

**The regulation of mercenary and private security-related activities under South African law compared to other legislations and conventions.**

by

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## Abstract

Private Military and Security Companies (PMSCs) have become increasingly important actors since the end of the Cold War. They provide a wide range of services and are therefore difficult to classify. Many view them as new front companies for mercenaries, which this thesis argues is not the case.

Few states have put in place legislation to deal with the problems caused by these companies, and they are therefore generally not accountable to states. This is problematic because their services are within an area where states have traditionally had monopoly. This thesis studies the new South African legislation, the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act of 2006, which was put in place in order to ban mercenaries and regulate the services offered by the private military and security companies based in the country. By comparing it to the older South African legislation, the thesis evaluates the extent to which the new legislation has been able to close loopholes inherent in the old legislation.

The new South African legislation is also compared to the international conventions which bans mercenaries. By banning these actors, South Africa is very much in line with the international community when it designed the conventions. However, PMSCs are not mercenaries.

The thesis then compares the new South African legislation to the domestic regulation in place in the United States of America. It finds that despite having many of the same weaknesses as the South African legislation, it is more likely that the American regulation will be abided by than the South African. This is due to the positive relationship between the US government and American PMSCs, and the fact that the government is a major client of the companies. South Africa does not enjoy the same positive relationship with its companies.

Finally, the new South African legislation is compared to the UK Green Paper of 2002, which presented options of how to deal with the companies. The ban on mercenaries put in place by the new South African legislation was discouraged in the Green Paper. The licensing regime (as in the USA) that was proposed by the Green Paper, however, is similar to the authorisation scheme established in South Africa.

## Opsomming

Private Militêre en Veiligheidsmaatskappye het belangriker rolspelers sedert die einde van die Koue Oorlog geword. Hulle verskaf 'n wye reeks van dienste en is daarom moeilik om te klassifiseer. Dikwels word hulle as frontmaatskappye vir huursoldate beskou. Dis iets wat in hierdie tesis weerlê wil word.

Daar is nog min state wat eie wetgewing aanvaar het wat voortspruitende probleme kan hanteer. Daarom is meeste maatskappye wat dergelike dienste lewer nie verantwoordbaar aan state nie. Dit is problematies, want die dienste wat gelewer word, val tradisioneel binne die terreine waar state 'n monopolie van dienste gehad het. Hierdie tesis ondersoek die nuwe Suid-Afrikaanse wetgewing, die Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act van 2006, wat in werking gestel is om huursoldate te verban en die dienste wat dergelike maatskappye lewer wat in Suid-Afrika gebaseer is, te reguleer. Deur dit met die vorige wetgewing (van 1998) te vergelyk, beoordeel hierdie tesis die mate waarin daar geslaag is om skuiwergate in die vorige wetgewing bestaan het, uit die weg te ruim.

Die nuwe Suid-Afrikaanse wetgewing word ook met internasionale konvensies oor huursoldate vergelyk wat huursoldate verban. Deur diesulkes te verban, is Suid-Afrika in lyn met internasionale praktyk. Maar private militêre maatskappye is nie huursoldate nie.

Die tesis vergelyk egter ook die nuwe wetgewing met regulering wat in die VSA bestaan. Daar is ooreenstemminge, en ook ten opsigte van swakhede in die wetgewing, maar dit is meer waarskynlik dat Amerikaanse beleid groter toepaslikheid sal ervaar. Een rede hiervoor, is dat 'n gunstiger verhouding tussen die VSA regering en hulle maatskappye as dié tussen die SA regering en Suid-Afrikaanse maatskappye bestaan. 'n Ander rede is dat die Amerikaanse regering dikwels ook 'n kliënt van hulle maatskappye is wat nie in Suid-Afrika die geval is nie.

Laastens word die SA wetgewing ook met die Britse Green Paper van 2002 vergelyk, wat 'n hele reeks opsies uitspel sonder om 'n keuse te maak. Dit is steeds die geval. Die huursoldateverbod in Suid-Afrika is byvoorbeeld nie iets wat in die Green Paper aanbeveel was nie. 'n Lisensieringstelsel (soos in die VSA) word egter voorgestel, wat ooreenstemminge toon met die magtigingskema wat in die nuwe Suid-Afrikaanse wetgewing vervat is.

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## Abbreviations

ACEA	Arms Export Control Act
CEMA	Convention on the Elimination of Mercenarism in Africa
CIA	Central Intelligence Agency
DDTC	Directorate of Defence Trade Controls
EO	Executive Outcomes
FCO	Foreign and Commonwealth Office
ITAR	International Transfer of Arms Regulations
MEJA	Military Extraterritorial Jurisdiction Act
NCACC	National Conventional Arms Control Committee
PMC	Private Military Company
PMSC	Private Military and Security Company
PSC	Private Security Company
RFMAA	Regulation of Foreign Military Assistance Act
UN	United Nations
UNITA	União Nacional para a Independência Total de Angola

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## Chapter 1. Introduction

### 1.1 Problem statement

Private military and security companies (PMSCs) are private actors that sell military and security services. These companies have become important players in the security sector, especially in Africa. In fact, only a handful of African countries have *not* hired PMSCs at some point (McIntyre, 2004:101). This is due to the security vacuum caused by a combination of weak states and the lack of will in developed countries to intervene in the internal conflicts in these countries. It is especially critical for weak countries that the permanent members of the United Nations (UN) Security Council have been increasingly unwilling to intervene in conflicts. The private companies are more than willing to fill the vacuum created by this unwillingness (Brayton, 2002:308). Many see this as problematic not only because the services offered by the companies threaten state monopoly on violence, but also because the companies are not politically accountable (Small, 2006:13; Zarate, 1998:77). Together with the fact that many see private military companies as mercenaries in a new guise, regulation of these actors is important. It is therefore striking how few states have legislation in place to provide such regulation, especially since the international conventions concerning private use of force are out of date (Kinsey 2007:134).

This research will investigate the new South African legislation of 2006, put in place to prohibit mercenary activities and to regulate all other activities by private actors in areas of armed conflict. It will do this in order to see if it is an improvement on the old South African legislation and to evaluate if it can be used as a model for other domestic regulations. This chapter will first introduce the industry with regards to the services it renders, and then discuss whether or not these private actors are mercenaries. This is important, as some scholars see the companies as merely mercenary-hiring entities (Musah and Fayemi, 2000:259), whereas others see them as legitimate players in the international arena, i.e. companies who render services of a special kind and are therefore different from traditional mercenaries (Shearer, 1998:22). How the companies are

perceived will affect how they are to be regulated. This will be discussed further later in this chapter.

The companies in question supply a whole range of services, making them not only hard to classify, but also to regulate (Bearpark and Schulz, 2007:74; O'Brien, 2007a:58). The services offered include “combat operations, strategic planning, intelligence, risk assessment, operational support, training and technical skills” (Singer, 2007:8). The companies themselves are also varied, ranging from big companies listed on the stock exchange to small companies resembling “glorified mercenary operations” (O'Brien, 2007a:57). Regulation is difficult to design because it needs to encompass all the relevant companies and all the services they offer.

### 1.1.1 Definitional issues

Because of the nature of some of the services these firms provide, e.g. that they take part in active combat, many scholars accuse them of being mercenaries. There are, in fact, many similarities between PMSCs and mercenaries, something that has led to a substantial scholarly debate about the nature of the industry. Mercenaries are historically soldiers of fortune selling their services to the highest bidder, without consideration of the cause he or she is fighting for (Percy, 2006:14). The mercenary trade got an especially bad reputation after the wars of the 1960s in Africa, when mercenaries were regarded as fighting to undermine the newly formed post-colonial governments (Shearer, 1998:15).

What exactly are mercenaries? International conventions have very detailed definitions of a mercenary. They are in fact so detailed that most would argue they are almost useless (Cameron, 2006:578; Singer, 2004:531). Under Article 47 of the 1977 Protocol I of the Geneva Conventions, a mercenary:

- a) is specifically recruited locally or abroad in order to fight in an armed conflict;
- b) does, in fact, take direct part in hostilities;
- c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that party;
- d) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
- e) is not a member of the armed forces of a party to the conflict; and
- f) has not been sent by a state which is not a party to the conflict on official duty as a member of the armed forces. (Shearer, 1998:17).

According to Kevin O'Brien, there are two main problems with this definition when it comes to applying it to the PMSC industry. First of all, one has to fulfil *all* of the above requirements in order to be defined as a mercenary. Secondly, the definition only concerns the actor, not the activities that the actor engages in (O'Brien, 2002:5). In addition to these main points, it is problematic that the definition does not take into account that hiring entities may differ in terms of legitimacy. Furthermore, it is especially problematic that the focus of the definition is a person's motivation. Proving the motivation of an actor before a court of law is extremely difficult (Sandoz, 1999:208). The picture is further complicated by the fact that most PMSCs are hired by states, something that the companies claim make them more legal. According to Enrique Ballesteros, however, this is not a valid argument, as the nature of their services are still mercenary (1998:13). Ballesteros is the former United Nations Special Rapporteur on the use of mercenaries. The combination of the factors described above makes it very difficult to legally prosecute anyone as a mercenary.

According to Guy Arnold, the Private Military Companies are mercenaries, and all talk of distinguishing the two is a result of campaigning by an industry trying to become more respectable (1999:124). Steven Brayton argues that the most important features of mercenaries are that "they are foreign to the conflict, they are motivated chiefly by financial gain: and, in some cases, they participate directly in combat" - all traits which PMSCs also possess (2002:306). Ballesteros agrees to this, suggesting that one reason for the existence of PMSCs is that mercenaries have realised that these companies are not covered as extensively in regulatory legislation (1998:15). To him, the private military industry consists of mercenaries, no matter how corporatized they have become. The extent to which private *security* companies (PSCs) are seen as mercenaries does not seem to be as clear-cut (Brayton, 2002:306). Sabelo Gumedze does not see the PSCs as mercenaries, but argues that there is only a fine line separating a PSC from a PMC (2007c:5).

The differentiation between private military companies and private security companies is complicated by the fact that in a conflict the situation on the ground can change, turning a defensive operation into an offensive one (Bearpark and Schulz, 2007:75). Consequently, the same company can shift between acting as a security

company and a military company during the same mission, something that for many authors represents a shift from being a legitimate operation to being a mercenary operation. Regulating such interchangeable entities is very difficult.

David Shearer agrees that it is difficult to separate the employees of PMSCs and mercenaries, especially because a PMSC can hire a former mercenary, while a person who has worked for a PMSC can become a mercenary – a shift that is common in the industry (1998:21; O’Brien, 2007b:39). This does not mean, however, that he sees employees of the companies as mercenaries. On the contrary, Shearer finds such arguments simplistic on two grounds: the legal definitions of mercenaries do not fit the employees of the companies; and the way the companies operate is very different from that of traditional mercenaries (1998:22).

Because of the wide range of services offered, often by the same company, researchers have had problems defining the different types of companies (O’Brien 2007a:57). For example, some argue for a distinction between private military companies and private security companies, whereas others see this as an artificial and problematic division, because a defensive operation can easily become offensive in a conflict situation (Holmqvist, 2005:5).

In this research, Kevin O’Brien’s classification will be used. He argues for a classification that defines the actors according to the activities they undertake. He distinguishes between mercenaries, private security companies (PSCs) and private military companies (PMCs) (2007b:35-39). PMCs undertake operations in order to alter the strategic environment in which they operate (O’Brien 2007b:40). The services provided by PSCs are only aimed at changing the immediate situations at hand, usually by guarding specific targets of strategic interest (O’Brien 2007b:38). Thus whereas a PMC has the capacity to operate as a PSC, a PSC does not possess the capability to operate as a PMC. Even if a PSC operation can suddenly turn offensive, the company will not have the means of changing the strategic environment.

This definition will be used in this research because it differentiates not only between PMSCs and mercenaries, but also between PMCs and PSCs, The private military and security industry as a whole will either be referred to as “the industry” or as PMSCs. Mercenaries are not considered to be part of this industry. It should be noted, however,

that this clear-cut definition is still problematic, because there are many grey areas, and the situation on the ground can easily change. This is all part of the difficulty in considering regulatory solutions: who and what to regulate. Definitional issues may be one of the reasons why so few states have made any attempt at all to regulate the PMSC industry.

### 1.1.2 Why regulate?

There have been many calls for regulation of the industry. Perhaps the most important argument has been that regulation is needed for states to regain control of the legitimate use of force (Percy, 2006 15-16). This is important, as its monopoly on the legitimate use of force has long been *the* main reason for states to exist, and many see threats to this monopoly as a threat to the state itself (Small, 2006:15; Holmqvist, 2005:1). By regulating the industry, some authors argue that governments will be able to maintain a certain measure of control over this development. Another argument for regulation is the need to make the private actors accountable, given the nature of the services they provide (Holmqvist, 2005:8). Others argue for regulation in order to prevent violations of human rights and international humanitarian law (Kinsey, 2007:135).

At the same time, some argue that regulation will not address the underlying issues. Those that hold this opinion are usually the same that argue for an abolition of the industry altogether, because they see the employees of the companies as mercenaries (Olonisakin, 2000:234). This is opposed by scholars who claim that abolishing the industry would only lead companies to sell their services on the black market, making them even less controllable for states (Mandel, 2002:144). As Yves Sandoz points out, however, there does not seem to be a strong will for regulation of PMSCs among states, and a complete ban seems even more unlikely (1999:215).

The arguments above call for a regulation of the industry, but there are very few regulatory functions in place. It is therefore important to design new regulatory legislation. Internationally, there are three relevant conventions: Article 47 of the Additional Protocol I of the Geneva Conventions (1977); the Organisation for African Unity (OAU, now African Union) Convention for the Elimination of Mercenarism in Africa (CEMA) of 1977; and the United Nations International Convention for the Recruitment, Use, Financing and Training of Mercenaries, proposed in 1989 and ratified

by enough states to come into effect in 2001. All of these have been criticised for being ineffectual (Kinsey, 2007:134). The conventions deal first and foremost with mercenaries, but as already discussed, the definitions of mercenaries are considered unworkable.

Domestically, only South Africa has a legislation that explicitly mentions Private Military Companies, in the Memorandum of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act of 2006 (O'Brien, 2007a:58). Most domestic regulation is out of date, as it concerns mercenaries, not PMSCs (Kinsey, 2007:136). In this research, the new domestic regulation of South Africa will be the focus of the study. The regulation of the United States and the options for regulation put forward in the United Kingdom in 2002 will also be examined. These countries have different solutions as to how to regulate the companies, and their regulations are based on different principles (Caparini, 2007:158). As I will come back to in later chapters, the differences in the regulations are heavily influenced by the different relationships between companies and governments. While US companies maintain close contact with their government, South African companies do not (Cilliers and Douglas, 1999:112). The United Kingdom does not have regulation in place, but is important because it therefore serves as a home base for most PMSCs based outside the United States (Smith, 2005:24).

One of the major problems with domestic legislation from the sending state is that it has to have extraterritorial application (Herbst, 1999:120). This is unusual in the post-cold war era, where, instead of domestic extraterritorial legislation, the norm has become internationally designed conventions (Le Billion et al, 2002:4). Due in particular to the difficulty of gathering evidence, extraterritorial application is almost impossible to enforce (Singer, 2007:239). Besides the difficulties inherent in domestic regulation itself, it is also problematic that PMSCs can avoid domestic laws easily by relocating to another country, owing to their flexible structure (Avant, 2005:67, Percy, 2006:25). Domestic legislation in this area is also complicated by the fact that the employees of PMSCs are not necessarily from the same country, therefore only some employees might be under domestic regulation. As a result of this, it would be preferable that the country from

which the company operates has a regulation that includes all the employees regardless of their nationality.

### **1.1.3 Research questions**

Specifically, this research will attempt to answer the following questions in order to evaluate if the new South African legislation is an effective domestic response to calls for regulating the PMSC industry.

