common denominators are simply not explanatory of the industry and the governments' actions. As well as for realism, a liberalist theoretical tool would not be explanatory for the analytical actors in the thesis.

Consequently as the aim of the thesis is to identify viewpoints of the chosen analytical actors, the theory is not meant to come up with a solution to a problem but rather identification and a better understanding of a complicated topic. It is exactly here that constructivism supports the method of the thesis. According to constructivism it is the reasoning, the thoughts and ideas that shape the identity of an actor and thus its actions. If any other IR theory were to be used for the thesis, a result would have been a given, foreseeing the future. A theory with a clear view of how the world should be. That is not the aim of this thesis. The constructivist theory allows one to identify different and perhaps contradictory streams of thought within the same area and let them stand on their own, to shed light on the complexities, not having to 'fit' them into a theory. Hence for this ambition, the constructivist theory is thought to be the most suitable.

3.2 Constructivism

Social constructivism or just, constructivism evolved in the 1980's and caught on in the neorealist dominated North America, after the Cold War ended. The basic neorealist assumption that had dominated during the Cold War was the power balancing between the USSR and the U.S. However after the fall of the USSR it was suddenly not clear who was going to take over in a multipolar system, which would inevitably happen according to the neorealists³⁰. The constructivist idea then offered an alternative as it is not, as opposed to neorealism, materialist³¹. It argues that what matters is, that international relations is social and that the international system does not exist as something you can 'reach out and touch' but something that is socially constructed by human ideas, beliefs and is subject to change, if the beliefs and ideas change. Constructivism believes in viewing the

³⁰ Jackson, Robert, Sørensen, Georg. *Introduction to International Relations –Theories and approaches*. 3rd edition, Oxford: Oxford University Press, 2007. P.163.

³¹ "...focus on how the distribution of material power, such as military forces and economic capabilities, defines balances of power between states and explains the behavior of states" Jackson and Sørensen, 2007, Ibid. P. 162.

whole instead of the part, and includes both culture and identity as major factors for action. As constructivism goes, it exists both as a social theory and in International Relations (IR). In this thesis only the IR aspect will be utilized³². The main scholars of constructivist theories in IR are Nicholas Onuf, who coined the term in 1989 and Alexander Wendt, the author of many books on the subject. Wendt's key argument is the rejection of the neorealist assumption that anarchy will lead to self-help. Wendt argues that it is the interaction between states that determines the identity and the actions.

Wendt and the neorealists nevertheless agree that states want to survive and be secure, and that states operate in a system characterized by anarchy. But what kind of anarchy varies, Wendt operates with three kinds of anarchy; Hobbesian, where it is '*war of all against all*'³³ which was characteristic until the seventeenth century, Lockean, dominant after the Westphalian treaty and was known by being enemies but acknowledging other states' borders, and finally Kantian, where states can become friends and support each other if one is threatened. This last form of anarchy came into existence amongst democracies after the Second World War³⁴. Wendt suggests to see what kind of anarchy exists between two parties in order to better understand their identities and culture of anarchy, in this way a better understanding can be found to how social interaction can change their idea and beliefs. It all boils down to the fact that neorealists say that a states' identity is a given and its interest is set before it engages in the international system, whereas the constructivist believe that these interests and identity has been influenced by ideas and beliefs even to become an identity. Constructivism does not claim that ideas are more vital than power and interests but more that the underlying factors and what determines power and interest are in fact ideas and thoughts³⁵.

³² For more information about the social theory, please see Jackson and Sørensen 2007, Ibid, p.164.

³³ Jackson and Sørensen 2007, Ibid, p.168

³⁴ Jackson and Sørensen 2007, Ibid, p.168

³⁵ Jackson and Sørensen 2007, Ibid, p.166

3.2.1 Critique of Constructivism

Constructivism has already been held up against neorealism in the previous section and it is indeed neorealism that poses the biggest critique of constructivism. The two theories naturally clash since constructivism in North America was seen and introduced directly after a period dominated by neorealism and was believed to fill the void where neorealism gave no answers. The approach to change has already been mentioned, which is a cornerstone to the disagreement. When it comes to other IR theories such as liberalism and even Neomarxism there is more common ground, because of their attention to ideas, norms and the international society.

Neorealism dismisses the constructivist idea that states can become friendly easily by interaction, neorealists do not believe in laying norms of communication on the states, as it is their opinion that survival of the states come first and that the international system of anarchy forces all states to act aggressively. Another point of neorealists is the uncertainty of the international system, constructivism believe that interaction is most often sincere and information trustworthy, whereas neorealisms' fundamental belief is that the information can be a deception, thus whilst one state might think everything is peaceful another state could be planning warfare. Analyzing the interactions, thoughts and ideas of a state however, constructivist claims, can minimize uncertainty³⁶.

³⁶ Jackson and Sørensen 2007, *Ibid*, p.163

4.0 The PMSC industry

The succeeding chapter will be an introduction to the PMSC industry's history, activities and actors. The purpose of the chapter is to leave the reader with an understanding of PMSC history, usage and significance for governments in modern warfare. It is thought this chapter will set the background to the analysis of IPOA, Shield, the US and UK in the following chapters, thereby rendering the section more effective.

The PMSC industry in the US began with Military Industrial Complex³⁷ that emanated from the two world wars. The UK PMSC industry emerged a bit later but both PMSC industries expanded greatly after the Cold War ended, where small states no longer were backed up by one of the superpowers. The example is 520,000 US military personnel deployed in foreign countries in 1983, and by 1992 the number had dropped to 344,000³⁸. This naturally also left a great deal of soldiers available for active duty, which gave the PMSCs a wide variety of choice and quality when taking on new employees. The PMSCs quickly filled a gap of security in the world, and turned out to be the only alternative for some countries. Post Cold War PMSCs have operated in conflict zones all over the world performing multiple tasks for governments and the UN in peacekeeping. Contractors were present during and after the war on the Balkans in the 90's training the national armed- and police forces in the countries. During the 90's private firms trained more than 40 national militaries. In 1996 they were sent by the US government to stabilize Sierra Leone, where UN troops could not because of a poorly defined mandate. The 2005 US Defense Strategy entailed goals as this: *"one of our military's most effective tools in prosecuting the Global War on*

³⁷ "A partnership of military professionals, leaders of industries dependent on military contracts, high government officials whose political interests are linked to military expenditure, and legislators whose constituents benefit from defense spending". Wittkopf, Eugene R. et al. *American foreign policy: Pattern and Process*. Belmont, CA: Thomson Wadsworth, 7th ed. 2008. P. 561

³⁸ Ortiz, Carlos. *Private military contracting in weak states*. Published in *African Security Review* Vol 17 no.2 2008. Taken from Institute for Security Studies website: <http://www.iss.co.za/pgcontent.php?UID=148> (22.04.10)

*Terrorism is to help train indigenous forces*³⁹ which helps underline the importance US puts on the jobs contractors perform.

Since the invasion of Iraq however a real boom in the industry has been seen, both in terms of government contracts, their size and the number of companies. By now the US PMSC industry alone generates \$100 billion yearly⁴⁰. The private industry, as illustrated by the quote before, is integrated into the US military strategy. Why this has happened can have several explanations. One is the body bag syndrome⁴¹. As wars now happen miles away, the public support for war and the willingness to send young soldiers off to war gets increasingly smaller. The financial crisis has alleviated parts of the problem in the US, simply because of the high unemployment rate in the country⁴². Another explanation is that on the one hand the US has made the decision to take home troops in Iraq to gain support and imply that they are no longer necessary –aka ‘we’re winning the war’, but on the other hand increasing the numbers of contractors working in Iraq. As of now the number of contractors in Iraq outnumber the US active duty personnel⁴³. Contractors can be and are, used in PR campaigns to signal a reduction of troops, even though the reality is a status quo in the number.

Another aspect is the rapidity of deploying contractors. In a national setting, planning military operations and deployment of troops is both a military and a political decision, and to set in motion the military system naturally demands time. In an international setting where the policies of several countries determine the mandate, the planning requires even more time. Traditionally, to deploy a UN operation takes 6-8 months from discussion to deployment, whilst

³⁹ Alexandra, Andrew, Deane-Peter Baker and Marina Caparini. *Private Military and Security Companies – Ethics, policies and civil-military relations*. London: Routledge, 2008, P. 120

⁴⁰ Farquharson, Kenny. ‘Don’t call us mercenaries’ in the Sunday Times 03.07.05

Taken from the website: Times Online.

<http://www.timesonline.co.uk/tol/news/uk/scotland/article539288.ece> (31.05.10)

⁴¹ The term originates from the intervention in Somalia during the Clinton Administration where the operation was cancelled because of loss of soldiers. Somalia is now characterized as a failed state and a terrorist haven.

⁴² LTC Chris R. Kelsey - Commander, Muscatatuck Urban Training Center Indiana, USA. During IPOA EuroConference 2010.

