

Domestic Law and Regulation of the Private Military Industry

A Comparative Analysis of the United Kingdom and the United States

Master Thesis

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1. Introduction

Long have nation states been the sole legitimate users of violence. The German sociologist Max Weber understood this monopolisation of violence to be one of the core characteristics of what defined a state¹. Domestically, nation states would legitimately police their citizens and provide them with protection from outside forces. Externally, international law would help condition the acts of violence by states. Legitimate violence was neatly organised and clearly understood by the majority, if not all of those involved in international affairs. Recently, this monopolisation of violence has been compromised. A challenge to this Weberian conceptualisation of violence has emerged, embodied by private companies offering services of a military nature, intruding into the once exclusive domain of nation states. Strongly gaining momentum after the end of the Cold War, private military companies (PMCs) have increasingly grown in importance as their services are employed in higher numbers by nation states, international organisations, NGOs, and other actors that seek to meet their security needs. However, the proliferation of these companies has proved to be problematic for the international order, as the commercial and military character of these companies has caused uncertainty and doubt regarding the morality of their activities, as well as concerns about the legality surrounding PMCs, their accountability, and the loss of democratic control over the use of violence. The issue of PMCs became particularly salient as a result of the increased use of PMCs by the United States and the United Kingdom during the Afghanistan and Iraq War.

Due to these concerns, some nation states and international organisations have sought to ban PMC activity, while others have recognised the necessity to control and regulate the private military industry. In this regard, South Africa has often served as an exemplary case of a state implementing a tight regulatory scheme for PMCs. Even though the choice for this form of regulation can be understood as a reaction to the links between South African PMCs and the apartheid regime², some scholars have found that the regulatory framework that South Africa implemented was not without its faults, and that several lessons could be learned from the South African case³. It is therefore important to analyse how different states have attempted to regulate the private military industry, to further improve future plans to regulate the industry. The contribution of this thesis is to provide a comparative analysis of the

¹ Chesterman and Lehnardt (2009: 1)

² Liu (2010: 150)

³ Liu (2010: 150)

domestic laws and regulations that the United Kingdom and the United States have implemented in order to control and regulate PMCs, and explaining the factors that led both states to reach different legislative and regulatory outcomes. The research question I seek to answer is: *What factors account for the different legislative and regulatory responses of the United Kingdom and the United States to the issues related to private military companies?*

This thesis attempts to analyse the problem from a historical institutionalist approach, and is therefore mostly focused on explaining how pre-existing norms and patterns of behaviour present in both states conditioned the options that both British and U.S. policymakers seriously considered when attempting to regulate the private military industry. The scope of this analysis is therefore limited, and does not represent the full explanation of why the United Kingdom and the United States responded differently on how to regulate PMCs. In addition, the thesis focuses just on three institutions, leaving much room for future studies to further enrich our understanding of the topic. I will start by reviewing the academic literature that attempts to explain what the factors are that influence the choices that policymakers make when regulating the private military industry and other quasi-military private actors. I will then continue by explaining the use of historical institutionalism to answer my research question, followed by the methodology used to come to my main findings, which consists mostly of a historiographical approach in combination with text and document based techniques. Lastly, I will present my analysis showing how three institutions have conditioned the legislative and regulatory outcomes of the United Kingdom and the United States. I will conclude that the role perception of PMCs in policymakers, the military culture, and the orientations of policymakers, have conditioned the paths to PMC regulation chosen by the United Kingdom and the United States.

2. Literature Review

The academic literature explaining or identifying the factors that account for states implementing or changing domestic law and regulation of PMCs is very limited. The focus of most scholars studying PMCs is usually on accountability issues and oversight⁴, problems of democratic deficit⁵, the gap in international law⁶, and morality. However, this has not impeded some scholars in analysing some of the explanations of why states change domestic

⁴ Yastin (2011: 495); Kwok (2006: 35); Jordan (2009: 336); Mehra (2010: 332)

⁵ Percy (2009: 18)