The South African legislation of 2006, the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act, aims to close loopholes inherent in the Regulation of Foreign Military Assistance Act (RFMAA) of 1998. The new Act covers all war zone activities by South African nationals; the recruitment by South African citizens of non-nationals into war-zone work and into regulated countries; it bans humanitarian work without government authorisation in countries that are proclaimed to be regulated, and prohibits mercenaries. Is this new act an actual improvement over the legislation of 1998?

How does the Act fit with international conventions, e.g. Article 47 of the 1977 Protocol of the Geneva Convention and the Organisation of African Unity's Convention for the Elimination of Mercenary Activities of 1977?

How does the new South African legislation compare with the US legislations? Specifically, how does it compare to the International Traffic in Arms Regulation Act of 1993 and the Military and Extraterritorial Jurisdiction Act of 2000.

Finally, how similar is the new South African Act to the options presented in the (UK) Green Paper of 2002?

## **1.2 Purpose and Significance**

### **1.2.1 Purpose**

One purpose of this research is to describe the growth of the PMSC sector, and the legislation and conventions that have been put in place to regulate it. This will be done in



order to shed light on the present regulatory situation. It is important to remember that it is not necessarily negative for a country to be the host nation of PMSCs, especially if the companies are considered legitimate. The companies can bring in substantial tax returns for the services they render (Avant, 2005:65). Being the home country of an illegitimate PMSC, however, can have negative effects. For example, the post-apartheid South African government saw the export of private violence from South Africa as an embarrassment, due to its goal of playing a positive role in Africa (Abraham, 1999:85).

Another purpose of this research is to assess the differences between PMSCs and mercenaries. This is important because there are both similarities and differences between the companies and mercenaries, as already shown above. Mercenaries gained a very bad reputation after their involvement in the post-colonial conflicts in Africa during the 1960s - their actions in the former Zaire are an example of this. PMSCs have therefore tried to avoid being labelled as mercenaries (Cullen, 2000:36). The differences and similarities between the PMSCs and mercenaries are very important for this research, as a lot of the academic debate around the industry concerns exactly that. This has in turn implications for the debate on how to regulate the industry, as mercenaries are, at least in theory, already regulated by international conventions.

This research will also compare domestic regulation already in place to regulate the industry. By comparing the domestic legislation of different states, the thesis aims to see if the South African regulation is the most effective of its kind. While comparing the legislations it is important to identify the objectives of the governments in question when creating the legislation, as the governments might have had different purposes.

Finally, the main purpose of this research is to evaluate the domestic regulation of PMSCs in South Africa. The extent to which the new legislation fulfils the goals of the South African government will be evaluated, as well as whether or not the new South African legislation can be a model for other countries.

### **1.2.2 Significance**

President Thabo Mbeki signed the new South African Act on 12 November 2007. Because the law is as new as it is, it has not yet been studied in detail. This study will, through an in-depth comparative analysis of the Act, be able to evaluate the extent to which the legislation effectively addresses the issues at hand. Private Military and

Security Companies are unlikely to disappear and it is therefore important to find the best way to regulate them (Small, 2006:4).

PMSCs can be regulated by the international community, by the companies' host state and by the state that signs a contract with the PMSCs. Mercenaries can be regulated in the same way, but are in theory already banned by the international community. The hiring state in developing countries is likely to be weak, thus the legislative capacity in this arena will generally be minimal. International regulation seems to be an important dimension, as the private military and security firms are transnational actors. However, new international legislation does not seem to be forthcoming, as negotiations are usually lengthy and questions of regulation are not currently on the global agenda (Kinsey, 2007:156). At this point in time, it is therefore the home state that has the best capacity to impose regulation on the activities of the industry. Together with the fact that very few states have domestic regulation in place to control this phenomenon, this makes the study of the new South African legislation important in order to see if South Africa has found a solution to the issues caused by PMSCs.

To put similar regulatory legislation in place in many countries can be an effective way of regulating the industry in the absence of effective international conventions. Due to their transnational nature, it is not difficult for a PMSC to move its home base to another country, but with similar regulation in place in many countries relocating to avoid regulation would be more difficult (Avant, 2005:144; Singer, 2007:240). This option has limitations, however, in that political will is required to put the legislations in place. It is unlikely that *all* countries will put in place identical legislation, but with the same kind of regulation in effect in enough countries, a company that decides to relocate to a state without legislation will send a signal that it does not want to comply with the regulation. This would damage the company's legitimacy (Singer, 2007:240). For domestic legislation to effectively regulate the industry, however, there needs to be measures put in place to ensure effective extraterritorial application of the law (Chesterman and Lehnardt, 2007:252).

Although this harmonisation of domestic legislation would be a substantial step forward in the regulation of the industry, the ideal way to regulate PMSCs would be through international conventions (Singer, 2007:241). This is first and foremost because

of the difficulty of enforcing extraterritorial domestic laws. But as discussed above, international regulation is not currently a realistic alternative. This research is significant, therefore, because it aims to contribute to the debate on domestic regulation and open further areas of investigation.

### **1.3 Research Methodology**

This research will study the new South African legislation on PMSCs and mercenaries. Existing US domestic legislation and options for regulation presented to the UK government in the 2002 Green Paper will be studied in order to evaluate the new South African legislation. In addition, the international conventions on mercenaries will be discussed. The units of analysis will therefore be the domestic regulation that has been implemented in South Africa and the US, the options presented for debate in the UK Green Paper of 2002 as well as the international conventions in place.

This study will primarily be descriptive in nature, but will also include evaluations of the domestic legislations regulating PMSCs today, especially the new South African legislation. The data used will be textual and mostly of secondary nature. It will include books, journal articles, international conventions and domestic laws. The sources will be studied in order to evaluate the new domestic regulation found in South Africa and see whether or not it can serve as a model for other countries' legislation.

### **1.4 Structure of Study**

#### Chapter 1: Introduction

The introductory chapter will present the purpose and the significance of the study. It will also include an outline of how the study will be conducted, as well as an introduction to the main debates surrounding the PMSCs.

#### Chapter 2: Literature Review

In the second chapter there will be a more extensive discussion on the debates introduced in the first chapter. In addition, the PMSCs themselves will be studied more closely. The chapter will investigate what has led to the companies' prominence in the world today.

### Chapter 3: The two South African Legislations compared and evaluated

This chapter will evaluate whether or not, and in what ways, the new South African legislation is an improvement to the much-criticised RFMAA of 1998. This will be done by evaluating the new legislation and by studying the criticism directed at the old legislation.

### Chapter 4: South African legislation and International Conventions

The fourth chapter will compare the new South African legislation to the international conventions applicable to private military actors. This will be done in order to identify the differences between them, and to see whether or not the South African legislation can avoid some of the difficulties encountered by the conventions.

### Chapter 5: Other domestic legislation compared with South African legislation

This chapter will compare and evaluate the US legislations and the UK options for legislation with the new South African legislation.

### Chapter 6: Conclusion

The final chapter will sum up the findings of the previous chapters and give an analysis of how successful the new South African legislation is in addressing the issues created by PMSCs. The chapter will also discuss whether or not the new South African legislation can represent a model for other countries.

## **Chapter 2: Literature Review**

In any discussion about privatized use of force, it is important to remember that the legitimate use of violence was not the norm until after the Peace of Westphalia in 1648 (Singer, 2007:19). Soldiers of fortune, on the other hand, are as old as the phenomenon of war itself (Singer, 2004:525). Even Machiavelli warned his Prince of mercenaries' lack of loyalty (1997:44). This chapter will first give a review of the literature that discusses both the history of mercenaries and the rise of the PMSCs. This is important because an understanding of the historical context of the PMSCs is necessary in order to understand the existing regulation (Zarate, 1998:82). Furthermore, as Sabelo Gumedze argues, the solutions to the problems of regulation should be based upon an understanding of the history of the industry (2007a:4).

In the second part of the chapter I will discuss whether or not PMSCs can be seen as mercenaries. This research finds that PMSCs should not be seen as mercenaries; rather they represent a new, more legitimate form of private force, PMSC employees are “corporate soldiers” (Kinsey, 2007). There is an academic debate on whether the industry should be regulated or abolished, and this will be discussed in the next section. This debate is closely tied to the debate on whether or not the companies hire mercenaries, and to whom the companies are accountable: to shareholders, state authorities, or both? It is important to understand why regulation is preferable to abolishment in order to get a meaningful discussion of how to regulate the industry. Although some of these themes have been mentioned in the first chapter, this chapter will widen the discussion in order to provide a thorough understanding of the issues that are important to this study.

### **2.1 The history of mercenaries**

Mercenarism has not always been regarded as a negative phenomenon in the way it is today (Abraham, 1999:81). In fact, until the Peace of Westphalia in 1648 and the establishment of the state system, hiring fighters foreign to the conflict was the norm (Singer, 2007:29). Not until armies came to be made up of citizens did states start restricting the enlistment of their citizens into foreign armies through neutrality laws (Singer, 2007:31).

Mercenaries as we know them today became well known during the decolonization of Africa, when they played reactionary roles and even committed various atrocities towards the civilian population (Singer, 2007:37). As a result of this, the international community felt for the first time in the 1960s the need to regulate or even ban these private actors. Prompted by African states, the United Nations passed several resolutions condemning the mercenaries fighting against the newly independent African governments (Sandoz, 1999:203-204). Since then, mercenaries have taken part in activities such as overthrowing governments, for example in West Africa and the Comoros, and fighting liberation movements as they did in the Belgian Congo. Because of all this, mercenaries have gotten a horrible reputation (Taljaard, 2007:109). Thus the perception of mercenaries throughout history has changed, and from being the norm prior to the emergence of citizen-armies, mercenaries have been shunned in the last decades.

The PMSCs operating in Iraq, Afghanistan and post-colonial Africa are very different from the mercenaries that operated in Africa during the 1960s, as most of them offer non-combat services. Nonetheless, there are still individual mercenaries operating in the world today, and their basic characteristics have not changed much (Singer, 2007:37; Zarate, 1998:82). Because of the continued existence of mercenaries and the seemingly ineffective regulation in place to control them, it is important to include mercenaries in the regulation of the private military sector, despite the fact that PMSCs and mercenaries are different from each other.

## **2.2 Rise of the Private Military and Security Companies**

International resistance to intervene in conflicts after the Cold War has created a new market for private military and security companies (Brayton, 2002:312). Whereas some authors argue that the existence of companies in the private sector using force is a new phenomenon, Jeffrey Herbst is among those who argue that hiring military services from companies is nothing new (1999:110). He claims that the chartered companies, such as the British South Africa Company of Cecil John Rhodes, had powers to exercise violence on behalf of the state if they saw it fit (Herbst, 1999:110). These companies were state agents of sorts, but they became powerful entities of their own as they operated outside their home country (Singer, 2007:34). Thus private companies with the means to exercise violence are not entirely new.

It seems that most scholars agree that the private military and security industry started emerging after the end of the Cold War. There is, however, disagreement about how the growth came about and whether or not the industry is now an accepted part of the international system. Most scholars argue that the downsizing of military forces worldwide, due to a perception of a friendlier international environment, increased the available military expertise on the market (McIntyre, 2004:102; Shearer 1998:26-27). This reduction of military spending also meant that the career opportunities in the militaries around the world were reduced, and a greater number of actors perceived the private sphere as a more viable alternative (Shearer, 1998:26-27). The supply of military expertise thus seemed to rise from the thaw in the international environment that reduced military spending. Having a supply side is not enough however, there also needs to be a demand for the services offered by the private military actors.

This demand came from governments of weak states in Africa who lost their assistance from the superpowers and seldom had the capacity to fight the rebels in their country. The UN Security Council and the Western world in general did not want to intervene. These weak states therefore had to look for new sources of support against internal threats, and created the initial demand for PMSCs that could assist them in staying in power (Brayton, 2002:308; Small, 2006:19). Soon, the developed world wanted the assistance of PMSCs as well, for example in the Middle East. This will be discussed further below.

The services these early companies provided varied. Among the most well known examples of private military companies are the South African Executive Outcomes (EO) and the British company Sandline, who took direct part in hostilities against the Revolutionary United Front (RUF) on behalf of the government of Sierra Leone. Other companies have trained forces, guarded pipelines and performed other defensive functions for various entities. Companies operating in these weak states can work for Multinational companies (MNCs), Non-governmental Organisations (NGOs), as well as for the government. Any company that aims to work in Angola for example, has to provide for its own protection, and this is often in the form of PSCs (Holmqvist, 2005:15).

It does not seem as though governments in the developed world want to risk

losing military personnel in unpopular wars. An obvious example of this is the war in Iraq. While there is a lot of focus on casualties in the US military, the government in Washington does not have to account for the deaths of hired, private actors. There is no public outcry at the death of a PMSC employee, there is no official funeral and the death is not counted in the official statistics (Howe, 2001:193). It seems that private actors are more expendable to the American government, and this makes it politically desirable to outsource military and security activities to private companies (Percy, 2006:22). Hiring private actors can in the case of Iraq be seen as a way to strengthen the mainly British-American coalition. Sending experienced, private soldiers to dangerous areas can not only reduce the number of official casualties, but free up regular forces to be used in other areas.

Thus both developed and developing countries hire PMSCs for different reasons. Developed countries use the companies to minimise the number of casualties they are accountable for, whereas developing countries' governments have had to rely on PMSCs to stay in power. In addition, many multinational companies and non-governmental organisations have hired PMSCs to protect them in conflict zones. These differences create problems when considering how to regulate the industry, because it is hard to design regulation that will encompass all the roles in which PMSCs are used.

The above factors are all tied to the post-Cold War period. More generally, Michelle Small argues that the privatisation of violence can be seen as the latest development in a general privatisation of society (Small, 2006:19). She argues that this privatisation has come about as a result of the state's inability in dealing with various issues effectively, and because of market pressures such as the military expertise available on the private market (Small, 2006:20). As the security functions are just another aspect of this trend of privatisation, she argues that privatized use of force has been more readily accepted in society than if it was to be privatized in isolation (Small, 2006:19). This could also be seen as a reason for the lack of regulation of the industry.

### **2.3 Are the companies made up of mercenaries?**

Because most existing regulation of privatised violence deals with mercenaries, it is important to decide whether or not it is possible to distinguish the employees of private military and security companies from mercenaries. There is a huge academic debate on



this, as introduced in the previous chapter, and this section will try to examine the differences and similarities between the two types of actors further.

The definition of mercenaries in Article 47 of the 1977 Additional Protocol 1 of the Geneva Conventions has a cumulative aspect. This means that a person has to fulfil all the specifications of the Article in order to be defined as a mercenary. One of the most problematic aspects of this definition is that the motivation of a person has to be proven in order for that person to be defined as a mercenary. This is extremely difficult. It is even more difficult still to prove that an employee of a PMSC is a mercenary (Shearer, 1998:17).

Nonetheless, many scholars argue that the companies are only a new guise for mercenaries to hide behind (Arnold, 1999:128). They base their arguments on the fact that the employees are generally foreigners to the conflict, who are paid to work and thus primarily have a monetary motivation (Brayton, 2002:306). To these authors, the PMSCs are therefore illegal entities that should not be confused with legitimate actors, and they argue that states are the only ones who can legally employ violence. Even when governments hire the companies, proponents of this train of thought criticize what they see as the immorality of the companies. To them, corporatisation simply means that the individual mercenaries are hired through companies instead of directly by their clients (Ballesteros, 1998:18). Enrique Ballesteros further argues that even in cases where the companies do not take direct part in hostilities, they are nonetheless mercenaries (1998:18). The moral aspect of this discussion will be studied in a later section of the chapter.