⁴³ Brooks, Doug. ‘Ruthless Humanitarianism: Why Marginalizing Private Peacekeeping Kills People. Alexandra, Andrew, Deane-Peter Baker and Marina Caparini. *Private Military and Security Companies – Ethics, policies and civil-military relations*. London: Routledge, 2008. P. 121

deploying the PMSC generally takes 2-6 weeks. National militaries are not quicker with their 2-5 months⁴⁴. The reaction force of the private industry is thus much quicker and requires no planning, nor assessment from the contracting side of national military capabilities. The former military advisor to the UN Secretary General, General Frank Van Kappen is quite precise when he, as early as in 1972 said:

*"The planning of peacekeeping operations is the ultimate challenge because you never know where you have to operate; you never know what they want you to do; you don't have the mandate in advance; you don't have forces; you don't have transport; and you don't have money! We always have to start from zero. Each and every operation that we start, we start with nothing"*⁴⁵

Some could argue that since 1972, a lot has happened to the UN and that it now has a staff and equipment to better plan operations. Nevertheless, the lack of flexibility and a slow moving institution that the deployment statistics show, suggest that this quote still has its merits. Additionally contractors allow the military to focus on their primary tasks and enable them to get support on specialist areas.

Finally the last reason is controversial but nevertheless relevant; Contractors are a very good excuse to get the 'dirty' or unpopular jobs done. It also allows the government to enjoy the success but to easily reject responsibility if things go badly^{46 47}. The argument that contractors are the cheapest option is debatable and has not been sufficiently proven⁴⁸, yet contracts save the government of

⁴⁴ Brooks, Doug. Alexandra, Andrew, Deane-Peter Baker and Marina Caparini. *Private Military and Security Companies – Ethics, policies and civil-military relations*. London: Routledge, 2008. P. 120

⁴⁵ Langille, Peter H. *Conflict Prevention: Options for Rapid Deployment and UN Standing Forces*. 1999. Taken from Global Policy Forum website: <http://www.globalpolicy.org/component/content/article/199/40962.html> (28.04.2010)

⁴⁶ Kinsey, Christopher. *Corporate soldiers and International Security – the rise of Private Military Companies*. New York: Routledge, 2006. Page 96.

⁴⁷ One example is contracted interrogators in Abu Grahیب who were involved in the scandal that arose when details of harsh interrogation techniques and torture reached the public surface. The US government took a stand against these actions, but the contractors were never prosecuted because of a loophole in the MEJA legislation. See analytical section on the US.

⁴⁸ For a description of the debate see: Singer, Peter Warren. *Corporate Warriors – The Rise of the Privatized Military Industry*, London: Cornell University Press, 2003. P.157

employee related expenses like, pension, health, insurance and training. Although the costs can vary in contracting one could argue that the benefits, and reasons listed above, of using contractors in some situations outweigh any regard to possible costs.

4.1 Recruitment

As previously mentioned, the end of the Cold War left highly trained and experienced soldiers without a job, when the international system changed. These, especially former Special Forces (SF) soldiers, were and still are the most desirable candidates for PMSCs. Usually contractors are retired, have been out of the military system for a while, or come directly from serving.

Criticism has been raised about the recruitment practices of PMSCs, that they try to recruit soldiers while they are still in the military, and there is a fear of actual brain drain from the military. In 2004 MOD officials requested UK PMSCs not to recruit from people serving in the military⁴⁹. Chris Sanderson, Director of Government Support at the UK based Control Risks was called in as a witness for a UK Parliament Select Committee on Defence hearing in 2008 on his company's recruitment practices and was asked: " *Would it be wrong for the Committee to draw the conclusion that there is a direct link between retention problems within the Armed Forces and your existence as private companies in the security industry recruiting ex-servicemen?*"⁵⁰. Favorable financial conditions were put forward as a primary reason, but Sanderson rather pointed to the flexible work schedule for the individuals, taking on jobs whenever they want to, short term commitments that does not put a lot of strain on the soldier's family, better living conditions when abroad, and a more flexible rotation than in the military⁵¹ as reasons for why Control Risks gets so many applications and can choose from the very best.

⁴⁹ Kinsey, Christopher. *Corporate soldiers and International Security – the rise of Private Military Companies*. New York: Routledge 2006. Page 107.

⁵⁰ UK Parliament Select Committee on Defence: *Examination of Witnesses (Questions 200-211)* 1st April 2008. Taken from UK Parliament website: <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmdfence/424/8040110.htm> (29.04.10)

⁵¹ UK Parliament Select Committee on Defence: *Examination of Witnesses (Questions 200-211)* 1st April 2008. Taken from UK Parliament website: <http://www.publications.parliament.uk/pa/cm200708/cmselect/cmdfence/424/8040110.htm> (29.04.10)

PMSCs do not only hire their countrymen, but also local nationals, meaning locals from the country they operate in.

Whether hiring retired or serving military members, the question is also how PMSC's recruit. Sanderson explains in his testimony that his company receives unsolicited applications and also has an online application form on their websites. Other companies have databases where they keep former and current employees -when a job comes up the person will receive a call and be asked whether he or she is interested in the job. The database system is quite common and allows the PMSC to recruit people that know the company from former operations and whose qualities they know and can rely on. The disadvantage with the short-term contracts and the database is for the contracting party, who has people coming in with different 'hats' on. One day the contractor represents one PMSC and the other month another PMSC.

The database, like many PMSCs, consists of people that know each other already. Interviewed PSC owner of Shield Risk Consulting J. Lundsgaard says that it is often people who know each other from the military who manage companies, also in Shield, and often recruiting is done by word of mouth by people that have served together. In the case of the Danish/US PSC, Shield, they do not hire any without a military background and have had an age limit when recruiting. Naturally the bigger a PMSC gets, the harder it is to recruit by word of mouth and thus a formalized application process must be set in place.

5.0 IPOA

IPOA is a non-profit US trade association for the US PMSCs⁵². The President of the IPOA, Doug Brooks, previously worked for the South African Research Institute on African security dilemmas and founded the trade association in 2001. IPOA works towards promoting coherent regulation. They encourage communication between Governments and the industry to create regulation and aspires to become the new peacekeepers -hence the name 'International Peace Operations Association'. IPOA represents PMSCs who work both for the commercial and government sector. Their mission is to:

- *"Promote professionalism and ethical conduct of firms active in the stability operations industry;*
- *engage key stakeholders in forging and upholding the highest industry standards;*
- *engage in outreach and educational activities regarding the role and value of the industry in support of international policies;*
- *engage in advocacy and establish a constructive dialogue with international organizations, policy-makers and governments worldwide;*
- *provide unique networking and business development opportunities for member companies"*⁵³.

5.1 IPOA Code of Conduct

IPOA acquires its members through an application process. A part of the admission process is to sign and promise to adhere to the IPOA Code of Conduct (CoC). The IPOA CoC was written on the initiative of Doug Brooks in Sierra Leone after the civil war, where human rights lawyers and representatives from NGOs and Doug Brooks drafted the CoC. The CoC is an effort to provide transparency and assurance to the contracting party that any given company that is a member

⁵² IPOA is right now starting to promote the term Contingency Contractors instead of PMSCs because they believe that the term 'military' is not consistent with the structure and work that the industry performs. JIPO. Journal of International Peace operations. Vol. 5, Number 5, March-April 2010.

⁵³ JIPO. Journal of International Peace operations. Vol. 5, Number 5, March-April 2010.

of IPOA adheres to a certain ethical code when operating in foreign areas. It works as a guarantee, and is an attempt to get rid of the 'cowboy' image, bring forward healthy business practices and an ethical code that includes respect for human rights and international law. Every other year the IPOA puts together a panel to review and readdress the CoC so that it will be up to date on any changes on the markets and the environment that its members work within.

A CoC naturally sets the bar for the conduct of IPOA members, but what can IPOA actually do with a member that has violated the IPOA conduct. The PMSC Blackwater was previously an IPOA member but was excluded from the IPOA after it was exposed in the press how the Blackwater management had tried to cover up, and removed the employees from the scene after the Nisour Square event. The IPOA only has this sanction and excluded Blackwater out of respect to IPOAs reputation and image. Messner, the Director of IPOA however points out in the interview in London in April, that Blackwater has never been prosecuted and thus leaves the question of their innocence open⁵⁴. As Messner puts it realistically the IPOA 'stick and carrot' is its reputation and image, as other sanctions are not very likely to happen, the 'stick' might seem a bit to weak, but as the interview with Messner revealed, IPOA regards losing their seal of approval as the ultimate price to pay.

Other organizations might have chosen to use an ISO standard, which is an official certification with regulations on business standards, management procedures, and outside determined audit procedures. The value of certification like ISO's case could potentially send a more open signal than an internally determined CoC, implementing the ISO standard nevertheless does not give IPOA a tool for sanction. The ISO standard says something about procedures and signals openness and transparency, but not the quality of the actions after the certification. ISO therefore cannot sanction if there is a humanitarian breach.