⁶ Doswald-Beck (2009: 115)

law and regulation of PMCs. South Africa is often seen as a great example of a state attempting to prohibit mercenaries and regulate PMCs⁷. Some scholars have identified a number of factors that could explain why South Africa decided to implement a strong regulatory framework for PMCs. Firstly, Liu argues that this strong response by South Africa reflects the country's unique history of mercenarism and the 'political backlash' of alleged connections to the apartheid regime⁸. Secondly, the Foreign Military Assistance Act 1998 (the legal document that introduced the strong regulatory framework to South Africa) could be seen as a clear response to the 'high-profile contracts' of Executive Outcomes⁹, the company that introduced the PMC phenomenon to the world. Thirdly, South Africa further developed its regulatory framework by replacing the 1998 Act with the Prohibition of Mercenary Activities in Country of Armed Conflict Act 2006, which the South African Minister of Defence though necessary as a measure to tackle some of the failures of the 1998 Act. The South African government was to a large extent motivated by "the recent arrest of a number of South African citizens, allegedly involved in a planned coup d'état aimed at overthrowing the Government of Equatorial Guinea"¹⁰. It is worth noting that certain events seem to have an important effect on a government taking action towards regulating PMCs. In the case of South Africa, both the activities and publicity of Executive Outcomes, and the arrest of South African citizens that were thought to be involved in a planned coup d'état of a foreign state became important factors in explaining why South Africa decided to implement and adjust domestic law and regulation concerning PMCs.

Isenberg notes that 'the form of, and motivation for, regulating differs according to region'¹¹. For example, he argues that the problem with South African legislation is that the South African government 'views PMC activity with suspicion', due to the fact that many of the employees of South African PMCs were formed during the apartheid regime, and are often seen by the South African government as potential troublemakers¹². In contrast, Isenberg argues that the United States views PMCs as part of their 'total force', essentially making PMCs a fundamental part of U.S. military strategy¹³. This sharp contrast between both states strongly conditions the manner in which they approach domestic law and regulation concerning PMCs. The United States is more concerned with the coordination of

⁷ Liu (2010: 150)

⁸ Liu (2010: 150)

⁹ Avant (2006: 161)

¹⁰ Republic of South Africa (2005: 9)

¹¹ Isenberg (2009: 84)

¹² Isenberg (2009: 85)

¹³ Isenberg (2009: 85)

PMC efforts and U.S. soldier operations, ensuring that PMCs are properly punished if they commit a crime, and standardising contracting practices¹⁴. These scholars point to some of the aspects that can affect both the legislation and the policy process, leading each country to different outcomes in domestic law and regulation.

In addition to the limited academic literature that concerns itself specifically with PMCs, other scholars focus on factors that explain why states implement or change domestic law and regulation of quasi-military actors, more specifically private security companies in Europe¹⁵. The inclusion of this literature shows that privatising not only happens abroad for military services, but also at home for security services¹⁶, and that states are attempting to regulate both. Two cases that are often studied are the United Kingdom and Germany. Krahnmann analyses how these two European countries approach the private military industry and in which ways they choose to exercise control over companies within this industry. One of the important points that she makes is that “the relationships between private military companies and their Western home governments frequently contribute to shaping the corporate structures of these firms and thus influence their behaviour at home as well as abroad”¹⁷. Krahnmann refers to two types of relationships: Public-Private partnerships and regulation. Firstly, Krahnmann shows how both the United Kingdom and Germany have implemented different forms of public-private partnerships, which have resulted in both states arriving at different opinions on whether and how to control and regulate private security and military services¹⁸. She argues that the United Kingdom has preferred to adopt a market-oriented approach, whereas Germany has opted for state control in private firms providing military and security services in the form of corporate shareholding and joint ventures¹⁹. Krahnmann describes how the British government started to privatise the defence industry during the Thatcher administration and much later during the Blair administration, an era that saw privatisation in many areas of government in a country where market-oriented approaches were popular, and cost efficiency was a strong argument. It could be argued that perhaps the predominance of the neo-liberalist thought in the United Kingdom had a strong impact on the speed of privatisation of the defence industry, as well as the strong focus on self-regulation. Germany, on the other hand, lacked this particular predominance, and was far more cautious in privatising its defence industry, placing more importance on strategic concerns of the state,

¹⁴ Isenberg (2009: 85)

¹⁵ Krahnmann (2005: 277)

¹⁶ Krahnmann (2005: 277)

¹⁷ Krahnmann (2005: 278)

¹⁸ Krahnmann (2005: 279)

¹⁹ Krahnmann (2005: 285)

rather than cost efficiency of the industry, which showed in the country's preference for tight corporate as well as legislative control²⁰. In addition, Krahmman explains that even though the United Kingdom and Germany both had such different original positions on whether and how to control and regulate private security companies, the policies of both states seem to be converging due to two developments²¹. Firstly, although the British government placed their hopes on a self-regulatory approach, unacceptable failures such as the Sandline Affair, in which "the Foreign and Commonwealth Office was accused of having knowledge of the illegal exports of arms to Sierra Leone by the London-based private military company Sandline International^{22,23}", led the British government to reconsider its original position, and seriously consider regulation as a potential tool to control the industry. The second development was the increasing political pressure from within the European Union to standardise the regulation of private security companies within the supranational body²⁴. Both the pressure from the European Union and the Sandline affair conditioned and influenced how the United Kingdom would act towards the private military and security industry.