There are, on the other hand, several arguments against treating employees of PMSCs as mercenaries. One argument is that they do not fit under any international, national or other accepted definition of mercenaries, and therefore it is difficult to legally define them as mercenaries (O'Brien, 2007:31). But it is difficult to prosecute even mercenaries under the international legal definitions available, therefore many do not see this as a valid argument (Singer, 2004:524). Another distinguishing aspect is that the companies can accept complex and long-lasting missions, something that individual mercenaries are incapable of (Percy, 2006:14). Furthermore, whereas the typical soldiers of fortune worked for anyone who would pay them, the companies claim to work only for

legitimate clients (Percy, 2006:14; Sandoz, 1999:204). The fact that the structure of these companies is hierarchically defined, with clear chains of command and public shareholders, make them very different from mercenaries (Shearer, 1998:21). Furthermore, the companies advertise their services openly, something mercenaries have not traditionally done. According to the proponents of a differentiation between mercenaries and PMSCs, stressing the similarities between the two types of actors is simplistic, as it does not take into account the new features of the companies (Shearer, 1998:22).

It seems to me as though how scholars view the industry is to some extent dependent on their moral standpoints. The debate is between two sides with morally irreconcilable standpoints on how to view PMSCs. I would argue that there are important differences between PMSCs and mercenaries. The PMSCs have a military hierarchy, a company structure and clear chains of command. The corporate structure and the fact that most of the companies are listed on the stock exchange also make them more open to public scrutiny. This corporate structure does create accountability-issues, however, as will be shown later in this chapter. Because PMSCs are different from mercenaries they should be regulated in a different way. However, the fact that the PMSCs have a corporate structure does not mean that they should be regulated as normal multinational companies, precisely because of the nature of the services they provide, especially combat in war-zones (O'Brien, 2007:31; Gumedze, 2007c:5).

## **2.4 Should the industry be regulated or abolished?**

There have been many calls for the abolishment of the industry because those who regard PMSCs as mercenaries feel that states have a moral obligation to abolish them. This debate is significant for this research because the premise of the thesis is that regulation of the industry is necessary owing to the fact that abolishing the industry does not seem sufficient or entirely credible.

### **2.4.1 Moral and accountability issues**

Critics of the private military and security industry see it as very problematic that the companies do not answer to anyone in the state system except the contracting state, which is often weak and in no position to hold the companies accountable. This lack of

accountability is especially problematic because of the violent nature of the services provided (Zarate, 1998:77). It also makes the actors seem less legitimate (Zedeck, 2007:99). This perceived lack of legitimacy is in itself a reason for the calls for abolishment of the industry. The worst-case scenario seems to be that rogue companies could work to keep rogue states in power and enhance their capabilities.

Because the companies are businesses, they are first and foremost accountable to the shareholders of the companies. This is seen as problematic because it is the citizens of states that feel the consequences of the companies' actions (Brayton, 2002:319). Although most PMSCs today claim that they will only work for legitimate clients, it is always possible that the shareholders or owners find it more profitable to work for non-legitimate governments as well (Zarate, 1998:80; Cilliers and Cornwell, 1999:234). It is also a concern that it is up to the companies themselves to decide who they define as legitimate clients. Regulatory legislation can, arguably, make the companies accountable to the state or the institution that is regulating them. The continued lack of legislation will mean that the companies will still not be accountable to any state. Therefore there is a need to put increasingly wider legislation in place (Percy, 2006:23). This research will evaluate the extent to which the new South African legislation makes South African actors more accountable.

PMSCs are accountable to their clients through their contractual agreements (Gumedze 2007c:6). However, while the contracts between company and client are a way in which the clients can potentially control the activities of the companies, when the clients are weak states it does not seem likely that they can hold the companies accountable. Sometimes the contracts include an immunity clause, which guarantees that employees of the companies will not be held accountable for their actions. Rachel Zedeck claims that this has made the industry seem like agents of Western neo-colonialism, which in turn is another reason why the companies are viewed with suspicion (2007:100). Even without an immunity clause, the situation in which the industry is called to work in is usually a war zone. In such a situation it is unlikely that a state can control everything that happens and hold anyone accountable.

As a consequence of the general lack of accountability, many scholars argue that promotion of accountability should be the foremost goal of any regulatory regime aiming

to control the industry (Mandel, 2002:146). Although making the companies accountable is important, the employees of the companies should also be held personally accountable for their actions (Kinsey, 2007:135). This research will therefore study the extent to which the different legislations promote accountability of both the companies and their employees.

Sarah Percy argues that one of the objections to the use of private military and security companies is that if the employees of a company kill someone in the conflict, the killing would be made solely for monetary gain (2007:14). This is seen as immoral, and is often used as an argument for the abolishment of the industry. Private Security Companies, however, do not actively take part in the hostilities and are therefore less likely to kill someone than private military companies whose mandate includes combat services (Percy, 2007:17). The moral indignation against PSCs is therefore not likely to be as fervent, at least not on this point.

Another moral objection that Percy points to is that private military and security actors threaten the state monopoly on the legitimate use of force (Percy, 2007: 18). This will affect both PMCs and PSCs, as both represent privatised use of force. PSCs will have to respond with force if what they are guarding is attacked. Thus many see the private companies as threatening states' *raison d'être* (Small, 2006:15). PMCs are likely to be seen as more threatening to states in this regard as they are more likely to use force.

PMSCs benefit from conflict and insecurity, and some argue that it is immoral to make gains from situations in which people are dying or suffering (Singer, 2007:216). On the other hand, it can be argued that the purpose of a PMSC operation is to prevent suffering (Brooks, 2000:33). Furthermore, seeing as the companies are making money from a conflict situation, it can appear to be in the interest of the shareholders to keep the conflict going (Bures, 2005:540).

Funmi Olonisakin argues that the industry should be abolished because the money used for paying PMSCs could in many cases be spent on the citizens instead (2000:234). This is especially an important argument in Africa, where both states and citizens are often very poor. Olonisakin also argues that PMSCs do not create lasting peace, but are used by regimes only in order to buy time (2000:234). Because many states in Africa are unaccountable to their citizens, the PMSCs can, in this way be upholding an illegitimate

regime. This leads many to argue for abolishing the industry (Olonisakin, 2000:234).

The proponents of the industry argue that because of the effectiveness of private companies, the moral debate should not be about abolishment but about why the companies have not been more widely used (Brooks, 2000:35). Their argument is that many lives would be saved if PMSCs were allowed to intervene in civil conflicts when the UN Security Council was slow to act. In other words, there are moral issues with both the use and the non-use of the companies. Again, it seems as though it is a discussion with irreconcilable moral values. The moral and accountability-issues could become less important with effective regulation of the industry in place. Regulation could, for example be a way for states to regain their monopoly on the legitimate use of force.

The calls for abolishing the industry have been criticised as being unrealistic, because most authors agree that an abolishment would be impossible to enforce (O'Brien, 2007:42; Holmqvist, 2005:43; Mandel, 2002:144). There is also a question of whether it would be legal according to international law to ban these actors, with regards to states' right to self-defence (Zarate, 1998:80). One reason why there is no prohibition of PMSCs today is that most states want to have the possibility of hiring the PMSCs should the need arise in the future (Cullen, 2000:37). Abolishment is made less likely by the inherent support for the industry that seems to exist among strong states, especially in the US and the UK (Singer, 2004:544). Thus while there are calls to abolish the industry, I will in this research argue that a prohibition is unlikely, and not entirely desirable. The reasoning behind regulation can be seen as a way to solve the issues outlined above, and will be further explored in the next section of this chapter.

#### **2.4.2 Arguments for regulation**

It is possible to argue merely from the moral and accountability issues outlined above that there is a need to regulate the industry. This section will review what other arguments have been given prominence in calls for sanitising the industry. The last part of the section will discuss the types of regulation in place.

Sarah Percy argues that there are five main reasons for regulating the private military and security sector. The first of these is that regulation is needed in order to bring the use of military force under state control. This is important because, as already shown, the monopoly on the legitimate use of force is one of the main reasons for states to exist –

if not *the* main reason (Percy, 2006:15). Christopher Kinsey agrees that regulation is needed to bring the industry under state control, but he points to very different reasons. He argues for regulation in order to ensure that the companies uphold constitutional responsibilities such as human rights, and because it would ensure that the companies do not act in a way that would undermine values that could negatively impact on peace and security (2007:135).

The second reason why it is important to regulate the private military industry is that the current legislation to regulate the industry, where it exists, is not sufficiently clear. In South Africa, the legislation was revised after only nine years in order to close the loopholes inherent in the RFMAA. Percy argues that any new regulation has to make it easier for the companies to understand what they are and what they are not allowed to do (2006:18). This would probably result in a safer working environment for the employees of the companies, as well as a safer situation for the local population where the companies are employed. A proper definition of a PMSC is important in order to clarify what is to be regulated.

Today there is little insight into the industry, and there are no records of all the companies or where they operate. Percy argues that more effective regulation would provide transparency (2006:21). The current lack of transparency is quite troubling, given the nature of the services provided by these companies. Both governments and the population in general should have knowledge about who these actors are and where they operate, and this information would be more readily available with proper regulation.

The problem of lack of accountability in the industry has already been discussed. This is Percy's fourth reason for regulation (2006:23). Christopher Kinsey agrees with Percy on this point, arguing that regulation should aim towards making the companies and their employees more accountable (2007:135). More accountability is important due to the violent nature of the services the companies provide.

So far, the industry has grown outside of the state system's control. Because of this, Percy argues that any regulation of the industry should try to determine its future growth (2006:23). This is important because, as argued by many scholars, the industry is not likely to disappear because of the high demand for the services offered (Singer, 2007:230). If states can control or direct the future growth of the industry by regulating it,

this is likely to lead to increased transparency and accountability.

#### **2.4.2.1 Current legislation**

There seems to be a consensus that the private military and security actors are not sufficiently regulated today (Singer, 2004:521; Smith, 2005:24). When considering what kind of regulation is necessary in order to bring the industry under state control, scholars seem to agree that there is a need for international as well as national regulation (O'Brien, 2007b:42). The legislations in place that could be related to the private military industry were mostly made with mercenaries in mind, and therefore do not encompass the structure of PMSCs.

Currently, there are three international bodies of legislation connected to the regulation of PMSCs, as described hereunder. However, most scholars argue that these conventions are not entirely relevant to the industry (Holmqvist, 2005:44; Abraham, 1999:85). Article 47 of Additional Protocol 1 (1977) of the Geneva Conventions contains the first definition in international law of a mercenary. As already discussed, the definition is flawed, and in any case the extent to which the private military and security companies can be seen as mercenaries is questionable.

The second international convention is the Organisation of African Unity/African Union Convention for the Elimination of Mercenarism in Africa (CEMA), 1977. This convention reflects the post-colonial context in which it was written, and it seems outdated in terms of the private military and security companies (Taljaard, 2007:110; Gumedze, 2007b:23). Furthermore, since the CEMA does not prevent African countries from recruiting mercenaries, it does not apply to mercenaries who are hired by states (Kuofor, 2000:203; Abraham, 1999:94).

The third international body is the UN Convention Against the Recruitment, Use, Financing and Training of Mercenaries, 2001. This convention was proposed in 1989, but did not come into force until 2001 when the minimum of 22 states had ratified it (Singer, 2004:531). By the time the convention came into force, the dominant private actors were no longer mercenaries, but private military and security companies, making the Convention seem slightly irrelevant (Chesterman and Lehnardt, 2007:251). The signatories to the Convention do not include any of the major powers or suppliers of PMSCs, and some of the signatories have previously hired PMSCs and mercenaries

(Singer, 2004:531).

In all, there does not seem to be any relevant international conventions relating to the private military and security companies. This is problematic, since it is a transnational industry that would best be regulated internationally (Percy, 2006:40). However, there does not seem to be much international will to regulate the industry. As mentioned above, it took 12 years to ratify the last UN Convention on the subject, and none of the major powers were signatories. Powerful states, such as the US and the UK, employ PMSCs and are unlikely to support new international legislation anytime soon.

The contracting state is not always in a position to control the companies' actions, and it is therefore important to study the relevant home state regulation (Kinsey, 2007:136). There are very few countries that have relevant regulation, but the following section will briefly introduce the regulation that does exist and that will be studied more closely in the following chapters.

South Africa is one of the few countries with domestic regulation that attempts to deal with the private military and security industry. The government passed the first legislation as a reaction to the negative publicity South African firms, such as Executive Outcomes, received internationally (Kinsey, 2007:138). The first regulation was passed in 1998, the Regulation of Foreign Military Assistance Act (RFMAA). This Act aimed at prohibiting mercenaries whilst regulating other private actors (Kinsey, 2007:138). The legislation was not seen as very effective, since it was not able to monitor the activities of South African PMSCs outside of South Africa, despite its extraterritorial jurisdiction. This is a typical problem with domestic regulation (Caparini, 2007:171).

Because of the apparent weaknesses of the RFMAA, and the failure to convict Mark Thatcher for his involvement in the plotted coup in Equatorial Guinea in 2002<sup>1</sup>, the South African government wanted to tighten certain loopholes in the legislation (Smith, 2005:24). The resulting Prohibition on Certain Activities in Country of Armed Conflict Act of 2006 is the most recent legislation in the field of private military and security companies in the world. The previous act thus lasted only nine years. The new Act was ratified as late as in November 2007, thus little has been written about it. This study aims

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<sup>1</sup> The trial was ended with a plea bargain in 2003. Mr Thatcher is a British citizen who was based in Cape Town where he recruited mercenaries to seize power in Equatorial Guinea.



to contribute to the existing literature on regulating PMSCs, by studying and evaluating the new legislation.

The United States also has legislation regulating their PMSCs, through the International Transfer of Arms Regulations (ITAR, 1993). The ITAR is part of the country's Arms Export Control Act of 1976. The American regulation focuses on what the companies sell to foreign persons, in order to make sure the companies do not act contrary to American foreign policy goals (Avant, 2005:149). The legislation includes a licensing procedure, but lacks a monitoring mechanism (Avant, 2005:150). In 2002 the Military Extraterritorial Jurisdiction Act was passed, granting extraterritorial jurisdiction for actions committed by civilians accompanying the American military abroad to the American Justice system. But the Act has not resulted in many prosecutions (Chesterman and Lehnardt, 2007:252). Moreover, it only applies to certain contractors, making it easy to avoid it (Singer, 2004:537). In all, there are many problems of oversight and follow-up issues with the US legislation.

The United Kingdom does not have pertinent legislation. In fact, the only legislation in place with regards to the private military and security companies applies to the arms trade. As long as the companies do not trade arms on British soil, the government cannot punish them. The government did publish a Green Paper on PMSCs in 2002, however, where it evaluated the options on how it could regulate private military actors (Kinsey, 2005:85). In short, the six options were: a ban on all overseas military activity, a ban on the recruitment for such military activity, installing a regime to license the private military and security companies, general licenses for PMSCs, and self-regulation (Kinsey, 2005:88). The government has so far not made a decision about which of the above alternatives should be made into actual legislation.

There are calls for self-regulation from within the industry, but this will not be dealt with in this research (Percy, 2006:59). The companies that are the least likely to break any rules want self-regulation, whilst other companies are unlikely to sign up for this type of voluntary constraints. Generally, it is deemed as problematic to leave the industry to regulate itself because of the violent nature of the services it provides. No other industries are self-regulated, and it does not seem desirable to start such a trend with something as serious as the private military and security industry (Percy, 2006:59).

## **Chapter 3: The Two South African Legislations Compared and Evaluated**

This chapter will discuss the two subsequent South African legislations aimed at controlling the PMSC industry, the Regulation of Foreign Military Assistance Act of 1998 and the new Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act of 2006. The legislations will be studied by examining the background for their creation, their purpose, their definitions and the issues inherent in them and by looking at how enforceable they are. Other unintended effects of the legislations will also be considered. The last section of this chapter will compare the two legislations against each other.