⁵⁴ The alleged Blackwater perpetrators in the Nisour square incident were never prosecuted as it came up that their statements had been taken under anonymity, thus the case was dismissed. For more information see: Mazetti, Mark, Risen, James. 'U.S. Examines Whether Blackwater Tried Bribery' 31.01.10. Taken from the *New York Times* website, <http://www.nytimes.com/2010/02/01/world/middleeast/01blackwater.html?pagewanted=1&ref=global-home> (15.06.10)

5.2 IPOA and Reasons for Regulation

IPOA has since its establishment worked for regulation on the PMSC area. There are several reasons for that. First of all getting the industry to work effectively and the market to be fair. A fair market is perhaps in the eye of the beholder, but one example is the US government bidding process, especially the one of the DoD that Messner calls horrible. DoD and DoS have the legal duty to take the bid with the lowest price. IPOA and the PMSCs argue that the lowest price makes way for unserious companies to bid, companies that do not provide proper training, equipment or insurance to their employees⁵⁵ and per definition do not live up to the IPOA standards. This procedure is argued to make the industry unhealthy and ultimately damaging the established industry's image. When confronted by me on the issue the President of IPOA Doug Brooks, says that the bidding process is one of IPOAs and the industry's biggest problems. Companies that factor in things such as IPOA membership costs and pre-deployment training in their contract bid can risk not being picked because they are not the cheapest⁵⁶.

Secondly, Messner explained the term 'regulation by reputation' where the turn of the public opinion and the actions of a company poses a real business threat to the whole industry. The incentive to clean up parts of the industry and preventing 'cowboy teams'⁵⁷ from operating thus becomes apparent.

5.3 IPOA and the Government

Generally the IPOA has a good relationship with its members' main employer, the US government. Nevertheless the IPOA is unsatisfied with the general licensing system of the US, that issues a general license to all PMSCs and then evaluates after the company is given a contract. There is therefore no formal audit on the companies before they are out in the field and potentially doing

⁵⁵ Security representative comments during the Panel 'Thinking Ahead' 8th April. IPOA EuroConference 2010.

⁵⁶ Short talk with Doug Brooks, 8th April. IPOA EuroConference 2010.

⁵⁷ 'Cowboy teams', term used by Messner and others for companies with a loose management structure, poorly trained but heavily armed employees that behave badly on the job. Kinsey, Christopher 'Private security companies and Corporate Social Responsibility' in Alexandra, Andrew, Deane-Peter Baker and Marina Caparini. *Private Military and Security Companies – Ethics, policies and civil-military relations*. London: Routledge, 2008 P. 70. And Rathsack, Thomas. *Jæger - I krig med eliten*. København: People's Press, 2009. P.195.

illegalities. Instead the IPOA would prefer a certification by 3rd party, making the company license harder to obtain and having to go through a general audit. Messner suggests that the license should entail the IPOA CoC. He is backed up by his boss Doug Brooks who writes: *"Government clients should create a minimum set of standards for companies, ensuring that they pledge to adhere to a Code of Conduct and favoring companies with a good human rights and operational track record"*⁵⁸

IPOA also encourages more oversight. At present oversight of contractors on operations is thought out to be the contracting officer and the Commander of Relief (COR) on the base⁵⁹. The COR though typically has no training, nor time for this particular task that is added on to the regular duties. IPOA encourages the presence of independent monitors on the operations, also to handle possible grievances or accusations⁶⁰ against the contractors.

Accountability in the PMSC industry is another issue that IPOA addresses in its relations with the government. As James Grimshaw, International Managing Director of the PSC GardaWorld put it *"Accountability is embryonic in the industry but on its way"*⁶¹. Accountability is however only obtained through the cooperation of the government. No matter how much IPOA scream and shouts, accountability will not improve without government legislation, which brings⁶² us to another interesting quote from Doug Brooks: *"Too many analysts overlook the fact that it is governments that make policy; private firms are simply hired to carry out the policies, or more often, just selected to portions of the policies"*. What Brooks is referring to is the critics claiming that the IPOA and the PMSC industry

⁵⁸ Brooks, Doug. Alexandra, Andrew, Deane-Peter Baker and Marina Caparini. *Private Military and Security Companies – Ethics, policies and civil-military relations*. London: Routledge, 2008. P. 126

⁵⁹ Lindemann, Marc. 'Civilian Contractors under Military Law.' in *Parameters –US War College Quarterly*. Autumn 2007.

<http://www.carlisle.army.mil/usawc/Parameters/07autumn/lindeman.pdf> (8.05.10) p. 87-91.

⁶⁰ Brooks, Doug. Alexandra, Andrew, Deane-Peter Baker and Marina Caparini. *Private Military and Security Companies – Ethics, policies and civil-military relations*. London: Routledge, 2008. P. 127

⁶¹ 8th April. IPOA EuroConference 2010.

⁶² *"The current legal quandary is not due to the prevaricating efforts of the industry but rather due to the tendency of policymakers to avoid honestly and frankly addressing a nuanced and controversial policy issue."* Brooks, Doug. In Alexandra, Andrew, Deane-Peter Baker and Marina Caparini. *Private Military and Security Companies – Ethics, policies and civil-military relations*. London: Routledge, 2008 P. 125

do not want regulation, where Brooks is directing attention to the voice missing so far- the government initiative. As it is now accountability, and its partner in crime- prosecution are two things that have not dominated the PMSC field very much. As of now prosecutions of contractors have been on a very low level.

From the IPOA perspective the fault lies with the US judicial and legislative system. Messner argues against MEJA⁶³ saying that appointing a prosecutor from the contractor's home state does not make any sense. Messner also gives a hypothetical example of contractor from Alabama that is accused of a felony in Iraq. According to MEJA this means that a prosecutor from the State of Alabama must travel to Iraq to gather information, affidavits and statements. This prosecutor might not even be trained nor have experience with other things than property law, but still he is the one that should go to a non-English speaking, very hostile and dangerous environment, where evidence will be hard to gather. Messner says the standard state prosecutor simply does not have the experience, the time or the potential for a solved case – *"no wonder they do not take the case"*. IPOA therefore supports the newly formed FBI office in Iraq that is supposed to deal with cases regarding contractors. Scholar P.W.Singer who backs up Messner claims:

"..when MEJA was created, it was underpinned by the assumption that civilian prosecutors back in the United States would be able to make determinations of what is proper and improper behaviour in conflict, gather evidence, carry out depositions in the middle of war zones, and then be willing to prosecute them to juries back home. 'The reality is that no US Attorney likes to waste limited budgets on such messy complex cases 9000 miles outside their districts, even if they were fortunate enough to have the evidence at hand'⁶⁴.

The lack of prosecutions and legal accountability also has another aspect: political will, which will be dealt with in the section on the US and UK. IPOAs

⁶³ For further explanation see section on US regulation

⁶⁴ Alexandra, Andrew, Deane-Peter Baker and Marina Caparini. *Private Military and Security Companies – Ethics, policies and civil-military relations*. London: Routledge, 2008 P. 182

conception of governments has a pro regulatory approach, manifested both in their mission. However one could also argue that their pro regulatory profile is of absolute necessity, and that if they do not secure a closer relationship with the government, they do not secure the survival of the industry, hence their members.

5.4 IPOA and the Public

As it is stated in the IPOA mission, IPOA should engage in outreach, constructive dialogue and educational activities and indeed IPOA initiates and partakes in outreach and public debates. The previous years of negative press about the PMSC industry and lack of firm regulation has however not helped the position of the IPOA. When Messner is asked ‘Do you feel that it is being put on the industry’s shoulders to create legislation –and to fix the public opinion of the industry?’ Messner replies that it can sometimes feel like an up field battle, where IPOA constantly has to deal with a public that tries to prove the negative. IPOA has a department that deals with Government and they do PR and advocate for their views both in Washington and in the public. Messner actually says that IPOA members encourage IPOA to go out and do PR for the industry. He wishes however greater public acceptance and understanding for the industry, which he sees as the greatest challenge for IPOA. He adds another wish to include an attitude change for those PMSCs that still do not operate under a common CoC. This section underlines the IPOA conception about their public profile. Messner’s comment is a clear statement of the awareness of IPOA to be conducting social interaction in a, at times, hostile public environment.

5.5 IPOA and the Dilemmas

From looking at the previous sections it appears that the ‘free’ market actually can force the IPOA and its members to make compromises with their ethics in order to get the government contracts. As mentioned previously both the IPOA management and the industry is aware of the fact that being on the ethic and moral part of the business is not always going to get you first in line. IPOA has already tried to accommodate the PMSC industry and their client by adapting their CoC. In the CoC in section 3.2 it says:

“Signatories shall support effective legal accountability to relevant authorities for their actions and the actions of their personnel. Signatories shall proactively address minor infractions, and to the extent possible and subject to contractual and legal limitations, fully cooperate with official investigations into allegations of contractual violations and breaches of international humanitarian and human rights laws”.