3. Theoretical Framework

In this thesis I will attempt to explain why the United Kingdom and the United States have arrived to different legislative and regulatory outcomes concerning the private military industry and PMCs, by using the theoretical framework of historical institutionalism, which is only one of many traditions of 'new institutionalism' that emerged as a direct reaction to the dominance of behaviourism and rational choice theory in the study of political science²⁵. At the core of these new approaches to the study of political science was the renewed interest in the importance of institutions in explaining political outcomes²⁶. However, the understanding of what institutions are differs substantially from its original use by old institutionalists²⁷. Institutions are no longer limited to meaning political organisations such as parliaments, government ministries, or international bodies such as the North Atlantic Treaty Organization. Under new institutionalism, an institution is understood as a 'stable, recurring pattern of

²⁰ Krahmman (2005: 285)

²¹ Krahmman (2005: 292)

²² Sandline International was disbanded in 2004. However, its founder, Tim Spicer founded a new PMC called "Aegis Defence Services"

²³ Krahmman (2005: 292)

²⁴ Krahmman (2005: 292)

²⁵ Lowndes (2009: 61)

²⁶ March and Olsen (1984: 747)

²⁷ Goodin and Klingermann (1996: 25)

behavior²⁸, laying more focus on the informal conventions of politics without neglecting formal structures²⁹. Furthermore, new institutionalists focus on analysing how institutions ‘embody values and power relations’, and pay attention to ‘the obstacles as well as the opportunities that confront institutional design’³⁰. In essence, new institutionalists attempt to analyse the relationship between institutions and behaviour, as well as attempt to explain the process of how institutions are formed, changed, and kept at the status quo³¹.

New institutionalism has six core assumptions that differentiate it from traditional institutionalism³². Firstly, new institutionalism has changed its focus from organisations to a focus on rules. As was mentioned earlier, ‘political institutions are no longer equated with political organizations; rather, they are seen as a set of ‘rules’ that guide and constrain the behaviour of individual actors’. Secondly, new institutionalism shifts its focus from a ‘formal to an informal conception of institutions’³³. New institutionalists focus on informal rules as well as formal rules. Thirdly, institutions are no longer seen as ‘things’ as was often the case in traditional institutionalist analyses, but rather as dynamic ‘processes’. In this view, institutional stability is achieved by a constant process of consensus, in the context of a changing environment³⁴. Fourthly, new institutionalists take a ‘value-critical’ stance. Lowndes sums this up well when he argues that ‘new institutionalists seek to identify the various ways in which institutions embody – and shape – societal values’. Offe argues that institutional change occurs when institutions are found to be incompatible with emerging or new values³⁵. Fifthly, instead of focusing on whole systems of government, as traditional institutional scholars did, new institutionalists focus on ‘component institutions of political life’³⁶. And lastly, new institutionalists analyse institutions within an embedded environment of institutions. In other words, ‘political institutions are not independent entities, existing out of time and space’³⁷, but instead exist embedded in various contexts.

Historical institutionalism is, as well as the other traditions of new institutionalism, based on the six core assumption mentioned above. However, it has additional elements that

²⁸ Goodin (1996: 22)

²⁹ Lowndes (2009: 61)

³⁰ Lowndes (2009: 61)

³¹ Hall and Taylor (1996: 937)

³² Lowndes (2009: 66)

³³ Lowndes (2009: 67)

³⁴ Marsh and Rhodes (1992: 196)

³⁵ Offe (1996: 685)

³⁶ Lowndes (2009: 69)

³⁷ Lowndes (2009: 70)

differentiate it from the other traditions. One of the key elements of historical institutionalism, as well as being what it makes it different to the other traditions of new institutionalism, is the notion of path dependency³⁸. Path dependency is crucial for understanding institutional efficiency and inefficiency. Historical institutionalists tend to argue that institutional designs often lead to inefficient outcomes, due to the notion of path dependency. Path dependence refers to “a process in which the structure that prevails after a specific moment in time ... shapes the subsequent trajectory in ways that makes alternative institutional designs less likely to triumph”³⁹. The context of previous decisions and institutional designs causes future institutions to be inefficient. In contrast, rational choice institutionalists tend to argue that actors will arrive at efficient outcomes that represent the power relations of the utility maximising actors that are involved⁴⁰.