### **3.1 Regulation of Foreign Military Assistance Act, 1998.**

#### **3.1.1 Background**

The Regulation of Foreign Military Assistance Act (RFMAA) of 1998 was a product of the transition from apartheid and of the demilitarisation of society that followed. The downscaling of the military created a surplus of potential recruits for mercenary activities and PMSCs (Caparini, 2007:168; Cleaver, 2000:138). The PMSCs brought ex-South African Defence Force (SADF) soldiers out of the country. Because these former soldiers were seen to be potentially disruptive members of society, it has been claimed that the Mandela government tacitly supported the PMSCs (Avant, 2005:158; Zarate, 1998:102). People seen as potentially dangerous for the new dispensation because they had fought for the apartheid regime, were taken by PMSCs out of the country, usually to somewhere in Africa. Some ex-SADF soldiers turned to mercenarism as their new trade, and were thus also out of the country. Mercenarism was never approved of in any way by the government (Taljaard, 2007:115; Cock, 2005:796).

In spite of the tacit approval of PMSCs, the ANC government did not trust the companies, many of whose employees they had fought against during apartheid (Avant, 2005:158,165). This distrust was the main reason why the government eventually made a move to make the PMSCs less legitimate (Avant, 2005:158; Singer 2004:539). Another reason was the perception that PMSCs were undermining South African foreign policy

indirectly, and directly affecting the country's new security policies (Avant, 2005:165). The activities of these private companies were seen as embarrassing to the South African government, because the Mandela government had focused especially on human rights and democratic principles in its policies on the continent (Caparini, 2007:168; Zarate, 1998:102). The negative publicity of Executive Outcomes' (EO) activities in Angola and Sierra Leone was particularly embarrassing (Kinsey, 2007:138; Percy, 2006:30; Zarate, 1998:101). Executive Outcomes was made up mostly of members of the 32 Battalion of the SADF. This battalion fought on the side of UNITA in Angola, and in this way gained knowledge of their tactics. It was therefore seen as immoral that these same people, now part of a company, were contracted to fight against their former allies (Howe, 2001:198). It was after EO's involvement in Angola that the South African legislation was planned. In Sierra Leone EO was contracted by the legitimate but weak government to fight in the war against revolutionaries and warlords. Initially, South African companies welcomed the legislation (Barlow, 2007:481). Executive Outcomes, for example, put forward 36 proposals during the drafting of the Act, 28 of which were included in the final law (Spearin, 2001:30).

### **3.1.2 Purpose**

The legislation of 1998 was based on the principle that "the resolve to live in peace and harmony precludes any South African citizen from participating in armed conflict, nationally or internationally, except as provided for in the Constitution or national legislation" (Caparini, 2007:169). The regulation had two main purposes. Firstly it aimed at prohibiting mercenaries, which were seen as morally decrepit actors. Secondly, it sought to regulate the supply of foreign military assistance by South African citizens and permanent residents, as well as foreign citizens who worked from inside the borders of South Africa (Abraham, 1999:102-103; Nossal, 2001:466). Private military and security companies or future employees of these, had to go through a two-step process in order to be granted authorisation. Requests for authorisation to provide foreign military assistance had to be submitted to the National Conventional Arms Control Committee (NCACC). The NCACC then forwarded its recommendation to the Minister of Defence, who had the final authority for each contract (Caparini, 2007:169). This is similar to the way arms

exports are regulated (Cilliers and Cornwell, 1999:238).

A company would not get an authorisation if the foreign military assistance for which it had requested authorisation was seen to contravene obligations South Africa has under international law, if it would violate human rights, jeopardize peace in a country or a region, encourage terrorism, go against South Africa's national or international interests or be "unacceptable for any other reason" (Sec7). Judging from this last point, part of the purpose of the legislation could have been to covertly control and ban an industry that the government did not trust. At the very least, it gave the government the possibility of doing so.

### 3.1.3. Definitional issues

The Act distinguished between mercenary activity, defined as "direct participation as a combatant in armed conflict for private gain", and foreign military assistance, which is:

military services or military-related services, or any attempt, encouragement, incitement or solicitation to render such services in the form of:

- a) Military assistance to a party to the armed conflict by means of
  - i) Advice or training
  - ii) Personnel, financial, logistical, intelligence or operational support
  - iii) Personnel requirement
  - iv) Medical or para-medical services; or
  - v) Procurement of evidence
- b) Security services for the protection of individuals in armed conflict or their property
- c) Any action aimed at overthrowing a government or undermining the constitutional order, sovereignty or territorial integrity of a state
- d) Any other action that has the result of furthering the military interests of a party to the armed conflict, but not humanitarian or civilian activities aimed at relieving the plight of civilians in an area of armed conflict. (Sec1iii).

Garth Abraham argues that this attempt to distinguish PMSCs from the traditional mercenaries was unsuccessful, and sees the definitions as meaningless (1999:104-105). This definitional problem is perhaps due to the speedy process with which the legislation passed through parliament - it seems as though not enough attention was given to definitional issues. The main problem with the definition of foreign military assistance is that it is so wide that activities not related to military activities are included (Sandoz, 1999:216; Kinsey, 2007:139; Malan and Cilliers, 1997:4; Taljaard, 2007:116; Abraham,

1999:105). At the same time, the broadness of the definitions creates loopholes in the legislation itself (Caparini, 2007:170; Percy, 2006:30).

Both the definition of mercenary activity and that of foreign military assistance could have faced constitutional challenges because they infringed on rights held by all South African citizens, such as the right to freely choose an occupation. Although these rights are not unlimited, a breach of the rights would have to be justified (Abraham, 1999:105-106; Holmqvist, 2005:52). This means that the government risked having to answer for the breaches in a court of law should a PMSC employee feel that his or her rights had been infringed upon unjustifiably.

There was a general concern among scholars that since humanitarian assistance was excluded from the regulation, companies could avoid the law by re-registering as a humanitarian organisation (Caparini, 2007:171). A company could, for example, claim that it was removing mines as humanitarian aid, not participating in combat. By re-registering in this way, a PMSC could circumvent the regulation.

The RFMAA covered only armed conflicts, something that was problematic. If foreign military assistance was rendered to a government before the conflict had escalated to the level of an armed conflict, it was not regulated (Sandoz, 1999:216).

#### **3.1.4 Enforceability**

Strict penalties were imposed on persons or companies when violations of RFMAA occurred, and the Act had extraterritorial jurisdiction (Abraham, 1999:103). There was a maximum of 10 years' imprisonment and a fine of up to 1 million rand for any companies or persons breaking the law by acting without authorisation or working as a mercenary (Ballesteros, 1998:20). Enforcement of the legislation was difficult, however, because of the methods used by PMSCs and mercenaries, and because of the environment - whether there was an armed conflict or not - in which mercenaries and PMSCs operate (Abraham, 1999:106). In order to ensure a conviction under the Act, evidence had to be gathered under difficult circumstances in conflict areas (Taljaard, 2007:116). Former chairperson of the NCACC, Kader Asmal, stated that the government would have to depend on journalists as sources of information to enforce the regulation (quoted in Caparini, 2007:170; Singer, 2004:536, 239). The South African police force does not have

jurisdiction in foreign countries, and therefore gathering evidence abroad is one of the difficulties with enforcing the country's extraterritorial legislation.

Many considered the RFMAA too weak to be enforced in any case (Caparini, 2007:172). The few attempts that were made to enforce it were settled by plea bargains; an example of this is the Mark Thatcher case (Holmqvist, 2005:52; Caparini, 2007:170 Avant, 2005:163). The plea bargains were largely a result of insufficient resources for monitoring actors outside of South Africa, but there was also an apparent lack of confidence in the feasibility of prosecuting actors under the RFMAA (Cottier, 2006:653). Two other cases were investigated, but there was not enough evidence to prosecute the companies involved (Caparini, 2007:172).

The general weakness of the legislation becomes apparent when considering that only two companies had applied to work overseas in 2003 and both were refused. That only two of the many companies that worked outside of South Africa in 2003 applied for authorisation shows clearly that the companies did not fear prosecution.

### **3.1.5 Other effects**

Many scholars criticised the RFMAA as it weakened the government's control of private actors (Avant, 2005:163). The increased regulation caused a large part of the industry to go underground (Avant, 2005:164). This illustrates one of the main problems with domestic regulation of the industry: because of their flexibility, PMSCs can easily relocate or go underground and thus escape regulation (Percy, 2006:31). Most companies seem to have relocated to London, where they are not under any regulation (Smith, 2005:22-24). In South Africa, it appears as if former SADF soldiers felt the RFMAA was implemented to penalize them by preventing them from earning a living (McIntyre, 2004:103). This pushed the former soldiers even further away from the government's jurisdiction.

The South African government aimed to de-legitimise the South African PMSCs. The fact that foreign governments and INGOs still hire South African PMSCs, however, seems to undermine this attempt (Avant, 2005:166). Conversely, the government was also criticised for putting in place a type of regulation that *did* legitimise the PMSC industry. Critics also argued that by authorising PMSCs to operate, they made themselves somewhat responsible for the companies' actions (Caparini, 2007:171; Kinsey,

2007:139). This danger never materialised, however, as not many companies applied for authorisation, and few of those that did, received it.

In all, it seems that the Act did not have as wide an impact as was anticipated by the government (Kinsey, 2007:139). It did not deter South African companies or South African individuals from offering their services internationally, something that is most likely due to the few sanctions imposed under the Act (Caparini, 2007:170). It did, however, reduce the South African government's control over the services rendered outside the Republic (Avant, 2005:166; Taljaard, 2007:115).

Executive Outcomes closed down three months after the RFMAA came into force, leading many to speculate if there was a connection between these two events (Cilliers and Cornwell, 1999:239). But whatever the case, the Act did not eliminate PMSCs operating from South Africa, nor did it stop foreign PMSCs from employing South Africans in Iraq or Afghanistan. It is questionable therefore, whether or not the legislation has had any lasting impact on the industry. But if EO closed down as a result of the RFMAA, the legislation has to be seen as somewhat successful by getting rid of the company that gave the government the worst publicity.

## **3.2 The Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act 2006**

### **3.2.1 Background**

The large number of South African military personnel in Iraq and Afghanistan, as well as the failed coup attempt against the Equatorial Guinean government in 2004 in which South African citizens and residents were involved, demonstrated that the existing legislation was not functioning (Caparini, 2007:173; Le Roux, 2008:1). It was especially troubling that South Africans were participating in the conflict in Iraq, which the South African government opposed. It became clear that the RFMAA was not working as a deterrent against private persons and companies engaging in foreign conflicts. As a consequence of this, the government saw the need to revise and improve the legislation.

### **3.2.2 Purpose**

The main purpose of the new Act is to ensure that the deficiencies of the older legislation are eliminated (Smith, 2005:24). The purpose of this legislation is therefore largely the

same as for the RFMA: to prohibit mercenaries and regulate the activities of South African citizens in a country of armed conflict. The last section of this chapter will evaluate to what extent the new Act succeeds in closing the loopholes of the RFMAA.

### 3.2.3 Definitional issues

Mercenaries are defined as persons who participate in a conflict for “private gain”. Recruiting, training, hiring, supporting or financing of mercenaries is also prohibited (Sec5). A person who is found guilty of any of the above commits an offense. The definition is problematic because being a mercenary hinges on the motivation of a person for taking part in hostilities. This is very similar to international definitions of mercenaries, and as mentioned in Chapter 1, most scholars do not see these international definitions as viable. The definition in the new South African legislation recognises, moreover, that mercenaries can operate in countries where there is no armed conflict.

When it comes to other types of foreign military assistance, these services are regulated only if the country in which the companies or their South African employees operate are seen to be in a state of armed conflict. Armed conflicts includes any:

- a) situation in a regulated country proclaimed as such in terms of section 6; and
- b) armed conflict in any other country which has not been so proclaimed, between –
  - i) the armed forces of such country and dissident or rebel armed forces or other armed groups;
  - ii) the armed forces of any states;
  - iii) armed groups;
  - iv) armed forces of any occupying power and dissident or rebel armed forces or any other armed group; or
  - v) any other combination of the entities referred to in subparagraphs i) to iv)

The South African government can proclaim countries as regulated, although the Act applies in situations of armed conflicts as well. This is done through the following procedure, prescribed by the new Act:

- (1) The Committee must inform the National Executive whenever it is of the opinion that-
  - an armed conflict exists or is imminent in any country; and
  - such a country should be proclaimed to be a regulated country
- (2) After the Committee has informed the National Executive in the matter contemplated in subsection (1), the President, as Head of the National Executive, may by proclamation in the *Gazette*, proclaim a country as a regulated country. (Sec 6).



This means that services rendered in a country, are not regulated by the Act unless there is an armed conflict there or it is proclaimed to be a regulated country (Caparini, 2007:175; Sec 6). This is problematic because the South African government could potentially use the new Act as a political tool. By proclaiming a country to be regulated because it feels an armed conflict is imminent, it can stop the companies from operating there. Related to this, there is a fear that the South African government could be pressured into not proclaiming a country to be regulated by other governments. This could only be done in countries in which there is no armed conflict, however.

In addition to prohibiting mercenaries, the Act regulates what types of services can be rendered to countries in armed conflicts, this is the private military assistance. The definition of assistance or service includes the following:

- a) any form of military or military-related assistance, service or activity
- b) any form of assistance or service to an armed conflict by means of-
  - i advice or training
  - ii personnel, financial, logistical, intelligence or operational support
  - iii personnel recruitment
  - iv medical or para-medical services; or
  - v procurement of equipment; or
- c) security services. (Sec 1)

More specifically, security services are defined as at least one of the following:

- a) Protection or safeguarding of an individual, personnel or property in any manner;
- b) giving advice on the protection or safeguarding of individuals or property;
- c) giving advice on the use of security equipment;
- d) providing a reactive or response service in connection with the safeguarding of persons or property in any manner;
- e) providing security training or instruction to a security service provider or prospective security service provider;
- f) installing, servicing or repairing security equipment;
- g) monitoring signals or transmissions from security equipment;
- h) making a person or service of a person available, directly or indirectly, for the rendering of any service referred to in paragraphs a) to g)
- i) managing, controlling or supervising the rendering of any of the services referred to in paragraphs a) to h) (Sec 1)

If the services are to be rendered in a country of armed conflict or a proclaimed country, they are regulated through an authorisation process. Training, recruiting, supporting or financing unauthorised PMSCs or humanitarian aid organisations operating in armed conflicts and regulated countries is also illegal under this legislation. To me, it seems

problematic that medical services are part of this definition because they are not of a military nature and includes NGOs such as Doctors without Borders.

By including humanitarian assistance on the same premise as security services and other forms of military assistance, the Act will not only regulate PMSCs but also non-military organisations from operating in countries of armed conflict. Thus, the government has included many actors in the regulation that were not previously included. Many of these actors do not offer military services.

#### **3.2.4 Enforceability**

The Act claims extraterritorial jurisdiction. This means that a South African court of law can try an offence committed outside of South African borders under the Act as though it was committed within the country (Sec 11). Moreover, any person who renders services that are aimed against South Africa can under the Act be tried if the person is apprehended inside the country (Sec 11). Extraterritorial jurisdiction is difficult to enforce for the same reasons as those mentioned above in the case of the old Act. However, South Africa is in line with international custom, as nationality is a typical form for claiming jurisdiction abroad. Enforcement of this claim of jurisdiction is only possible, however, if the state in which the crime is committed consents to South Africa exercising its jurisdiction there (Higgins, 1984:6; Boldt, 2004:543). This will typically be a problem in relation to PMSCs, as it will not be in the interest of the state that has hired the company to allow South Africa to exercise its jurisdiction there. In such a case South Africa will have to wait until the return of the persons in question.

#### **3.2.5 Other effects**

The Act regulates humanitarian assistance in much the same way as it regulates the activities of PMSCs. Providers of humanitarian assistance must apply for authorisation in the same way as companies rendering other regulated services do. This is problematic because the authorisation process could delay urgently needed humanitarian assistance. The Act does state, however, that the President of South Africa can exempt organisations from the authorisation process if it is seen to save civilian lives. It is not clear if this exemption is permanent for a given organisation, or if it is given on a case-to-case basis. This makes the legislation imprecise.