If this is true, then a contractor can avoid cooperation with authorities with the blessing of IPOA, if the contract between the PMSC and the government states it. When confronted by this, Messner argued that IPOA has to have this in their Co. Although not ideal, it is a pragmatic action necessary in order for their members to get government contracts. IPOA cannot demand to see their members' contracts and can nothing but encourage that both parties in the contract sign the IPOA CoC. Messner argues that the IPOA CoC is the culture and backbone of IPOA but that some things have to be shaped. It seems like the government is in fact not supporting the efforts by the IPOA and not in agreement with the future that IPOA would like to see for the PMSC industry.

There is another aspect that can keep IPOA from achieving transparency in the industry. Having a government contract equals being able to deal with confidentiality. Keeping a low profile and not attract unnecessary attention becomes a must and a lifestyle for PMSCs. The before mentioned IPOA member GardaWorld writes in their add in JIPO⁶⁵ in the April 2010 issue that they have a *'Low profile approach'* which underlines the image of the PMSC industry. That they in order to make themselves attractive to government clients, has to stress their low profile approach or in laymen's terms their ability to *'keep their heads down'*. This adjustment to the market must make the job of IPOA even harder if they are to *'engage in outreach.... regarding the role and value of the industry'*. It appears like IPOA really is fighting an *'up field'* battle, because how are they going to advocate for something if they are not allowed to promote or attract attention? However the social interaction and outreach that IPOA so firmly believes in illustrates the constructivist idea that the situation, or deadlock, between IPOA and the government is not static, but can be challenged by the

⁶⁵ Journal of International Peace operations. A quarterly magazine published by the IPOA.

beliefs and ideas of IPOA. Changing an environment where the IPOA is looked at with suspicion, to one where the social interaction has changed the system into being a mutual acceptance of one another that fosters friendly interaction and cooperation appears to be another challenge for the IPOA.

6.0 Shield Risk Consulting

Shield Risk Consulting is a part Danish part American PSC that performs security operations both for the commercial sector and for the US government in Lebanon, Saudi Arabia, Yemen, Somalia, Iraq, Afghanistan, South America, Asia, and the US. Shield was founded in 1998 by Jesper Lundsgaard. He owns Shield Risk Consulting (Europe) and co-owns Shield CrossLock LLC (Shield US) with former DynCorp Senior VP Colonel Pete Phelan. Both Lundsgaard and Phelan have extensive experience within the military and have worked with risk management in various international organizations and operations.

When asked about his company's relationship to the US government Lundsgaard replies that it is generally good and that it is much easier to work for the US government than for a commercial client. When working for the US government all permissions are already granted, that companies normally have to apply for e.g. through ITAR if they are bringing weapons, or other defense components where ITAR applies. Especially right after the invasion of Iraq in 2003 Lundsgaard says that there were enormous amounts of money in the budget for defense contracts and the check and balances was so poorly that a lot of PMSC companies were granted US DoD contracts without having qualified and well trained employees. Lundsgaard felt that until 2007 there was a form of 'carte blanche' given to the PMSCs, and that poor or no auditing led to incidents with lethal outcomes in Iraq. Yet again the DoD procedure of picking the bid with the lowest price possible has generated negative attention, in line with the comments made by Brooks. Lundsgaard has also experienced that Shield bids have been turned down, because of the expenses to professionally trained personnel. Its consequences is illustrated by the quote from retired Major General William L. Nash, USA: *"If you're trying to win hearts and minds and the contractor is driving 90 miles per hour through the streets and running over kids, that's not helping the image of the American army. The Iraqis aren't going to distinguish between a contractor and a soldier."*⁶⁶

⁶⁶ Lindemann, Marc. 'Civilian Contractors under Military Law.' in *Parameters –US War College Quarterly*. Autumn 2007. P. 85.

Lundsgaard points out in the interview that whether working for the UN or the US DoS or DoD, contractors are under a sort of organizational protection and furthermore that when working for the UN it is hard for a person to identify 'who's who' –UN employee or contractor on the ID. Lundsgaard explains that it is in fact only a few numbers on the ID card that differentiates the contractor from a UN employee. It is thus not possible for an outsider to tell the difference.

Contractors are thus equipped so they do not 'stick' out and attract attention or differentiate themselves from others. This is a clear sign of the governmental and commercial conception of how the industry should be acting in the public eye. Shield accommodating this request is a sign of consideration to their company's survival. In order for them to grow and expand, it is necessary for Shield to 'keep it low'. The assumption clearly shows how Shield assesses the market as a typical commercial non-regulatory construction.

6.1 Shield and the Public

Keeping a low profile, an aspect mentioned in the IPOA section, is also a characteristic that Shield recognizes and practices. Lundsgaard explains that he rarely does PR and interviews, partly because he always has to defend himself and the industry whenever he is interviewed, the result and the debate is often misconceived and starts with a 'you mercenaries'. Lastly because the jobs and the contracts that Shield gets, they get because they are known for their discretion. Lundsgaard says that the market demands it.

When it comes to approaching the industry's trade associations, Shield has not wanted to become a member of IPOA or any other association. Lundsgaard feels that the people that are representing the PMSC industry are not the right ones and Shield has not wanted to sign a common CoC. Lundsgaard explains that Shield has a CoC and Rules of Engagement and that is included in every contract and entails the principles of 'respect for humanitarian law and human rights'.

Lundsgaard says that the CoC is drafted around the UN manual he had when he worked with the UN as a Field Officer. The CoC is nevertheless not on the website and when asked why, Lundsgaard assures me that the CoC is a part of their contract procedures, but just not made public. The statement clearly identifies Shield's conception of the public interference. It supports the argument that Shield has a commercial non-regulatory viewpoint and considerations for the market outweighs the benefit of them opening up to the public. Partly because they see no need for it, cannot benefit from it financially, and partly because it perhaps would harm the company with a public approach. Whether Shield does or does not have a CoC in their contracts is really not the interesting part, and there is no point in speculating if they do. The interesting is the reasoning behind the choice. Lundsgaard's background in the UN suggests that he is more familiar with the international contractual environment than most, so it must be due to this knowledge that they have chosen not to publish it. The conception of the market simply keeps Shield from a public CoC. Furthermore, the negative background of Lundsgaard's experience regarding interviews further supports the argument that there is no benefit from keeping a public profile underlines the commercial non-regulatory argument.

6.2 Shield and regulation

When discussing international vs. international regulation Lundsgaard believes that the most effective regulation will be the national because international legislation is 'too easy to get around anyway if you want', Lundsgaard is not too impressed with the work done by for example the UN Working group on Mercenaries, who he says has used too much time and produced no results.

In any case Lundsgaard argues that working under a commercial contract the consequences and the legislation is much tougher than national legislation. In commercial contracts Lundsgaard says that a contract will be annulled if there are breaches on international humanitarian laws, whereas on government contracts especially in the US Lundsgaard says there has been a tendency to 'deal with it' internally, thus adhering to national legislation. However Lundsgaard does not think that there should be a general national legislation on all areas of

PMSC activities, but only on specific areas like piracy, where there is presently no international or national legislation. Lundsgaard believes that his company is no different from any other company and that the tasks, terms and conditions of the contract should be taken care of by the parties' lawyers and no one else. When confronted with the argument that the consequences of his employees' actions are different than from a bakers' employees, he shrugs his shoulders and says he does not believe there is a difference. When asked what contracting system Lundsgaard would prefer, he replies that he would prefer if there were none, but that companies were evaluated case-by-case on government projects.

What he believes will produce the most change is a change of attitude in the PMSC industry.

7.0 The Industry

After reviewing the two industry actors, it is clear that there are diverging views on regulation and the public role of the PMSC industry. Taking a constructivist outlook and looking at the fears of the two actors they seem to be totally opposite. IPOA fears a withdrawn and isolated industry and Shield prefers a low profile, market driven, and isolated industry, where companies determine their own business without too much interference from regulation. The fear of Shield would be the dream for IPOA, where clear and consistent legislation would provide the PMSC industry with a positive image and allow for a more outgoing profile.

One could put down Shield's adversity towards joining IPOA for example to the fact that no one in the IPOA management are military educated, but Lundsgaard actually makes it quite clear that he believes that no trade association is presently good enough or represented by the right people.