The Act prohibits the enlistment of South African nationals into other national armies. After the legislation came into force on 16 November 2007, those enlisted in foreign armies had six months to apply for authorisation for their continued enlistment (Section 15(2a)). Thus persons presently employed in foreign armies are now violating the Act unless they have received authorisation (Le Roux, 2008:4). These actors can be arrested and tried upon their return to South Africa. Except for the effects listed above, it is too early to tell precisely what empirical effects the Act will have on South Africans working in the PMSC industry and the South African PMSCs themselves.

There is an inherent lack of transparency in the new legislation. Neither the public nor the media has access to the authorisation process, and the Minister of Defence makes the final decision alone. As in other areas, lack of transparency makes it more difficult to detect cases of corruption.

It is interesting that the Presidency has not proclaimed any country to be regulated as of September 2008. Any proclamation should have been published in the *Government Gazette* according to Section 6 (2), but I have been unable to find such a proclamation in any of the *Gazettes* published after the new legislation came into effect. When the government has not proclaimed a country to be regulated, the PMSCs only have to apply for authorisation for operating in countries experiencing armed conflict according to the imprecise definition in the Act. That no country has been proclaimed as regulated is probably due either to a feeling in the South African government that the definition of armed conflict is suitable for the situations in which South African companies are known to operate, or it could be that there is not enough political will or belief in the legislation to proclaim a country as such.

### **3.3 Comparing the two legislations**

#### **3.3.1 Similarities**

The purpose of both regulations is to prohibit mercenaries and regulate the activities of other private actors operating in conflict areas. The Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act (2006) came about as a result of deficiencies in the RFMAA, which means that it should be an

improvement. The new Act regulates a wider range of actors in order to close the loopholes that allowed PMSCs to circumvent the old legislation.

The two Acts have the same definition of mercenaries. The criticism directed at this definition in the first legislation was either not taken into account, or the government was unable to improve it. After all, it has been difficult for the international community to come up with a definition of mercenaries that is not hinged on the motivation of the actor. It is nonetheless problematic, because a viable and enforceable definition is very important to any legislation that aims to prohibit mercenaries. Moreover, a poorly worded definition could unjustly infringe upon an individual's rights by including activities in the ban that are not necessarily mercenary activities (Abraham, 1999:83). Without a proper definition, it is also difficult or impossible to convict anyone of breaching the legislation in a court of law. Generally, psychological issues, such as motivation, are difficult to prove, and it is especially so in the context of a person participating in a conflict.

The RFMAA has been widely criticised for using a definition of foreign military assistance that is too wide and all encompassing. The new Act casts an even wider net regarding which services are regulated. As opposed to the RFMAA, the new Act does not mention foreign military assistance, but its definition of "assistance or service" is exactly the same as the first part of the definition of foreign military assistance used in the old legislation. Furthermore, the new Act includes a more detailed definition of security services. It bans unauthorised enlistment in other countries' armed forces and it regulates humanitarian assistance. But the concept of a "regulated country" is new. Thus while the old regulation exempted humanitarian assistance and included less in its definition of foreign military assistance, the new legislation has included so much that it seems difficult to enforce.

Both legislations prescribe the same method of authorisation. Applications for authorisation for operating in a regulated country are considered by the NCACC. The NCACC makes a recommendation to the Minister of Defence, who has the final say. The Minister can approve or reject the application, or require certain amendments before approving it. He can also withdraw or change the authorisation at any time.

Neither the new nor the old legislation sets a time limit for the application procedure, nor do they prescribe a time frame within which the Minister has to give

reasons for his decisions if the applicant asks why he or she did not receive authorisation. The lack of a time frame is problematic as timing is often of great importance to PMSCs, and especially for organizations that offer humanitarian assistance. The application process can therefore make South African PMSCs who apply for authorisation uncompetitive since other PMSCs who do not have to wait for authorisation will be able to react faster. This also opens the possibility of the new Act being used as a political tool, because the Minister can withhold an authorisation until the application is irrelevant.

Neither legislation puts in place a monitoring mechanism. This means that it is difficult for South African authorities to gather evidence of breaches of the legislation. Although a monitoring mechanism could prove to be problematic because it would have to monitor events taking place within other states' jurisdiction, South Africa has by not including one, sent a message to private military industry that the government will not be able to enforce the legislation.

In all, there are many similarities between the two legislations. For example, the purposes behind them are the same, which is unsurprising given that the new legislation was put in place to tighten the loopholes of the first legislation. Several issues that critics pointed out in the old legislation have remained more or less the same in the new Act. The wide definition and the lack of a time limit for the application procedure are only two of these points. The next section will discuss the differences between the two legislations, specifically the question of whether the new Act has succeeded in closing the loopholes of the old RFMAA.

### **3.3.2 Differences**

One major difference between the two legislations is that the new one can also be in effect in countries in which there is no armed conflict. This is possible because the President of South Africa can proclaim a country to be regulated despite the absence of a conflict. The RFMAA, however, is only valid in countries of armed conflict. Thus while both legislations are valid in countries of armed conflict, the new legislation can also prohibit PMSCs from operating in a country in which there is no armed conflict. Because PMSCs can operate in countries where there is no armed conflict, this closes a loophole in the old legislation. In this way, the government can proclaim a country to be regulated if it finds South African PMSCs operating there. This gives the government increased

control over PMSCs. It is only likely to be effective, however, if the government has a monitoring mechanism that can detect where the companies are operating.

The new legislation includes a section that regulates humanitarian aid organisations in a country that is proclaimed to be regulated and in countries of armed conflict. These organisations were explicitly exempted from regulation in the first legislation. This was one of the loopholes of the RFMAA, as it made it possible for PMSCs to re-register as humanitarian aid organisations and thus avoid the legislation. Although this inclusion closes the loophole, it has generated criticism because it may delay humanitarian assistance.

The role of the President is another difference between the two legislations. Whereas the President is granted the powers of exempting humanitarian aid organisations in the new legislation, he no longer has the power to exempt individuals as he could under the RFMAA. Exempting humanitarian aid organisations from having to obtain authorisation seems to be a good notion, but the legislation does not specify if this exemption is permanent for a specific organization, or if it is given from case to case.

In my opinion, it can be negative for a conflict situation that the President can no longer grant an exemption to an individual. For example, situations can arise where the presence of a person could have a positive impact on ending a conflict. If the authorisation process delays his or her departure from South Africa, it would be favourable if the president could circumvent it.

Both legislations claim extraterritorial jurisdiction, but the extent of the jurisdiction differs. The RFMAA had jurisdiction only over acts committed outside of South Africa by South African citizens. For foreign citizens to be under the jurisdiction of the RFMAA, some of the activities had to be conducted in South Africa. The new legislation, however, has extraterritorial jurisdiction of a foreign citizen even if the activities are taking place outside South Africa if they are directed at South Africa or its citizens. Thus, the new legislation claims to have more extraterritorial jurisdiction than the RFMAA.

In all, there are both important similarities and important differences between the two legislations. The differences stem from the government's goal of closing the loopholes of the old legislation. However, the attempts to close the loopholes have come

at the expense of humanitarian aid organisations, which now have to apply for authorisation unless they are granted an exemption from the process. This is negative for the humanitarian organisations, but is an improvement in terms of controlling the industry. Moreover, the extraterritorial enforcement of the legislation is still problematic, although that is a general problem with all domestic extraterritorial legislation.

### **3.4 Assessment**

The new legislation seems to be an improvement over the old RFMAA in terms of regulating PMSCs. It closes the loopholes of the RFMAA, however, by including more actors in the regulation. This is problematic for these new actors, which are first and foremost humanitarian organizations, as it affects their ability to operate legally in countries of armed conflict or in regulated countries. Thus it is also problematic for recipients of humanitarian aid.

The new legislation does clarify some of the unclear parts of the RFMAA, but this has not been done thoroughly enough. There are still uncertainties regarding how long the application process can take, and it is not clear how the exemption process for humanitarian organisations will work.

Although the new legislation seems to be an improvement of the old legislation in that it has closed some of the loopholes in terms of the PMSCs, there is still room for improvement. It is difficult to say whether or not this new legislation will make the PMSCs more accountable, because the problems of extraterritorial jurisdiction are still present and these can allow the companies to escape its jurisdiction.

## **Chapter 4: The new South African Legislation and International Conventions**

This chapter will examine how the new South African legislation compliments the international legislations that were drawn up to regulate private military actors. First, the relevant international conventions (Article 47 of Additional Protocol I of the Geneva Conventions 1977, the OAU Convention for the Elimination of Mercenarism and Civil Conflicts 1977 and the UN Convention against the Recruitment, Use, Financing and Training of Mercenaries 1989) will be introduced in terms of their background, purpose, the problems with their definitions and their enforceability. Each of the conventions will then be compared to the new South African legislation to see whether or not it adds something that is not included in the international conventions, and if the South African legislation goes against anything that is included in the international conventions.

### **4.1 Article 47 of Protocol 1 of the Geneva Conventions (1977)**

#### **4.1.1 Background**

The international community felt a need to create international legislation regarding mercenaries because of the events that took place in Africa during the 1960s (Abraham, 1999:82). By fighting against national liberation movements, mercenaries seemed to fight against the principle of self-determination. The atrocities they committed also contributed to create a negative image of the mercenaries, as they were seen to disregard human rights (Sandoz, 1999:204). This negative image resulted in several UN resolutions condemning the recruitment and training of mercenaries as well as using them against the new governments in post-colonial Africa (Abraham, 1999:83). It was against this backdrop that the international community drafted the Additional Protocol I.

#### **4.1.2 Purpose**

The main purpose of the Article is to exclude mercenaries from being categorised as prisoners of war (Ballesteros, 1998:16). This was to dissuade people from becoming mercenaries, not prohibiting them from doing so (Cleaver, 2000:144). By excluding them from protection under international humanitarian law, it was hoped that those considering becoming mercenaries would be deterred from this. Without prisoner of war



status, a person who is captured can be tried for his or her participation as an illegal combatant under the Geneva Conventions (Boldt, 2004:513). It seems as though the drafters of the Protocol were not entirely successful in their endeavour. This becomes clear when considering the definitional issues included in Article 47. It is very difficult to prove that someone is a mercenary because he or she has to fulfil all the criteria in the definition. Therefore it is difficult to deny these types of actors the status as a prisoner of war.

#### **4.1.3 Definitional issues**

The definition used in Article 47 was presented in the first chapter of this thesis. As already discussed, there are many definitional problems that arise from the cumulative aspects of the definition. First of all, many scholars argue that the definition is not only flawed, but also dated. This implies that the definition is only valid for mercenaries operating at a certain historical period, and that it is not likely to be applicable to contemporary private actors (Ballesteros, 1998:16). For example, the article is only relevant in situations of wars of national liberation and international wars (Cleaver, 2000:132). As most wars today are internal and there are few recognised national liberation movements, Article 47 seems irrelevant. This problem is amplified by the fact that the definition is used as a basis for the other international definitions, which will be studied later in the chapter.

Regarding PMSCs, several scholars have argued that the companies are not covered by this definition of mercenaries (Millard, 2003:5,19; Herbst, 1999:114). Neither do they fit into the categories for combatants in the Geneva Conventions. As a consequence, it has been argued that they have to be seen as civilians under the Geneva Conventions. If they take direct part in hostilities while being defined as civilians, company employees are no longer protected by the Conventions (Bosch, 2007:47; Millard, 2003:35).

One of the cumulative requirements of the definition is that a mercenary must be recruited for a specific conflict. But because PMSCs often do not recruit their employees for specific conflicts, they do not fulfil this requirement (Boldt, 2004:533). Even though Article 47 does not cover PMSCs, it is relevant in terms of this thesis because it is one of few international instruments that are directed at private actors who render military-like

services. It is also relevant because it demonstrates some of the problems with international regulation in this field.

#### **4.1.4 Enforceability**

There is no real ban on mercenaries in this Article, thus there is not much to enforce. While the Article denies mercenaries the right to be treated as prisoners of war, it does not prohibit states from treating them as such. In this way, it will not punish states for not treating mercenaries as prisoners of war, but leaves it up to each state to decide how they want to treat these private actors.

#### **4.1.5 Comparison with the new South African legislation**

##### **4.1.5.1 Similarities**

The new South African legislation and Article 47 of Additional Protocol I of the Geneva Conventions both have definitions of mercenaries that are contingent on being able to establish a person's motivation for fighting. The motivation is in both cases personal gain. The form of this personal gain is not specified in either definition, but it seems as though it is meant to be monetary. As already discussed, definitions that hinge on motivation are seen by most scholars in the field as unworkable. However, it is difficult to create a definition of a mercenary that does *not* depend on motivation. This is demonstrated by the new South African legislation, which has failed to create a better definition in this regard.

##### **4.1.5.2 Differences**

The purposes of the two legal instruments are different. Whereas Article 47 of Additional Protocol I of the Geneva Convention was created with the purpose of denying mercenaries the right to prisoner-of-war status, the new South African regulation was created with the purpose of banning mercenaries while regulating other services rendered in a country of armed conflict. Although the purposes of Article 47 and the new South African legislation are different, they both stem from a belief that the activities engaged in by mercenaries are morally despicable, and therefore that these private actors should not be allowed to function in a theatre of war. As already discussed, Article 47 of Additional Protocol I of the Geneva Convention is seen as a very dated article. Because it

does not deal with PMSCs and other military-service providers, it may not be as valid in the contemporary environment as the new South African legislation. In this way, the South African legislation is more relevant because it does attempt to regulate PMSCs.

The definition of mercenaries in Article 47 is only valid when they are fighting in international conflicts or against national liberation movements. The new South African legislation, on the other hand, prohibits mercenaries from operating anywhere. The new South African legislation has thus gone further than Article 47, in that it is also valid in coup attempts and civil wars. The new South African legislation is therefore better adapted to the contemporary environment, but considering that Article 47 is from 1977, this is not surprising.

## **4.2 The Organisation of African Unity Convention for the Elimination of Mercenarism and Civil Conflicts (1977)**

### **4.2.1 Background**

As already discussed, the greatest incidents of atrocities committed by mercenaries occurred in Africa during the 1960s, giving mercenaries a bad reputation. African countries were therefore instrumental in pushing for an international solution to the problem of mercenaries. When no proper international convention materialised, they made their own Convention on mercenaries. These African states rightly did not see Article 47 of Additional Protocol I of the Geneva Conventions as a sufficient deterrent. Although most members of the Organisation of African Unity (OAU) signed the Convention for the Elimination of Mercenarism in Africa (CEMA), it has only been ratified by 27 of the 53 states. It was neither signed nor ratified by South Africa, Sierra Leone or Angola (Aning et al, 2004:60). The member states that ratified the CEMA have not internalised it into their laws (Taljaard, 2007:114). Furthermore, many of the states that signed the CEMA have later breached several of its principles (Aning et al, 2004:59). Thus it seems as though the regulation of the private military market does not have much backing in Africa (Harris, 2004:34). In my opinion, the fact that South Africa is not a signatory to the Convention is a telling sign of the lack of support it has received.

#### 4.2.2 Purpose

The main purpose of CEMA is to protect the sovereignty of African countries, against which the mercenaries were seen as a threat (Herbst, 1999:113). The purpose is thus to ban the use of mercenaries against sovereign African states and against liberation movements supported by the OAU. At the time, these liberation movements fought against the white settler regimes that were still in charge in certain countries of Africa. This means that the purpose is not to ban mercenaries as such, only their use against states and liberation movements supported by the OAU. The signatories retain the possibility of hiring mercenaries themselves, as the ban is only on using mercenaries against the state (Herbst, 1999:115).

#### 4.2.3 Definitional issues

Although the Convention is generally regarded as more complete than Article 47 of Protocol I of the Geneva Conventions, the definitions of mercenaries are almost identical (Ballesteros, 1998:16; Krahmman, 2005:106; Millard, 2003:53). It is thought to be more complete because it actually bans mercenaries being used against sovereign states and national liberation movements.

All of the following requirements have to be fulfilled for a person to be considered a mercenary under the CEMA. First of all, the person has to be specifically recruited to fight in the armed conflict. There is no definition of armed conflict, however, and consequently it is not clear which situations a person cannot be recruited for. Mercenaries have also operated in situations where there is no armed conflict, such as in coup attempts (Gumedze, 2007b:24). In those situations, a person cannot be defined as a mercenary under the CEMA.

The second requirement is that a mercenary must take direct part in the hostilities of an armed conflict. What this implies is not defined either, making it even less clear what actions are included under the CEMA (Gumedze, 2007b:25). Thirdly, a mercenary must be proven to have private gain as a motivation. As already discussed, this type of motivation is incredibly difficult to prove in a court of law. For this reason it is problematic that the definition is cumulative, because motivation has to be proved in the same way as the other aspects of the definition. When this is almost impossible, it is difficult to successfully convict someone of being a mercenary under the CEMA.

Fourth is the requirement that a mercenary must be neither a citizen of a party to the conflict, nor a resident of any territory on which the fighting is taking place. According to Sabelo Gumedze, “in the event that a party to the armed conflict is not in control of the territory in which the person is resident, and that person is recruited, he or she cannot be treated as a mercenary in terms of the CEMA” (2007b:28). The fifth requirement is that a mercenary cannot be a member of the armed forces of a party to the conflict. This means that a person can become part of the armed forces of his or her employer and thus escape the definition (Gumedze, 2007b:28).

The sixth requirement is that the states who signed the CEMA are to “prohibit on its territory any activities by persons or organisations who use mercenaries against any African State member of the OAU or the people of Africa in their struggle for freedom”. Although it is not directly stated, this is seen as a way for the leaders of the African countries to retain their right to hire foreigners to fight for them (Gumedze, 2007b:29; Howe, 2001:228; Kuofor, 2000:203). The CEMA is only directed at the forces that could threaten the African states, not those that could be hired to uphold the African state’s sovereignty (Herbst, 1999:115; Singer, 2004:529). If governments that are party to the conflict hire soldiers of fortune, they will not fit into the definition of mercenaries, even if they fulfil all the other requirements. In this way, the sixth requirement fulfils the purpose of the CEMA in that it protects African sovereignty.

#### **4.2.4 Enforceability**

CEMA does not have a monitoring mechanism. The Convention is therefore based on a presumed adherence to its rules, and it seems as though states were expected to internalise these rules into their own legislations (Singer, 2004:529). Neither of the two expectations were fulfilled. Without a monitoring mechanism and without domestic laws that enforce the Convention, lack of enforceability is inherent in the CEMA.

#### **4.2.5 Comparison with the new South African legislation**

##### **4.2.5.1 Similarities**

CEMA attempts to ban the use of mercenaries against states in Africa, while the new South African legislation attempts to ban mercenaries in general. The South African legislation thus goes further, because it aims at stopping South African citizens from

operating as mercenaries. It also aims to prevent mercenaries from operating within South African borders.

Both definitions hinge on the motivation of the mercenary, although the definition in the CEMA is also dependent on other issues. In both definitions a mercenary has to be fighting for private gain. This has been discussed at length in other chapters, and it is clear that it affects the enforceability of the two legislations studied in this section. Because it is difficult to prove that the motivation of a person is private gain, enforcement of both the Convention and the new South African legislation is difficult. Enforcement is further complicated by the lack of internalisation and an enforcement mechanism in the CEMA. The difficulties of extraterritorial jurisdiction for domestic legislation also make it difficult to enforce the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act 2006.

#### ***4.2.5.2 Differences***

CEMA was written at a time when the main threats against the sovereignty of African states were perceived to be mercenaries. The CEMA therefore focuses exclusively on mercenaries. The PMSC industry did not emerge until after the Cold War, and it is for this reason not included in the Convention from 1977. The new South African legislation on the other hand, has regulating the activities of South Africans in the PMSC industry as one of its main purposes. This difference could be due mainly to the different time-periods the two legislations were written in. Nonetheless, it is in my opinion not likely that the African Union would be able to agree on a new Convention regulating the use of PMSCs, as this would go against their focus on upholding African sovereignty. Nor is it likely that a revised CEMA will be designed in order to include PMSCs. The African Union (AU) Peace and Security Council has the possibility of intervening under “grave circumstances” but it is unlikely that they would stage an intervention as the result of PMSC involvement. Thus, due to the focus of the AU on non-interference and upholding state sovereignty, a convention on the use of PMSCs in Africa is improbable.

## **4.3 Convention against the Recruitment, Use, Financing and Training of Mercenaries (1989)**

### **4.3.1 Background**

Traditionally, the member-states of the United Nations have had the monopoly on the use of legitimate force and have been wary of threats to this monopoly. The UN is therefore guarded in its response to the PMSCs and mercenaries (Adams, 1999:104). Despite many resolutions criticising mercenaries, the Convention against the Recruitment, Use, Financing and Training of Mercenaries is the first UN Convention that attempts to deal with the problems posed by these actors. There seems to be little support internationally for the Convention. Most states have not ratified the Convention, a fact many see as a sign that states want to retain the possibility of hiring PMSCs or mercenaries in the future (Cullen, 2000:37). Under the Bush administration, for example, PMSCs form part of the “coalition of the willing” in Afghanistan and Iraq.

It took 12 years for enough countries to ratify the Convention in order for it to come into force, and none of the major powers were among these states (Holmqvist, 2005:44). This could be due to the timing of the Convention, as it opened for ratification at the time the private military market was changing from ordinary mercenaries to PMSCs, something that might have reduced its support internationally (Singer, 2004:531). Thus it is possible that it has received so little support as a result of states seeing it as irrelevant to the current security environment.

### **4.3.2 Purpose**

Because there had been no UN Convention dealing with mercenaries and no mention of those recruiting, financing and training them in international conventions, the purpose of the UN Convention is to rectify this. It attempts to do so by banning mercenaries from operating. However, due to its lack of support and the definitional issues inherent in the Convention it does not succeed in its purpose because mercenaries are still operating worldwide (Taljaard, 2007:112; Singer, 2004:531; Dutly, 2007:173; Smith 2005:24).

### **4.3.3 Definitional issues**

The definition of mercenaries used in the Convention is based on the definition contained in Article 47 of Additional Protocol I of the Geneva Conventions, and encounters many

of the same problems because of this (Krahmann, 2005:105). Although there are different elements included in the Convention's definition, the primary definition of mercenaries still has the six cumulative requirements. This has been criticised for many years, and it seems strange that the international community has not been able to agree on a new definition (Millard, 2003:58).

The definition does, however, include a new section that recognises that mercenaries do not necessarily operate in a country of armed conflict. In this sense, it represents an improvement on Article 47 (Percy, 2006:43). On the other hand, the Convention does not try to define or regulate PMSCs in any way and is therefore largely seen as irrelevant to the industry (Percy, 2006:44). All in all, it does not seem likely that the UN's prohibition against recruiting mercenaries will be very effective, due to its definition. However, it is not possible to measure to what extent it acts as a deterrent for people becoming mercenaries (Cottier, 2006:656).

#### **4.3.4 Enforceability**

There is no monitoring mechanism to ensure that the signatories abide by the resolution (Singer, 2004:531). This means that the Convention is largely unenforceable. The low number of signatories shows the lack of support for the Convention, and it is unlikely to have as large an impact on the international environment as was envisaged. This could also be due to the relatively diminished importance of mercenaries compared with the growth of PMSCs.

#### **4.3.5 Comparison with the new South African legislation**

##### **4.3.5.1 Similarities**

One similarity between the two legislations is that their mercenary definitions hinge on the motivation for private gain. This has been discussed at length in other sections and will not be discussed further here. However, both the South African legislation and the UN Convention recognise that mercenaries exist in places where there is no armed conflict, such as under coup attempts.



#### **4.2.5.2 Differences**

The UN Convention does not have much support from UN members. This is obvious judging from the unwillingness of states to ratify it, and the fact that none of the major powers have done so yet. The South African Act, on the other hand, is the second legislation passed on this subject, and it thus seems as though it has extensive support in the parliament. However, the amount of support is irrelevant both at the national and international level unless the laws are enforceable. There is no enforcement mechanism in the UN Convention, and it is generally not seen as enforceable. The South African legislation suffers from the difficulty of enforcing domestic extraterritorial jurisdiction, the lack of a monitoring mechanism and the problematic definitions used in the legislation. Consequently, it is unlikely that either legislation will be successfully enforced.

#### **4.4 Assessment**

The international conventions studied in this chapter all seek to deal with mercenaries because these were the major players rendering military services on the private market at the time. As a consequence, they are unable to respond to the challenges posed by PMSCs, as these do not fit into any of the Conventions' definitions of mercenaries. The South African government, on the other hand, has attempted to manage PMSCs by regulating various services rendered in countries of armed conflict. This does not mean that it goes against the international conventions. Instead it reflects the different international environments of the time the conventions and the South African Act were drafted.

All in all, the South African legislation seems to be very much in line with the international conventions in its attempt to ban mercenaries. It could in fact be argued that it is too similar to the international conventions, because the new legislation uses a similar definition for mercenaries that focuses on motivation. It is as difficult to find someone guilty of mercenarism under the new South African legislation as under the international conventions. But at least the South African legislation has made an attempt to regulate the private military and security industry.

## **Chapter 5: Comparing the US legislations and the UK Green Paper with the new South African legislation**

This chapter will first review the two US legislations that pertain to PMSCs, the International Transfer of Arms Regulation of 1993 and the Military Extraterritorial Jurisdiction Act of 2000. The two legislations will be considered in terms of their background, purpose, definitional issues and enforceability. Each of the two legislations will then be compared to the new South African legislation separately. The United Kingdom does not have legislation that specifically covers PMSCs, but the government published a Green Paper in 2002 outlining the options for dealing with the industry. The options proposed in the Green Paper will also be compared with the new South African legislation.

The main points of the US legislation and of the UK Green Paper that will be compared to the South African legislation of 2006 are the following: what do the regulations and the options proposed actually cover? Do they cover only PMSCs contracted by home-state governments, only those contracted to foreign governments, or both? What do the regulations and the options put forward in the Green Paper entail; are they licensing regimes, systems of registration or another form of control? Furthermore, what kinds of services are covered by the legislations? The companies discussed in this thesis provide a wide range of services and it is difficult to include all of them into one legislation. How have the different legislations dealt with this, and what is being proposed in the Green Paper? Does the regulation limit itself to certain services, or does it attempt to regulate all of the different services provided by PMSCs? What kind of monitoring system is proposed or included in the regulations, if any? The degree of monitoring in the legislation could be evaluated by looking at the degree of departmental and/or congressional oversight. Somewhat connected to this is the degree of transparency in the legislations. How much access does the public or the media have to the processes involved in the regulation and monitoring of PMSCs? Lastly, regulation of PMSCs has to be extraterritorial, which is inherently difficult. How is this dealt with?

Each government's attitude toward PMSCs is also important to consider, because it says something about its motivation for putting in place legislation to regulate them. Do

home states have more positive attitudes towards certain types of services offered by PMSCs? Are, for example, the legislating states friendlier towards non-combat PMSCs, and does it ban certain activities? The companies discussed in this thesis often provide some of the same services as those offered by humanitarian organisations. How do the home states deal with this in their legislations? Do they distinguish clearly between PMSCs and humanitarian organisations? These issues will be compared to the South African Act only where it is relevant in relation to the American legislations and the options outlined in the Green Paper.

## **5.1 The US International Transfer of Arms Regulation**

### **5.1.1 Background**

The US government outsources many of its military functions to PMSCs, something that has been clearly demonstrated in Iraq and Afghanistan. In fact, in 2004 there was a ratio of at least one contractor to seven soldiers in Iraq, the highest number in any conflict up till now (Boldt, 2004:503). That the US government hires so many PMSCs shows that it seems to regard the industry as an opportunity, and not necessarily as a threat to its monopoly on violence (Avant, 2005:146; Singer, 2004:544). Furthermore, most US PMSCs work according to US foreign policy objectives (Avant, 2005:152). For example, one of the biggest American PMSCs, Military Professional Resources Incorporated (MPRI), clearly states that it will not act contrary to its government's foreign policy goals (Fredland, 2004:208; Adams, 1999:5). Many informal ties between American PMSCs and individuals in the American military also reduce the likelihood that the PMSCs will act contrary to American interests (Cullen, 2000:37-38).

It is therefore not surprising that the US government has taken an accommodating approach towards regulating the industry. The government does not have to answer publicly to the deaths of PMSC employees, and as a consequence PMSCs are seen by the US government as a way to circumvent political reluctance to involvement in high-risk situations for example in Iraq (Adams, 1999:6). Internationally, American PMSCs are in high demand, as many governments see hiring them as a satisfactory substitute to actually receiving American military aid (Cilliers and Douglas, 1999:114). Because of the international interest in hiring American PMSCs, the US government takes an active

interest in regulating their activities so that PMSCs do not act against its foreign policy objectives or reveal military secrets. ITAR is the government's main tool for preventing this. ITAR is part of the Arms Export Control Act (AECA) and deals with arms exports as well as defence services. Only defence services will be discussed in this thesis.

### 5.1.2 Purpose

The purpose of the International Transfer of Arms Regulations (ITAR) of 1993 with regards to PMSCs is to regulate the services provided by the companies to other governments, in other words controlling the export of defence services from the United States. The aim is to ensure that the services provided by American PMSCs are in line with US foreign policy interests (Avant, 2005:149). Although many PMSCs state that they will not act contrary to US foreign policy interests, the government felt that it was necessary to put regulation in place as a precaution.

Companies who export defence and military services have to register, so that the government can control who is active in the field (ITAR Sec. 122.1). Companies who wish to sell their services to foreign persons must then, according to the ITAR, apply for a license for each contract from the State Department, more specifically the Department of State's Directorate of Defence Trade Controls (DDTC). The DDTC considers the license applications in terms of the companies' legitimacy and reliability, and controls that the export of the services for which the license is applied does not contravene US foreign policy interests (Caparini, 2007:160; Cullen, 2000:37). Companies are prohibited from selling their services to certain countries under the ITAR. These are either countries seen by the Department of State as supporting terrorism, or are otherwise specified in the legislation (ITAR, Sec 126.1).

### 5.1.3 Definitional issues

In the ITAR, the defence services that are regulated are defined as the

furnishing of assistance (including training) to foreign persons whether in the United States or abroad in the design, development, engineering, manufacture, production, assembly, testing, repair, maintenance, modification, operation, demilitarisation, destruction, processing or use of defence articles (ITAR sec 120.9).

Scholars generally see this definition as too wide, making the ITAR appear unclear (Caparini, 2007:163). The definition does not specify whether the regulation also covers

traditional security services such as guarding individuals (Cottier, 2006:658). This is problematic because, as discussed in other chapters, a clear definition is necessary for enforcing any legislation.

#### **5.1.4 Enforceability**

The DDTC is responsible for enforcing ITAR. This is supposed to be done through investigations of suspected violations of the regulation (Caparini, 2007:161). However, employees at the DDTC responsible for monitoring PMSCs have stated that they do not feel they should be investigating fellow Americans (Singer, 2004:539; Avant, 2005:151). Furthermore, no employee has monitoring their companies as their only task (Singer, 2004: 539). This lack of investigation may be a sign of unwillingness to thoroughly monitor American PMSCs, and as a result the licensing procedure does not seem to be strictly enforced (Holmqvist, 2005:51).

In addition to the DDTC, the US Congress has the right to investigate contracts worth more than \$50 million. This is easy for the companies to circumvent, however, by splitting large contracts into several smaller ones worth less than \$50 million (Holmqvist, 2005:51; Avant, 2005:151). The degree of oversight therefore varies.