When looking at IPOAs and Shield's culture and its transparency there is an obvious contradiction on the area of the CoC. The Shield CoC is not online and there is therefore no actual evidence that it exists and if it also entails areas that are subject to change due to contractual limitations- like the CoC of IPOA. The difference is that IPOA puts it online and thus offers the information, which correlates with its wish for transparency and debate. Shield's choice not to do so, correlates with its wish to maintain a low profile but it nevertheless is an indication of the industry's clear problem. The industry will appear shady because it does not publicize- whether it wants to or not, its CoC. If this is solely done because of its government clients, it is an indication of governments not being interested in a transparent PMSC industry. Nevertheless the cultural stigma remains a public problem for the pro-regulatory IPOA, despite working for democratically and legal western governments. One could fear that the inter-subjective understandings and ideas of how the industry is constructed and should behave have been settled. According to the constructivist theory it is however not impossible to change and by continuing to engage in social

interaction with the whole industry the IPOA could alter the environment. Unless the industry really deals with this, it will never evolve into being the IPOAs vision of future peacekeepers. The question is, if some people in actual fact will be quite pleased with that. Naturally if Shield does not benefit from a commercial non-regulatory point of view there is no need to publicize the CoC. They are not a business, living of morals alone and the governments will perhaps also be quite appeased with the fact, that the industry is split in fractions of companies that want different things. That they have diverging views of how open the industry should be, how much regulations there should be, and basically have a different view on how business should be run. If one were to make a comparison of the two actors representing the PMSC industry in the thesis, it is clear that the two actors represent two different sets of anarchy, and a great deal of interaction would be necessary to foster an understanding between the two, in order for them to get away with the suspicion that they have against each other's motives. Building a bridge from the Hobbesian commercial non-regulatory view of Shield, to a Kantian pro regulatory IPOA, represents an important challenge to the industry.

8.0 United States of America

The US government is the biggest consumer of PMSC services worldwide and PMSC services are applied both abroad and domestically. Every US operation since the Cold War has involved considerable amounts of support from private companies⁶⁷. The DoD alone from 1994-2002 entered into more than 3000 contracts with US based firms for more than \$ 300 billion⁶⁸ from the war in Afghanistan and the invasion of Iraq that number has only gone up. Contracting services that do not include armed contractors are by far the largest share. Base building, transport, cleaning, general support and logistics are primary tasks for contracting firms. Armed contractors are however used in great numbers especially in Iraq and Afghanistan. Since then, the number and variety of operations have ranged from private security, intelligence gathering and special operations. The classical debate on whether the military should outsource its activities seems outdated and rejected with the implementation of the Military Industrial Complex. So what is the deal then? If there are no loud objections to the privatization of military services, then what is hindering effective legislation on the area? The following section about the US is dedicated to explain the legislative efforts and identify the main characteristics and arguments.

8.1 Regulation and Its Shortcomings

The American legislating efforts have several explanations. First of all the US has a longstanding tradition of contracting. Secondly, the US has had various incidents where US PMSCs have been involved in criminal offences. Scandals like Abu Graib and the Nisour Square shooting where contractors have been involved, have directed a lot of media attention towards the area and have forced the US government and its agencies to come up with plans and precautions that will prevent incidents like these from happening again. However the utilization and the specific tasks that the PMSCs have in the US have made it quite the effort

⁶⁷ Singer, Peter Warren. *Corporate Warriors – The Rise of the Privatized Military Industry*, London: Cornell University Press, 2003. P.16.

⁶⁸Singer, Peter Warren. *Corporate Warriors – The Rise of the Privatized Military Industry*, London: Cornell University Press, 2003, P.15.

to encompass all contractors and tasks, maintaining the profile and flexibility that the US wishes to exercise. Following are short introductions to US legislative efforts.

8.1.1 MEJA

The US Military Extraterritorial Jurisdiction Act from 2000, *“MEJA allows for the prosecution in federal courts of any individual employed by or accompanying the military on deployments overseas who engages in conduct that if committed in the United States would constitute a federal criminal offence punishable by imprisonment for more than a year”*⁶⁹.

The controversy about MEJA is that it only applies to contractors on DoD contracts. Contractors working for the DoS, DoJ, other agencies, foreign governments or organizations are not covered by MEJA. This loophole made it possible for the contractors involved in the Abu Graib event to be shielded from prosecution because they were working for the Department of Interior instead of DoD. Furthermore under MEJA it is the civilian state prosecutors’ task to prosecute and collect evidence, which we have already learnt from the IPOA section, has had the effect that no prosecutors want to take the cases.

8.1.2 UCMJ

The Uniformed Code of Military Justice from 1950 regards *“persons serving with or accompanying an armed force in the field”* were subject to the UCMJ *“[i]n time of war”*⁷⁰. The critique of UCJM is amongst other things that a civilian can be put before a court martial without a grand jury. Secondly that ‘time of war’ was defined as war declared by the US Congress. Since Congress is not in the habit of declaring war, not even the Vietnam War was officially declared a war, the UCMJ has been proven ineffective until Congress added *“[i]n time of declared war or a contingency operation”*⁷¹. Operation Iraqi Freedom and Operation Eduring

⁶⁹ Alexandra, Andrew, Deane-Peter Baker and Marina Caparini. *Private Military and Security Companies – Ethics, policies and civil-military relations*. London: Routledge, 2008. P. 180

⁷⁰ Lindemann, Marc. ‘Civilian Contractors under Military Law.’ in *Parameters –US War College Quarterly*. Autumn 2007.

<http://www.carlisle.army.mil/usawc/Parameters/07autumn/lindeman.pdf> (8.05.10). P. 86.

⁷¹ Lindemann, Marc. ‘Civilian Contractors under Military Law.’ in *Parameters –US War College Quarterly*. Autumn 2007.

Freedom are such operations, and the addition to the UCMJ thus finally made it applicable again. Despite the addition however there is still a need for clearer identification of what 'persons accompanying' means, what type of tasks these persons could have and what kind of offences adheres to UCMJ.

8.1.3 ITAR

The International Traffic in Arms Regulation. The point of ITAR is to regulate the import and export amount of defense services and articles. The ITAR license is needed for any US PMSC before they wish to undertake a contract. During the IPOA conference, the ITAR prerequisite was discussed and criticized for being too inflexible and slow in granting the ITAR licenses, thus damaging the PMSCs comparative advantage of rapid deployment.

8.2 Governmental Debate

The US debate on PMSCs has, as mentioned before, not been so much a question of whether the companies should be used or not, but in which way they can be held accountable. The laws adopted however seem to be divided into categories of weaknesses; departments for the MEJA, operation type in the UCMJ and speed for ITAR. The US House of Representatives Committee on Oversight and Government Reform has stated: "The conduct of private security contractor personnel has not been subject to a clearly defined and practically effective legal regime"⁷². One could argue that the reason for having this kind of legislation is for the government to obtain the most freedom and control over their contracts. If the government would introduce standard regulation covering all fields and operations it would not grant it the amount of flexibility to determine the government contracts' conditions and individual specifications. Furthermore, the legislative efforts have been done without the consult of the industry or IPOA.

An industry representative explained to me that the reason why there has not been a regulatory standardization and expansion is because some members of the US Congress are deliberately slowing down the process. The reason for this

<http://www.carlisle.army.mil/usawc/Parameters/07autumn/lindeman.pdf> (8.05.10). P. 88.

⁷² Alexandra, Andrew, Deane-Peter Baker and Marina Caparini. *Private Military and Security Companies – Ethics, policies and civil-military relations*. London: Routledge, 2008 P.172.

is, that the industry represents a lot of money to the US in tax revenues. It is felt that keeping these jobs and these companies, even if they may be 'cowboy teams', is outweighing the concern for legal offences and lack of prosecuting possibilities.

On the other hand the US has actually taken steps towards being able to control the processes and the actions of the contractors. If this is to avoid negative media attention cannot be said, but the US has nevertheless moved towards a better-controlled and legislated industry. This shows that the US has a pro-regulatory position.

The fact that agencies and departments have different sets of rules is another reason for an unclear image of the regulation. In the history of the US, the departments have become more and more decentralized and self run. The sheer size of the DoD (budget of \$419,3 billion and three million employees⁷³), DoS (budget \$16,4 billion, employees: 18.900) and DoJ (budget: \$46.2 billion, Employees: 112.500) is a sign of the bureaucratic processes that the departments must go through when working together. Different legislation nevertheless also gives the US the possibility of rejecting the responsibility when things have gone wrong with contractors. The blame shifting between the departments takes the focus off the deeds and the issue quietly disappears if the media is not on it.

8.3 US Viewpoint

Despite of this, the US remains the country with the most defined legal framework, in spite of its flaws and inadequate implementation and detail. One must not forget to ascribe a lot of the legal initiatives to the media attention that the PMSC industry has had in the US. A degree of attention unseen in Europe and elsewhere. A simple google search for 'US PMCs' gets a122.000 results, while the same search for the UK 'UK PMCs' gets 33.800 results⁷⁴. This might not be the most scientific test, but it shows how much people associate the US with this

⁷³ US Department of Defense <http://www.defense.gov/pubs/dod101/dod101.html> (09.06.10)

⁷⁴ Google search on the 8th June 2010.

type of companies. Naturally this focus will result in a demand for more attention directed at the topic. As a result, the arguments that the US PMSCs work outside the law, is not entirely true. There exists a legal framework, but the legal framework needs to be elaborated and the terms and operations of PMSCs clarified so that it fully covers the topic. It is important to remember that in the case of US PMSCs were the vast majority of contracts are government contracts and therefore the one that sets the demand of the market, the issue of immorality is not only on the PMSCs but also on the government. The pro-regulatory approach that the US has taken is a sign of its long PMSC history, as well as lessons learned from the discussion and debate that has been in the American public over the events like Abu Graib and companies like Blackwater.