The public is largely kept in the dark with regards to the monitoring of the companies (Caparini, 2007:162). Critics of the ITAR point to a tendency in which individuals regularly change from working for the government to being employed in PMSCs, and then back to the government again (Cottier, 2006:661). Due to minimal Congressional oversight, public awareness, and the circulation of employees, the ITAR process lacks transparency. This lack of transparency is especially problematic because of the military services these companies provide.

#### **5.1.5 Comparison with new South African legislation**

##### **5.1.5.1 Similarities**

Both the ITAR and the new South African legislation of 2006 have a licensing system in which PMSCs need to apply for authorisation on a contract-to-contract basis. Whereas South African PMSCs only need to apply for authorisation when operating in an area of armed conflict or a country proclaimed to be a regulated country by the South African President, American PMSCs must apply for a license for all contracts with foreign

persons. The systems, however, function in very similar ways. Under the specific conditions of each legislation, PMSCs in both countries have to wait for authorisation from a governmental department before fulfilling the contract

The two legislations are similar in that they attempt to include a wide range of services. The definitions of what is included under them are therefore very wide in both cases. Both governments' motivation for the wide definitions seem to be to prevent their national PMSCs from using loopholes in the definition to avoid regulation.

There are problems of transparency inherent in both the ITAR and the new South African legislation. These stem from the lack of public insight into the authorisation and monitoring processes. The ITAR's problems are further enhanced by the lack of congressional oversight and the close relationships between employees of the State Department and the PMSCs. This latter aspect does not appear to be a problem to the same degree in South Africa.

The DDTC is responsible for the enforcement and monitoring of the ITAR. This involves monitoring the activities of PMSCs outside the United States. State Department employees are stationed throughout the world, but this does not mean that overseeing the ITAR is one of their priorities. The extent of the monitoring therefore seems to be minimal, especially because State Department employees appear to be reluctant to monitor fellow Americans. The South African legislation includes a section in which it claims extraterritorial jurisdiction. It does not, however, give the responsibility of monitoring the activities of South African companies to a specific governmental department. Thus there are difficulties inherent in the enforcement of both the new South African Act and the ITAR, even though they deal with the difficulties of extraterritorial enforcement in different ways. It is possible that the good relationship between American PMSCs and the US government make violations of the ITAR less likely and reduces the problem of enforceability. The South African government does not enjoy the same positive relationship with South African PMSCs.

#### ***5.1.5.2 Differences***

The ITAR regulates American PMSCs' contracts with foreign persons, whereas the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act of 2006 regulates any military assistance to parties of an armed

conflict from South African PMSCs and individuals (Sec 3). The difference thus lies in that American PMSCs have to apply for a license to operate for all their contracts whereas the South African companies only have to apply for authorisation when their contracts are in countries proclaimed to be regulated or in countries of armed conflict. Therefore the ITAR is in effect in more countries than the South African one.

The monitoring system put in place under the ITAR stipulates that the State Department's DDTC employees monitor the activities of the PMSCs. Although the extent to which the DDTC employees are fulfilling their monitoring responsibilities seems to be limited, as discussed above, no monitoring mechanism at all is defined under the new South African Act. While it is not certain that there would have been enough resources available to the South African government to actually monitor PMSC activities abroad in any case, some sort of monitoring mechanism should nonetheless be defined. Without a monitoring mechanism, it seems almost impossible to enforce the legislation.

As mentioned above, the two governments have very different views on the private military and security industry. The US government sees the industry as a potentially useful asset, whereas the South African government regards South African PMSCs, mainly employing former SADF soldiers, as a potentially disruptive force. And while the US government seems to have a degree of confidence that US companies will not act against American foreign policy interests, there is little trust between South African companies and the South African government (Cullen, 2000:38).

That the South African government is stricter in its legislation than the US may also be due to the legacies of apartheid. Because of the apartheid history, it does not reflect well on South African foreign policy to have former SADF-soldiers active in countries like Angola and Sierra Leone, let alone in conflicts South Africa does not support such as that in Iraq. This is probably also the reason why the South African government has not hired PMSCs. The American government, on the other hand, has outsourced many military functions to American PMSCs, for example in Afghanistan and Iraq. The difference in attitude is further illustrated by the reactions on South African Executive Outcomes' active participation in hostilities in Sierra Leone and Angola and the American company DynCorp's active participation in hostilities in fighting Columbian guerrillas. Whereas the South African company's involvement was heavily

criticised, the American company's activities were discussed more positively (Boldt, 2004:511). It is also clear, for example from the US military's request that the new Iraqi government grant PMSCs operating in the country immunity, that the US government and the companies are sympathetic towards each other (Boldt, 2004:541).

The South African legislation bans mercenary activities. A ban on mercenaries is not mentioned in the ITAR. This difference could stem from South African mercenaries being more prominent than American ones, or it could be another way for the South African government to distance itself from the post-apartheid hired guns.

The South African legislation explicitly includes humanitarian organisations as requiring authorisation to operate in countries proclaimed to be regulated and in countries of armed conflict in the same way as PMSCs. The ITAR, on the other hand, does not mention humanitarian organisations. This could be due to the generally more amicable relationship between US PMSCs, or it could be that the American government have better control systems for humanitarian organisations.

## **5.2 The US Military Extraterritorial Jurisdiction Act 2000**

### **5.2.1 Background**

The US Military Extraterritorial Jurisdiction Act (MEJA) was promulgated in 2000 to close a loophole in the Uniform Code of Military Justice of 1950. The old Code did not give the US criminal jurisdiction over civilians travelling with the American military abroad. This was seen as problematic because civilians took part in military missions abroad more frequently over time as contractors for the Department of Defence. The MEJA may be seen as a way to gain jurisdiction over these individuals (Percy, 2006:28; Yost and Anderson, 2001:446).

### **5.2.2 Purpose**

The purpose of the MEJA is to ensure that civilians accompanying American military forces abroad can be prosecuted for crimes committed outside the US upon returning to the United States. Although the Act was not originally designed to deal with private contractors such as PMSCs, it has been applied to such cases as well (Percy, 2006:28). It is important to realise, however, that the MEJA does not apply to employees of the PMSCs who sign contracts with foreign persons, only to PMSCs hired by the US government.



### 5.2.3 Definitional issues

MEJA was first designed to cover only civilians contracted by the Department of Defence while on a mission accompanying the armed forces outside the US (Lehnardt, 2005:6; Boldt, 2004:539; Singer, 2004:537). This changed when it became clear that the PMSC employees who were active in the atrocities committed in the Abu Ghraib prison in Iraq in 2004 could not be prosecuted under the MEJA because they were contracted through the Department of the Interior. Civilians hired by other governmental departments than the Department of Defence were not covered by the legislation (Holmqvist, 2005:17; Percy, 2006:29; Boldt, 2004:505). With the National Defence Authorisation Act of 2005, civilians hired by other governmental departments accompanying the Department of Defence on international missions were brought under the jurisdiction of American courts (Percy, 2006:29). Because they are civilians, court-martials do not have jurisdiction over them; only regular courts of law can prosecute civilians under the MEJA (Yost and Anderson, 2001:448). Civilians contracted by for example the CIA are still not under the jurisdiction of the MEJA.

MEJA only covers crimes for which the penalties are one or more years of imprisonment. This means that petty theft and other misdemeanours committed by non-military personnel accompanying the US Military on a mission abroad could go unpunished if not dealt with in a court of law in the country where the crime was committed. This is negative for military discipline within the companies, and it may cause discontent among regular soldiers who can be held accountable for *all* their actions (Percy, 2006:29).

### 5.2.4 Enforceability

American prosecutors do not seem eager to make prosecutions under the Military Extraterritorial Jurisdiction Act (Chesterman and Lehnardt, 2007:252; Percy, 2006:29). This could be due to lack of will, or the fact that they are uncertain when prosecution is appropriate or possible (Singer, 2004:537). Also, the legislation suffers the same problems as other extraterritorial legislations, for example with regards to obtaining evidence.

## **5.2.5 Comparison with the new South African legislation**

### **5.2.5.1 Similarities**

Both the MEJA and the new South African legislation of 2006 suffer from problems inherent in enforcing domestic jurisdiction extraterritorially. Both legislations struggle due to the difficulties of finding evidence abroad. Both also struggle because the host state of the PMSCs may not approve of other countries policing crimes that occurred within its jurisdiction (Yost and Anderson, 2001:453). It is assumed, however, that monitoring of the companies under MEJA is easier because they are part of a US mission.

### **5.2.5.2 Differences**

Because the MEJA covers PMSCs who accompany the US military on missions abroad, its focus is different from that of the Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act. The South African Act does focus on activities abroad, but it takes issue with and regulates the industry rather than prosecuting other criminal actions taken by individual employees of PMSCs.

Another difference between the two legislations is that whereas the new South African legislation introduces a regime in which companies have to apply for authorisation to operate, the MEJA focuses on ending impunity of civilian military personnel's actions by including them in the jurisdiction of American criminal courts. Introducing an authorisation scheme such as the one in the South African legislation or the ITAR does not seem to make as much sense with regards to the MEJA, as the personnel it is concerned with is hired by the US government itself. It seems likely that those responsible for hiring the companies have done thorough background checks so that a license to operate is not necessary.

## **5.3 UK Green Paper Proposals**

### **5.3.1 Background**

In 1998, an incident called the “arms to Africa affair” caused the British government to investigate how to control the private military and security companies operating from within its borders (Kinsey, 2005:86; Avant, 2005:172). The Affair was a misunderstanding between the British PMC Sandline and the British government.

Sandline broke an UN arms trade embargo by transporting arms to the elected government of Sierra Leone, which had been ousted in a military coup earlier that year. The company believed the UK government supported the ousted government and that its actions were in line with government policies, but were wrong (Cullen, 2000:37). The British authorities, despite wanting to support the ousted government, could not support a private military company that went against the UN arms trade embargo and were put in an embarrassing situation. There was also a public outcry over the government's seeming lack of control over British military suppliers (Cleaver, 2000:143).

The government felt it needed to demonstrate that it was in fact in control of the private military and security actors. The Foreign and Commonwealth Office (FCO) wrote the Green Paper with the intent of exploring the different regulatory options available to the British government. However, no legislation has by 2008 been created as a result of its findings. Because of the lack of regulation in the UK, London has remained a focal point for PMSCs situated outside the US (Singer, 2004:541; Smith, 2005:24). The British government, despite the furore caused by the "arms to Africa affair", seems to be supportive of the industry, and has itself outsourced military functions to PMSCs, especially in Afghanistan and Iraq (Singer, 2004:544).

### 5.3.2 Purpose

The Green Paper is an outline of the possible ways in which the British government can deal with PMSCs. It is not a "proposal of policy", but a presentation of the options so that the wider community can take part in the debate on what the correct policy option ought to be (FCO UK Green paper, 2002:5). Therefore, and conveniently from the perspective of the "coalition of the willing", the PMSC industry remains unregulated in Britain (Holmqvist, 2005:52; Avant, 2005:170).

The Green Paper puts forward six options of how to regulate the industry. The first is an outright ban of PMSC activity, either through an amendment of the 1870 Foreign Enlistment Act or through new legislation. A ban is seen as a way to respond directly to what most see as a distasteful industry, but it is not viewed as an effective tool against the PMSC industry because of the enforceability issues inherent in a ban (FCO UK Green Paper, 2002:22-23). Furthermore, it is recognised that a ban would encounter definitional problems. It is difficult to include all the unwanted actors without including

other actors, such as humanitarian organisations (FCO UK Green Paper, 2002:23). Christopher Kinsey suggests that the problem of including humanitarian organisations could be avoided by exempting non-profit organisations from the ban, but he recognises that this would result in many inconsistencies, leaving the legislation imprecise (2005:89).

The second option is a ban on the recruitment of persons for military activity outside of Britain. This ban would be on recruitment inside Britain and would therefore avoid the difficulties of enforcing extraterritorial jurisdiction (FCO UK Green Paper, 2002:23). If companies hired permanent employees, however, there would not be a need for recruitment and the ban would be avoided. Furthermore, this type of legislation would not result in an industry that strived to be respectable, which was presented in the Green Paper as part of the purpose of any legislation that was to be enacted in Britain (FCO UK Green Paper, 2002:23-24). Also, companies could avoid this type of legislation and continue to recruit British citizens by basing themselves outside Great Britain.

A licensing regime is put forward as a third option of how to deal with the PMSCs. In this regime, companies and individuals would be required to apply for licenses to fulfil all contracts involving military and security services outside of the country. The Green Paper does not, however, specify exactly what types of services would require a license. It appears as if the drafters of the Green Paper see this as a more preferable option than the two first ones. However, the Green Paper points out that due to the difficulties of domestic extraterritorial legislation, it would be difficult to enforce a license regime (FCO UK Green Paper, 2002:24). The drafters also realised that having to obtain a license for each contract could take time, making the British PMSCs less commercially competitive. Together with the fact that a licensing regime could be damaging to the confidentiality of contracts, it could cause PMSCs to relocate out of the country (Kinsey, 2005:92). Most PMSCs have a flexible structure that allows them to relocate easily if they find the regulation too stringent. It is not necessarily in the government's interest to force the PMSCs out of the country.

The fourth option is a general registration of companies who render military and security services. Registered companies would have to notify the government of specific contracts they are bidding on (FCO UK Green Paper, 2002:25). While in many ways

similar to the licensing option, all contracts would as a rule be licensed under the registration regime. However, the government could retain the license for specific contracts (Kinsey, 2005:95). This option provides for a less rigorous regulatory framework, and it would probably allow the British government to gain more knowledge of the industry. It would, however, suffer the same difficulties of enforcement and investigation of breaches as the third option, because it would involve extraterritorial enforcement (FCO UK Green Paper, 2002:25).

Granting PMSCs a general license is the fifth option presented in the Green Paper. This license would be granted for the companies themselves, not for the individual contract as with the two previous options. The license would specify which countries the company was allowed to operate in (Kinsey, 2005:95). This is not presented as a valid option by itself, but it could be used in conjunction with either of the two previous options. One problem with a general license is that it would imply giving credibility and respectability to companies about which the government might have little information or whose operations might change after they are granted a license (FCO UK Green Paper, 2002:25-26).

The sixth and last option presented in the Green Paper is that of self-regulation by the industry. This would be done by presenting a voluntary code of conduct, probably through a trade association, which would in turn aim to guarantee its members' respect for the code. Companies themselves argue that there is a certain degree of self-regulation in place already, because their ability to attract future contracts would be diminished if they contradict the unwritten rules in place today (Cullen, 2000:38). Self-regulation could be an easy way out for the government, but it could not guarantee that companies would act according to British foreign policy interests. That companies do not go against these interests is naturally important to the British government when considering how to regulate the industry (FCO UK Green Paper, 2002:26). Sarah Percy argues that the companies support this type of regulation because it would give them a lot of respectability, and would increase the companies' likelihood of earning money (2006:58-59). It would also mean that no governmental regime would scrutinize their business contracts, which is preferable for the companies as confidentiality is almost certainly secured. Most scholars see it as very problematic to give the industry itself this kind of

responsibility, especially in a field as sensitive as security and military services (Percy, 2006:59).

### **5.3.3 Definitional issues**

The Green Paper discusses the difficulties of defining mercenaries and other private military actors. Although one possibility would be to distinguish the companies according to the services they render, this poses many problems. Companies would more often than not provide services belonging to several categories because it is difficult to categorise the services and the services provided can change during the operation (FCO UK Green Paper, 2002:9). In other words, the discussion of how to define the actors remains unresolved, and the Green Paper largely avoids or postpones definitional issues.

### **5.3.4 Enforceability**

The British government has, by 2008, not acted in any way to change existing legislation or put in place new legislation to deal with the issues created by PMSCs. However, it does recognise the inherent difficulties of enforcing domestic extraterritorial legislation. Four of the six options would imply creating extraterritorial legislation.