The US has recognized the role of the industry and seems to be viewing the relationship between the industry as a Lockean type of anarchy, where the relationship is mutual beneficial, but where the US government in the end draws the legislative line. IPOA would prefer a Kantian relationship, where the two can work together on the issues and 'be friendly', and as we learned earlier its vision is indeed to come closer to the government. So far however the US is in complete control of where the line goes, and how and when the legislation should be applied.

9.0 United Kingdom

The UK does not share the same kind of contracting history as the US regarding the use of PMSC in military operations. In the UK, the mercenary operations in Africa in the 60's and 70's have characterized the use of private entities and its negative image in the public.

The size of the companies have reflected the scale of the national military involvement, therefore naturally UK PMSCs have not been on the same size and contract level as in the US. Despite the size of the UK PMSCs they have still been very effective in their activities, several UK PMSC have won bids on large contracts in Iraq over multinational corporations⁷⁵. Perhaps because of its size the UK industry has close ties and is more integrated with the government and its procedures and planning. Messner from IPOA also stresses this point and says that it is a clear difference from the cooperation that the US industry has with the US government, which is a more client-employer relationship. Another characteristic about the UK industry is that its primary market is the commercial sector and not the government. That said, government contracts are there, but in most cases the contracts do not involve combat action on the frontline in conflict zones, but rather security⁷⁶.

The UK initiated a private military privatization in 2001 that authorizes key military services to private companies a contract nominated to \$ 15 billion⁷⁷. The UK and the US nevertheless remain by far the largest users and exporters of PMSC services worldwide. The reason for that perhaps being, that it is two liberal economies where a trimmed state structure is preferred. That combination is usually more likely to look towards liberalization and privatization.

⁷⁵ Kinsey, Christopher. *Corporate soldiers and International Security – the rise of Private Military Companies*. New York 2006, Routledge. P. 97.

⁷⁶ Chesterman, Simon and Chia Lehnardt. *From Mercenaries to Market – The Rise and Regulation of Private Military Companies*. Oxford: Oxford University Press, 2007. P.240

⁷⁷ Singer, Peter Warren. *Corporate Warriors – The Rise of the Privatized Military Industry*, London: Cornell University Press, 2003. P.12.

9.1 UK Legislative Efforts

The UK has legislation about private military forces dating back to 1870, where the Foreign Enlistment Act stated that it was “*Illegal to recruit or enlist in the armies of a foreign power without Her Majesty’s license*”⁷⁸, after mercenary involved wars in Africa in the 70’s and especially in Angola, the Diplock Committee found that the law of the use of private forces should be reviewed and changed⁷⁹. However it never happened. This is the perfect example of how the legislative efforts in the UK have been conducted. Unlike the US that learned from very public PMSC scandals and was ‘forced’ into legislation, the UK has not had very recent unfortunate events with British companies in Iraq and Afghanistan that could have ‘forced’ them into the same direction as the US.

The lack of government legislative results is nevertheless not a sign of the government not knowing or using the services of the PMSC industry. In 2000 when Bill Clinton was still in power, he and Tony Blair, then PM in the UK agreed on a waiver for the UK regarding ITAR legislation which means the need for a license when exporting US defense material and services. This waiver was not put into effect right away because of resistance in the US Congress, but in 2007 George Bush and Tony Blair signed a treaty, which would effectively lift the ITAR restrictions. This signed treaty has still to be ratified -not by the UK but by the US⁸⁰.

The author Christopher Kinsey underlines the UK governments’ acceptance of PMSCs. Kinsey claims that the FCO has a list with number of PMSCs who are willing to work for the government on operations too ‘politically sensitive’ for the UK armed forces. Kinsey claims that foreign governments can send a request

⁷⁸ Kinsey, Christopher. *Corporate soldiers and International Security – the rise of Private Military Companies*. New York; Routledge, 2006. P. 136

⁷⁹ Kinsey, Christopher. *Corporate soldiers and International Security – the rise of Private Military Companies*. New York: Routledge, 2006. P. 136.

⁸⁰ Lunn, Jon, Miller Vaughne, Smith, Ben. *British foreign policy since 1997*. Research Paper 08/56 2008. International Relations and Defence Section, the Library of House of Commons. Found at: <http://www.parliament.uk/documents/commons/lib/research/rp2008/rp08-056.pdf> (03.06.10)

to FCO, who will then provide details on companies who will be able to carry out the operation⁸¹.

9.1.1 Green Paper

The most thorough debate ending out on paper was the Green Paper from 2002 under the Foreign Secretary Jack Straw. With the assumption that there must be a control on violence, that the second world war produced its challenges and opportunities for the private and public sector, that the current PMSC industry is far away from the classical mercenary involvements, and that PMSCs could constitute a viable alternative in the future the scene was set for a discussion on the subject. However what came out of the discussion was six very different alternatives of what the government could do in the future when making a decision about PMSCs, which means that no actual legislation came out of it⁸². Straw himself favored a case-by-case licensing system, which was also favored by the British industry. In the end though nothing happened after the Green Paper was published, except for an outcry against the UK government's involvement with the PMSCs, which perhaps explains why it has been so quiet since.

The latest effort was in 2009, where a consultation document was produced, where the industry's opinion and suggestions were asked for. It had the intent to *"Improve standards across the Private Military and Security Company (PMSC) industry globally"* and to *"seek views from stakeholders and interested parties on the Government's proposal to promote high standards in the industry by working with the relevant trade association, using our status as a key buyer, and increasing international standards through international cooperation."* Furthermore the paper states that *"The Government considers that a national licensing regime would not meet the policy objectives"* in the same paper Foreign Secretary David

⁸¹ Kinsey, Christopher. *Corporate soldiers and International Security – the rise of Private Military Companies*. New York: Routledge. 2006. P.16.

⁸² The six alternatives were:

1. A ban on military activity abroad. 2. A ban on recruitment for military activities abroad. 3. A licensing regime for military services. 4. Regulation and notification 5. A general license for PMCs and PSCs like in the US. 6. Self-regulation. The industry should regulate itself via a voluntary CoC
Kinsey, Christopher. *Corporate soldiers and International Security – the rise of Private Military Companies*. New York: Routledge, 2006. P.141

Milliband says *"The PMSC industry is essential, inevitable and international"* in stressing that the industry plays a positive role Milliband says *"we need to make sure any system of regulation we propose is based in international cooperation to improve standards of the industry in the UK, and more widely"*⁸³. Despite this, the consultation document from 2009 has so far not lead to any national legislation, or an increased UK effort on international legislation.

9.2 Governmental Debate

Reflecting on the UK historical utilization of PMSC services it is clear that the involvement has not been accompanied by a public concession. Chia Lehnardt in her 'Private military companies and state responsibility' adds *"..on those occasions where it has been alledged that international obligations have been violated, governments have explicitly or implicitly denied any responsibility for such wrongdoing, not on the basis that no breach of international law has occurred, but because any connection to the perpetrators is denied"*⁸⁴. To this Lord Jack McConnell, until the May 2010 election Gordon Brown's Special Representative on Peace Building and former First Minister of Scotland, adds that he believes that all efforts that could push towards legislation is avoided to avoid any public controversies.

McConnell views the UK PMSC industry as the same as the American, ranging from commercially successful responsible companies to cowboy teams. On that, McConnell notes that he thinks that the UK is very careful of who it supports and contracts, because of a political opposition towards combat use of PMSCs. Indeed the vast majority of UK government contracts regard logistics. McConnell says that Tony Blair understood the reality, understood that that PMSCs were necessary in British operations, but that Blair was reluctant to take on the discussion about PMSCs because he did not want "another issue to deal with". Blair was under enough pressure as it was, from the public about the UK's engagement in the war in Afghanistan and Iraq. One could have argued that

⁸³ Foreign & Commonwealth Office. Consultation document. *Consultation on Promoting High Standards of Conduct by Private Military and Security Companies(PMSCs) Internationally*. A Consultation paper produced by the Foreign and Commonwealth office 2009.

⁸⁴ Chesterman, Simon and Chia Lehnardt. *From Mercenaries to Market –The Rise and Regulation of Private Military Companies*. Oxford: Oxford University Press, 2007. P.141

instead of seeking a national debate the UK could have pushed on international legislation, but McConnell argues that there was, and is, no firm position on PMSCs to put out. McConnell stresses that it seems that the UK does not have any confidence in their position. Many things could have caused this. McConnell argues that the UK has had four Foreign Secretaries and six Secretaries of Defense since 1997. This mixed together with internal disputes in the parties can act as an explanation to the lack of attention to the area.

Asked about the characteristics of the debate on the political level, McConnell sketches a rough picture with the Conservatives generally in support of the PMSC industry and its use, but lacking a well thought out position on the legislation and perhaps not all agreeing that there even should be legislation on the area. The Liberal Democrats, is characterized by not having a strong engagement in International Relations, something that McConnell says they will have to change now they are in government. McConnell would however expect them to favor international law over national. No matter what, McConnell stresses that the British government has a moral responsibility to show transparency on the use of PMSCs, as McConnell puts it *"If the companies and their services are all right, then why not?"* he goes on to add that the industry will always be surrounded by suspicion if there is no transparency.

When addressing the Green Paper and the six solutions that it offered, McConnell puts forward that the very different solutions is a sign of lack of will to actually address the issue. McConnell argues that a national and international legal framework is needed. When confronted with the difficulties in reaching international agreements and asked if not bilateral agreements between host and exporting country could be a solution, McConnell says that it is not the solution and not ideal, because it would be easy to go around it for the companies by moving to another country. As it is now G4S⁸⁵ is the biggest UK employer and to loose such a major player in the UK would be unfortunate

⁸⁵ G4S, a security solutions company employs 40000 people in the UK and has an annual turnover of more than 1 billion pounds. <http://www.g4s.uk.com/en-gb/Who%20we%20are/> (23.06.10)

financially and legally. McConnell mentions that G4S cancelled a scheduled conference twice, and goes on to say that it seemed like someone *“tapped them on their shoulders”* and let them know that public attention was not preferred. That statement pinpoints the dilemma that exists. On one hand the government is happy to use a PMSC but on the other, it is preferred that they keep a low public profile so it will not cause a public stir. This is also illustrated by the debate when the Green Paper was discussed in 2002 where a fellow Labour member *“of the Commons Foreign Affairs Select Committee found it ‘breathtaking in the extreme’ that the Foreign Minister ‘should even contemplate giving such companies a veneer of respectability’ ”*⁸⁶. Another more recent critique: *“This House calls on the Government seriously to reconsider the introduction of a formal licensing and monitoring system and to discontinue or at least reduce the use of private military staff as soldiers in war zones”*⁸⁷

Suspicion towards the industry and a shared wish to decrease the use of PMSCs in operations is also supported by a NATO representative I spoke to. First of all he stresses that the time of PMSC is over on the same level as it has been in Iraq and Afghanistan. Secondly, his opinion was that no immediate legislative effort is pressing, because the market will no longer allow these companies to grow that fast. He specified, that the amount of money spent by the US on PMSC would not happen anymore, and he therefore did not share the vision of the PMSCs as being the future peacekeepers. The NATO representative pointed out that the PMSC industry knew this, and in their attempts to involve themselves more publicly, the only reason was to secure their own survival, protection and assistance of regular troops, like ISAF, on operations abroad. He also argued for the traditional argument that the state is the right holder of the monopoly of violence. He also argued that PMSCs should not be involved in situations on the frontline, but

⁸⁶ Waugh, Paul, Morris, Nigel. “Mercenaries as peace-keepers’ plan under fire” 14.02.02. *The Independent*. Taken from the Independent website. <http://www.independent.co.uk/news/world/politics/mercenaries-as-peacekeepers-plan-under-fire-660606.html> (03.06.10)

⁸⁷ UK Parliament:

http://www.publications.parliament.uk/cgi-bin/newhtml_hl?DB=semukparl&STEMMER=en&WORDS=privat%20militari%20compani&ALL=Private%20Military%20Companies&ANY=&PHRASE=&CATEGORIES=&SIMPLE=&SPEAKER=&COLOUR=red&STYLE=s&ANCHOR=muscat_highlighter_first_match&URL=/pa/cm/cmedm/90610e01.htm#muscat_highlighter_first_match (10.05.10)

merely concentrate on logistical efforts. This argument by the NATO representative shows, the traditional viewpoint on the state as the holder of the monopoly of violence is still very much alive. The resistance in UK against the use of PMSCs reflects a moral objection and is a sign that not everyone will accept UK to be privatizing core military services. The times of questioning the morality about the PMSCs thus appear not to be over, despite its leaders approval and usage of them.

9.3 UK viewpoint

Arguments along the lines of those mentioned above have already had its consequences. The British Association of Private Security Companies, BAPSC, launched in 2006 is the British PSC industry's trade association and their response to the lack of regulation is alternative number six from the Green Paper; Self-Regulation via CoC and ISO standards⁸⁸. The example of BAPSC shows exactly how frustrated the industry must be by the lack of legislative initiative from the British Government.

The UK debate on the governmental level is characterized by a lack of political will and responsibility to initiate legislation on the area. It also shows however that the underlying resistance against the use of PMSCs and the traditional viewpoint that the state is the holder of the monopoly of violence is stronger in the UK than it is in the US and this resistance is the blocker for constructive engagement in legislative efforts. Despite a history of utilizing PMSCs it appears that the UK government is more than happy to push that utilization, the regulating and the public and moral responsibility that comes along with it in the background, to please those who believe that the state should not be outsourcing military services. An 'out of sight out of mind' procedure has been applied to the area simply because of fear of being politically unpopular. Certainly, as we have seen, the UK has had enough experience with the industry since the 60s. Unlike the US however where its experience with the industry has shown a need to deal

⁸⁸ Kinsey, Christopher. *Corporate soldiers and International Security – the rise of Private Military Companies*. New York: Routledge, 2006. P.79.

with the issues legally, the size of the industry and the lack of scandals appears to be a contributing factor to why the UK has not raised the issue yet.

10.0 Why is Legislation Limited?

In the thesis, four actors have been described and analyzed. In it the key viewpoints of the actors were identified and their significance in explaining the amount of national regulation. In the analysis the IPOA, Shield Risk Consulting, the US and UK were the subject of a constructivist analysis where the actors' background, motives and efforts regarding regulation were discussed in order to identify their perceptions on regulation.

In the analysis the IPOA was analyzed and found to have a pro regulatory profile, that could be seen both in their commitment to their CoC, strengthening their relationship with the legislators, and keeping an open profile towards the public in discussing the future of the industry.

When it came to governmental actors we found that the US government in some ways shares its views with the IPOA. The US legislative framework has loopholes, but the US profile is pro regulative and under constant scrutiny from the press. The IPOA and the US government share the pro-regulatory profile. Their motives however appear to be very different. IPOA wants to have the industry more incorporated into government processes whereas the US maintains its right to determine the contracts themselves, and to create and maintain regulation with loopholes that frees the US government, and sometimes contractors, for the responsibility if something goes wrong. Regulation is also created on the basis of a fierce critique from the media after unfortunate events with contractors and on the foundation of a long history with utilization of PMSCs.

Looking at Shield, based in Denmark and the US, another view was found. Shield has a commercial non-regulatory profile and preference and maintains its right to determine its contracts and conditions themselves. Shield does not favor legislation just for the sake of it. Shield believes that the market will determine the conditions. That does not mean that Shield rejects all legislation but from

Lundsgaards' statements one can find that he believes the legislative system, both internationally and nationally is too weak to make a difference. However, he argues that unless the governments play with open cards about their contracts and their operations the companies will have to continue with a low public profile and keep their heads down in order for them to survive.

The same sort of argument is heard from McConnell on the situation in the UK. Here, the government is also a buyer of PMSC services, and has been for many years, but the legislation is limited if not non-existing and its viewpoint reflecting a traditional view on the state as the holder of the monopoly of violence. Several attempts of legislation has been made but nothing has come of it, according to McConnell simply because no politician will risk to the political unpopularity. Furthermore there is no political leadership with a confident position on the PMSCs. The resistance towards privatizing on the states' monopoly of violence is a main factor in the criticism and every discussion there has been so far in parliament comes back to this issue. The knowledge of the UK PMSC utilization has been kept on the low, which perhaps explains that critics go back to the monopoly of violence, because they simply do not know that the UK has crossed that bridge a long time ago. So far the UK has been spared of great PMSC scandals, and McConnell argues that it probably would be a triggering factor if legislation were to happen. The fact that the government seems to be slowing down the process themselves also affects the lack of public profile of UK PMSCs. In fact the BAPSC is promoting self-regulation in the industry due to the lack of national regulation.