### **5.3.5 Comparison with the new South African legislation**

#### **5.3.5.1 Similarities**

The ban on mercenary activities that South Africa has put in place seems to encounter some of the same enforceability difficulties that the Green Paper foresees with banning PMSCs (FCO UK Green Paper, 2002:23). This is interesting as the Green Paper was published in 2002, four years before the new South African legislation was passed in parliament. Why did not the South African government take this important document into consideration? In my opinion, it appears as though taking a moral stand against mercenaries has been given priority over implementing an enforceable ban. Furthermore, South Africa is a regional power and for the South African government to be seen as ignoring South African mercenaries, especially in Africa, undermines its foreign policy objectives. The ban discussed in the Green Paper is a ban that includes all private military and security providers, something that would cause great definitional issues. Nonetheless, the Green Paper does discuss the difficulties of defining mercenaries with regards to

definitions based on motivation. Legislation with similarities to the new South African Act was discouraged in the Green Paper, but was chosen in South Africa probably in order to send a message both domestically and internationally that South Africa does not condone mercenaries.

The licensing regime, the third option presented in the Green Paper, is largely similar to the authorisation process in the new South African legislation. In both cases PMSCs, as distinct from mercenaries, would have to apply for a licence to operate abroad. There are some differences, however, as the option outlined in the Green Paper implies that all companies must apply for a license regardless of the situation in the contracting country, whilst under the new South African legislation authorisation is necessary only in countries experiencing armed conflicts or when the receiving country is proclaimed as a “regulated country”. The Green Paper proposition thus represents a more stringent regime, giving the government more control and information over the companies’ operations because the companies *do* operate in countries without armed conflicts.

The South African government has also realised this because it can proclaim countries to be regulated under the new Act in order to include the companies operating there in the authorisation system. In this way, although the Green Paper option would be in place at all times making the industry more controlled, the South African government can use its legislation to specifically prevent South African PMSCs to operate in certain countries. The government has not yet proclaimed any country to be regulated, however, so at this point in time the regulation is only in effect in countries experiencing armed conflict.

#### **5.3.5.2 Differences**

As the British government has not implemented new legislation after the Green Paper, the political will to control the private provision of violence that emanates from the country seems to be limited. The South African government, on the other hand, has enacted its second legislation on this in eight years, and seems to be more dedicated to regulate the industry. The lack of a British legislation points to a more accommodating view of PMSCs than that of South Africa. Not only does London house the headquarters of most non-American PMSCs, the government also outsources certain military functions to

PMSCs. A government with a more critical perception would probably put in place regulation to control the companies, instead of hiring them. Perhaps another incident like the “arms to Africa affair” is necessary to create enough pressure on the government for legislation to be implemented. Without such an incident, new legislation is unlikely at this point in time, because the conflict in Iraq is proving to be long-lasting, and private security operators play significant security roles in the US/UK-led “coalition of the willing”.

#### **5.4 Assessment**

The attitude towards PMSCs varies from country to country, something that is evident in their respective approaches to regulating the private military industry. The US government sees PMSCs as useful instruments and actively uses them. The fact that the government is a major client of American PMSCs makes it more likely that the companies will follow the regulations. It is in each company’s interest to maintain a good relationship with this important potential client. The ITAR and the MEJA seems to leave one group of PMSC employees outside of US criminal jurisdiction, however: employees of American PMSCs contracted by foreign governments are not covered by the legislations. The crimes committed by these PMSCs’ employees are likely to go unpunished in the contracting state, because contracts often include immunity clauses. Also, the contracting government is often too weak to make prosecutions of PMSCs possible. Consequently, there is a definite lack of jurisdiction over crimes committed by employees of American PMSCs who are contracted by foreign governments. These crimes are not covered by the MEJA, nor are they covered by the ITAR unless they relate directly to the violation of the licensing-conditions given by the government. It seems strange to me that crimes committed by American PMSC employees contracted to foreign governments are not included in the legislations, because the actions of these companies can reflect badly on the US government even if they are not contracted by them.

For reasons cited above, the South African government does not have the same congenial relationship with its country’s PMSCs. In fact, there is an inherent distrust between the government and the South African PMSCs. This makes it imperative for the government to have control over South African PMSCs’ activities. The result of this is



the new, more stringent legislation of 2006. South African PMSCs, moreover, do not see the government as a potential client, and do not have to strive to maintain a good relationship with it in order to receive contracts. The industry did not see the old South African legislation as enforceable, and so it will be interesting to see how it reacts to the new legislation.

The British government has not put in place new legislation on PMSCs after the Green Paper was published in 2002. This could be because the PMSC industry has not acted against British foreign policy interests since the “arms to Africa” affair. Should an incident like this occur again, it is likely that the government will be under pressure to design legislation to control the industry. But in the absence of such an event, and given the present realities of the use of PMSCs by the “coalition of the willing” in Iraq, it does not seem likely that the British government will introduce any new legislation in the nearest future.

Because so much hinges on the attitude of the government in question with regards to PMSCs, the extent to which the new South African legislation can serve as a model for other countries depends on the aims of these states. But because of the problems discussed above, it seems likely that the South African legislation would function as a foundation on which further legislation could be built for countries with a critical view of the industry. For countries with a more positive relationship between the government and the industry, US legislation is perhaps a better foundation for a new legislation. Regardless of the legislation used as a foundation, new legislation put in place by any state should include monitoring mechanisms.

## **Chapter 6. Conclusion**

This thesis has focused on the South African legislation on PMSCs of 2006. The legislation has been evaluated in terms of how effective it is in fulfilling its goals of regulating PMSCs and prohibiting mercenaries. This has been done by comparing it to the older South African legislation, the international conventions on private violence, the American legislations on the subject as well as the options presented to the British government in 2002 on how they can deal with the industry in Britain. The final chapter of this thesis will begin by summarizing the findings made in each chapter. The next section will discuss in what ways the findings have shed light on the research questions and the section after that will consider the problem statement. The last section will discuss the implications of these findings.

### **6.1 Recapitulation of the findings**

There are many problems inherent in home state regulation of PMSCs. This thesis has explored these problems and discussed where and how they have become apparent in the new South African legislation. The Prohibition of Mercenary Activities and Regulation of Certain Activities in Country of Armed Conflict Act, which was proposed in 2006 and signed into effect in November 2007, is the newest legislation of its kind and has therefore been the focus of the thesis.

In Chapter 2 of this thesis, the growth of the PMSC sector was described. The rise of the PMSCs came as a result of the general reduction in military spending that occurred at the end of the Cold War, and also of the reluctance of the developed states to intervene in conflicts in the developing world after the Cold War. Governments of weak African states such as Angola and Sierra Leone, struggling to deal with rebel movements within their countries, created an urgent demand for the types of services provided by PMSCs. Developed states hired PMSCs as well, first and foremost in politically unpopular wars where they did not want to risk their regular soldiers. Chapter 2 also clarified the distinction between mercenaries and PMSCs, and discussed whether the industry should be abolished or regulated. In this thesis I have argued that PMSCs are not mercenaries in a new guise because of their different organisation, the fact that most of them do not

actively participate in combat operations, and that they openly advertise their products. Furthermore, I have argued that there is a need for regulation because abolishing the companies might make them go underground. This would in turn make it even more difficult to gather information on their activities, thus making it more likely that they could get away with committing atrocities.

One major problem with the industry is that it operates in the security and military field without being accountable to states. This is problematic because states are defined by their monopoly on legitimate violence. Regulation of the companies can be seen as a way for governments to re-establish this monopoly. It does not seem likely that the new South African legislation will manage to make South African companies more accountable, because there are still many problems inherent in the legislation that make it difficult to enforce. It is especially problematic to enforce it extraterritorially. But it is too soon to tell whether the companies themselves see the legislation as something they need to abide by. However, since the Presidency has not yet proclaimed any country as “regulated”, PMSCs’ actions are only regulated in countries of armed conflict. This despite the fact that they are probably operating in countries that are not experiencing armed conflict as well.

As discussed in Chapter 3, the new South African legislation is an attempt to close the loopholes in the legislation of 1998. This has been done primarily by including more actors in the regulation, such as humanitarian organisations and South Africans enlisted in foreign armies. This means that South African humanitarian organisations working in countries of armed conflict or countries proclaimed by the government of the Republic to be regulated must apply for authorisation to operate there. This could be a timely procedure, as there is no time limit for the authorisation procedure. For humanitarian organisations this is problematic, as time is often of the essence for them to operate effectively. The President of South Africa can exempt humanitarian organisations from the application procedure, but there is no guarantee that this will be done.

Both South African legislations studied in this thesis suffer from the lack of a monitoring mechanism. Without this mechanism, the government has no real way of extracting evidence of breaches of the legislation, making it virtually impossible to convict those who breach the legislation. A monitoring mechanism does not guarantee

that an extraterritorial legislation will be enforceable, however, because not all states will accommodate another country enforcing its jurisdiction on their soil.

The international conventions in the field of privatised use of force are outdated, as they concern only mercenaries. PMSCs became prominent actors only after the conventions were designed. The new South African legislation is in line with the international conventions when it bans mercenary activities.

The American legislations aimed at regulating the industry, the ITAR and the MEJA, are both influenced by the US government's positive view of the private military and security companies operating from within its borders. This positive view is also characterised by the outsourcing of military services to PMSCs, especially in Iraq. The ITAR has many similarities to the South African legislation, and many of these similarities are weaknesses. However, the weaknesses in the ITAR may in practice be less visible than those in the South African legislation. It is in the American PMSCs' business interests to maintain a good relationship with the US government, and they are therefore less likely to violate the regulation. The South African government does not enjoy the same kind of positive relationship with the industry, and South African PMSCs are not as likely to abide by South African legislations.

The options presented in the UK Green Paper have not been made into legislation, and the industry remains unregulated in the UK. The options that were presented, however, were compared to the new South African legislation in chapter 5. The ban on mercenaries that is put in place by the new legislation in South Africa was somewhat discouraged as unworkable in the UK Green Paper. It seems likely that if the UK does design legislation, it will be a licensing regime or something similar rather than a ban, as the UK government is quite positive towards outsourcing military services to these companies.

## **6.2 The answers to the research questions**

This section will study how the findings of the thesis, outlined above, answer the research questions introduced in Chapter 1. These questions will provide useful insights to the main purpose of the thesis, which is to evaluate the new South African legislation of 2006 in order to see if it can be used as a model for other domestic legislations on the private military industry and on mercenaries.

The first question put forward was whether or not the new South African legislation was an improvement over the old RFMAA. The findings indicate that the new legislation has, as it was designed to do, closed many of the loopholes in the older legislation by regulating more actors. Increasing the scope of the legislation might have been necessary in order to close the loopholes inherent in the RFMAA, but it is negative for the actors who are now included without being part of the private military industry. The new legislation also expands when it is valid, which is in countries experiencing armed conflicts as well as countries proclaimed by the President of South Africa to be regulated. The new legislation does not have a monitoring mechanism, making it problematic to investigate and prosecute breaches of it. Furthermore, the definitions in the new legislation are still very wide, and include actors whose activities are not part of the private military and security industry in the legislation. In all, the new legislation is clearer in some areas and is in this way an improvement of the RFMAA, but is at the same time perhaps too wide in its scope and there are many problems remaining.

The second research question was how the new South African legislation fits with the international conventions in this area. The findings of this thesis show that the ban on mercenaries, though very difficult to enforce, is in line with the international conventions. None of the international conventions mention PMSCs, thus the South African legislation does not violate them by regulating these companies.

How the new South African legislation compares with other domestic legislations was the third research question. The American International Traffic in Arms Regulation and the Military Extraterritorial Jurisdiction Act were the only two domestic legislations in effect in 2008, and were therefore compared to the new South African legislation. The findings indicate that the US and the South African governments have very different views on the industry. While the US government outsources many of its military functions to American PMSCs, the South African government has, for many reasons, a more sceptical attitude towards the PMSCs situated in the country. Neither legislation has a monitoring mechanism and both have extraterritorial dimensions, factors that, combined, make both difficult to enforce.

The fourth and final research question was how similar the new South African legislation is to the options presented in the Green Paper published in 2002 by the British

government. Of the six options presented in the Green Paper, the first and third options are the most relevant in terms of the South African legislation. The first option presented in the Green Paper is that of a general ban on the industry. The Green Paper then discusses the problems inherent in this type of ban, problems that the new South African legislation encounters. It can be assumed that the problems inherent in the ban on mercenaries was considered in South Africa, but that the government opted for a ban on moral grounds, in order to send a message internationally that it does not tolerate mercenaries operating from within its borders. The licensing regime that was presented as the third option in the Green Paper is similar to the authorisation system in the new South African legislation. This is one of the options that seems most likely to be chosen should the British government decide to design legislation. The UK government outsources many military functions to PMSCs and seems to be more tolerant towards the industry.

### **6.3 Problems revisited**

From the above discussion of the research questions, it seems clear that the new South African legislation, although an improvement over the FMAA, still has too many flaws to be used as a model for other governments wishing to regulate the private military and security industry. The authorisation system in itself might provide useful insights when designing legislation. However, a monitoring system is needed in order to make legislations more enforceable. Clearer definitions, a time limit for the application process and increased transparency would also enhance the legislation. These changes would significantly improve such legislation, although it would not completely solve the problems of extraterritorial enforcement. Governments that have a good relationship with their PMSCs will most likely prefer to use the American International Traffic in Arms Regulation (ITAR) as a foundation on which to build a more comprehensive legislation. An international harmonisation of domestic legislations seems unlikely, because governments have such different views on the industry.

Because it can be seen as an improvement of the older legislation, it can be argued that it has fulfilled some of the government's objectives for it. But because there are so many problems inherent in enforcing the regulation, it has not fulfilled all of the objectives.

## 6.4 Implications and the way forward

The new South African legislation has not been studied in as much detail before. The findings in this thesis can therefore be used to further the discussion in the regulatory debate. To me, the findings of the thesis strongly indicate that there is a need for further exploration in this area, because there seems to be no ideal way of regulating PMSCs today. Although the ITAR and the new South African legislation could be used as foundations for other countries' legislations, the two legislations both suffer from lack of a monitoring mechanism, too wide definitions, and the difficulties of finding evidence abroad. This thesis has not included a proposal or recommendation for other countries' domestic legislations, but the findings indicate that there should be continued focus on how to regulate PMSCs, both in academic and political circles.

The findings indicate that there is need for international regulation of PMSCs - a new UN Convention would be preferable. None of the current domestic legislations deal effectively with the challenges posed by the PMSCs. Dealing with these challenges is difficult not only because of the wide range of services, but also because a wide range of actors can hire them. New international regulation does not seem likely, however, judging from the very different stands towards the industry taken by for example the US and the South African governments.

Some scholars argue that a harmonisation of domestic legislations could be a temporary solution until the international community designed a convention on PMSCs. But as long as governments have as diverging views of PMSCs as they have today, a harmonisation seems unlikely. This is unfortunate, because harmonisation of domestic legislations would have made it more difficult for the PMSCs to relocate in order to avoid the regulation of their current host nation.

In South Africa, the findings of the thesis indicate that the government is still not successful in its attempt to control the private military and security industry that involves many of its citizens. The government should therefore either work towards international legislation or work towards improving the enforceability of the current legislation. This could be done by adding a monitoring mechanism to the current Act and by proclaiming countries to be regulated.

Because of the nature of the services provided by the actors studied in this thesis, it is not acceptable in my opinion to leave them unregulated in large parts of the world. The attempts at domestic regulation existing in South Africa and in the United States have their flaws, the most important being the difficulties of enforcing domestic extraterritorial legislation. But this will be inherent to some degree in any other domestic law regarding PMSCs, because they offer their services on the international market. The international community should therefore work towards an international convention on PMSCs. Although this is not realistic at this point in time, it is what needs to be done in order to control the private provision of violence. The system in place today is, essentially, self-regulation. This means that privatised war is in effect being accepted, due to the lack of regulation in most countries and especially internationally. This should not continue, and more work is needed to determine how to best deal with the PMSCs.



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