The actors' viewpoints should have provided the reader with a better understanding and perhaps more detailed reasons for the dilemmas in creating legislation. First of all, all actors do not see legislation the same way. This make legislation even harder to make, and is why also I chose to look at the national level. If one does not have a firm position nationally like the UK, how could one expect to make firm legislation internationally. Secondly even though privatizing military services to PMSCs, the states, both the US and the UK, are still unwilling to fully let go of the market forces, and so the legislation and boundaries of PMSC

utilization are limited. This leads the industry nowhere, because it is still at the whim of the states. The IPOA and Shield, despite having different viewpoints, both say that the low profile and secrecy is hindering them into becoming a legitimate actor and business. It seems like the governments both the US and the UK, although they have different approaches to the industry and the legislation, they still face the same problem of defining what exactly they want and need from the PMSC industry. If there were defined set of rules to what states would be using PMSCs the legislation would presumably be easier to draft. When the US still does not know if they want to use PMSCs for mainly logistics or hardcore intelligence gathering, it leaves the industry and the legislation in a bit of limbo. Or when the UK does not have the political leadership to even have the discussion on the utilization in the open, it naturally leaves the market driven industry like Shield with a secretive role. The two industry actors are characterized by at times conflicting viewpoints, representing two diverging interests. Nevertheless there is common ground amongst the two and the basis for the social interaction that IPOA encourages could perhaps build a bridge between the two 'anarchies'. If the industry is having any hopes and dreams about becoming the Peacekeepers of the future a bigger effort internally in the industry is needed to get as many companies to show a common front, to convince the politicians and the international community that they are qualified for the job.

10.1 Reflections

Reflecting on the process and execution of the thesis there are a few things that come to mind. The constructivist theory has been a great tool for a thorough analysis of the underlying beliefs and perceptions of the actors. On the other hand using constructivism means that one needs to constantly exercise a sense of perspective since, as mentioned in the theory section, constructivism is not a formula with a given result. That means that one needs to have a constant overview of what is the most prudent to look at in the actor with the thesis' aim in mind, so the analysis does not become flooded with irrelevant information.

The qualitative method of interviews has been a very positive experience and as a result of the gathered empirical data, the validity and relevance of the thesis appears clearer. Picking the two PMSC analytical actors, as mentioned in a previous chapter, supports the constructivist theory for a thorough analysis. The challenge of the interviews is to do comprehensive research before the interview, to know what is important and potentially controversial before asking the question, and to keep an eye on the aims of the thesis when asking questions during the interview. The interviews potentially demonstrate the biases of the interviewed and one could perhaps argue that the biases affect the validity and relevance in a negative way. Nevertheless, as this thesis has a constructivist framework where the beliefs and ideas of the actors are what is important, possible bias is a sign from the actor of its ideas and beliefs, and thus actually supports the constructivist analysis. Hence the results from the interviews can be applied showing a relevant aspect of the governments and the PMSC industry.

After the interview the challenge was to be true to the material, resisting the temptation of overanalyzing what was said in the interviews, perhaps especially what was left unsaid, and not letting one's own bias affect the analysis. A provocative and controversial thesis would perhaps have attracted more attention. However, as this kind of research has not been done before, a clear and simple analysis with straight answers coming from the interviewed was essential. Research following in the path of this thesis, will have the chance to dig into the things left unsaid. The results from the thesis are thus considered to be reflecting the complexity of the topic, and applicable to a wider group.

11.0 Further Avenues of Study

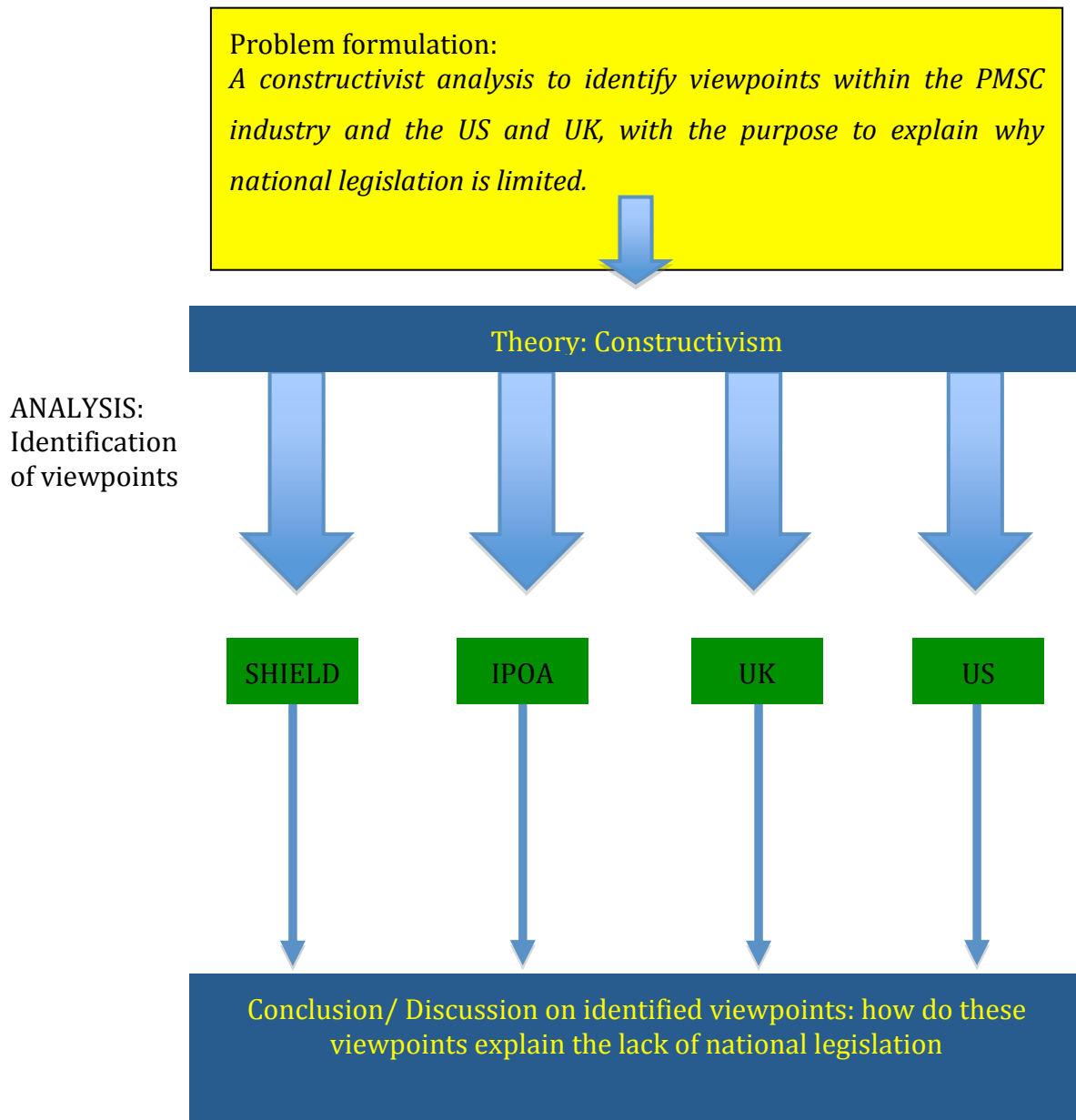
During the research on a topic like this one cannot help but to look at one's own country. The Danish attitude towards the use of PMSCs struck me as odd. Without the topic being addressed and discussed openly by the government, or the general media, one is left to think that Denmark is unfamiliar with PMSCs. However Denmark and the rest of the Scandinavian countries are in fact users and exporters of PMSC services, without having an official policy on the topic and without acknowledging the utilization openly. Furthermore owner Jesper Lundsgaard of the Danish PSC Shield Risk Consulting pointed out that the Danish government does not seem to be interested in dealing with the regulation issue nor cooperation with Danish PSCs, but have preferred dealing with foreign companies, it is therefore also the UK based PSC, ArmorGroup, that provides personal protection of Danish advisors from the Danish foreign ministry in Iraq⁸⁹, despite Danish companies being able to take on the contract⁹⁰. An industry representative told me that his impression of the Danish Defense Ministry was that they simply are not qualified and up for the job of drawing legislation, nor dealing with the companies. Denmark, that has expanded its military activities, and consequently use of PSCs, substantially since 9/11 2001 without any new regulatory initiatives, is the perfect example of a 'market' where legislation can start from scratch and has the possibility to initiate far-reaching initiatives because of its relatively new tradition of using private companies and the relatively small PMSC industry present in Denmark. Nevertheless the example of Denmark is symptomatic, as we have seen in the thesis, of the situation in general.

⁸⁹ Fridberg, Anders. *Forsvaret samarbejder med private sikkerhedsfirmaer*. 10.08.09. Taken from the website of Forsvarets- Forsvarskommandoen. <http://forsvaret.dk/FKO/Nyt%20og%20Presse/Ovrigenyheder/Pages/Forsvaretsamarbejdermedprivatesikkerhedsfirmaer.aspx> (30.03.10)

⁹⁰ Interview with Jesper Lundsgaard, Shield Risk Consulting. Copenhagen 24.03.10

12.0 Appendix

12.1 Project Map



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