Historical institutionalism is particularly apt for analysing the factors that explain why the United Kingdom and the United States arrived at different legislative and regulatory outcomes. Other scholars have done analyses with similar dynamics to the one presented in this thesis. As Hall and Taylor argue “analysts in this school [historical institutionalism] began to explore how ... social and political institutions ... could structure interactions so as to generate distinctive national trajectories”⁴¹. ‘Analysing distinctive national trajectories’ is a core element in my analysis of domestic law and regulation of PMCs. Examples of research using a historical institutional approach are Katzenstein’s study⁴² explaining why the policies of the advanced industrial countries differed so much when responding to the oil crisis of 1973, Thelen’s work⁴³ on explaining why some industrial relations systems proved to be more stable than others under pressure of globalisation, and Steinmo’s analysis⁴⁴ of the differences in taxation and public spending among different countries⁴⁵. Katzenstein’s analysis of policy responses to the oil crisis of 1973 is particularly similar in dynamic to the analysis of this thesis.

Furthermore, historical institutionalism focuses on the types of processes that are characteristic of international relations, focusing on explanations that look at ‘founding

³⁸ Fioretos (2011: 376)

³⁹ Fioretos (2011: 376)

⁴⁰ Fioretos (2011: 376)

⁴¹ Hall and Taylor (1996: 938)

⁴² Katzenstein (1978)

⁴³ Thelen (1993, 1994)

⁴⁴ Steinmo (1993)

⁴⁵ Thelen (1999: 373-4)

moments in shaping long-term power relations’, how new ideas become norms, how unintended consequences occur, and the reasons for the ‘prevalence of incremental reform over stasis and fundamental transformations’⁴⁶. In addition, a historical institutionalist approach focuses on the notion that “the timing and sequence of events shape political processes”⁴⁷. This means that later events are significantly conditioned by earlier ones, making radical institutional redesign a rather improbable and rare phenomenon. Historical institutional analysis illustrates how past decisions influence and condition the preferences of actors regarding current and future institutions⁴⁸. Furthermore, institutional change only occurs when the benefits of the new design outweigh the losses of ending the past design. However, as Fioretos points out, “since the nature (and understanding) of such losses is contingent upon the institutional context in which individuals are embedded, exposure to the same external parameters typically generates diverse responses”⁴⁹. This is an important implication that would affect a historical institutionalist analysis of how the United Kingdom and the United States came to different outcomes in regulating PMCs. It shows the potential this approach could have in explaining different outcomes based on institutionalist analysis.

Historical institutionalism as employed in this thesis emphasises the cultural approach, as opposed to the calculus approach. This approach stresses the importance of an actor’s worldview in determining behaviour, and acknowledges that actors do not behave in a fully strategic manner⁵⁰. A direct consequence of this is the fact that actors are not seen as utility maximisers, as would be the case in rational choice institutionalist analyses, but instead see actors as satisficers. Hall and Taylor reinforce this by arguing that “the choice of course of action depends on the interpretation of a situation rather than on purely instrumental calculation”⁵¹. From a historical institutionalist perspective, institutions then provide not only ‘strategically-useful’ information, but also condition the worldviews, identities, perceptions, and preferences of actors⁵².

Historical institutionalism helps answer the research question of this thesis by providing it with the right framework to highlight the importance of the historical contexts that

⁴⁶ Fioretos (2011: 369)

⁴⁷ Fioretos (2011: 371)

⁴⁸ Fioretos (2011: 373)

⁴⁹ Fioretos (2011: 375)

⁵⁰ Hall and Taylor (1996: 939)

⁵¹ Hall and Taylor (1996: 939)

⁵² Hall and Taylor (1996: 939)

conditioned the options that policymakers in the United Kingdom and the United States considered for regulating the private military industry. The concept of an “institution” lays the focus on norms and patterns of appropriate behaviour and tendencies, which can make a strong contribution to explaining my dependent variable, while illustrating the importance of path dependence for explaining how past decisions and pre-existing institutions affected policymakers in implementing a regulatory scheme for PMCs. I will use three institutions to explain the diverging paths that both states took towards regulating the private military industry, and how they were conditioned by policy paths that were taken in the past. These include the institution of “role perception”, the institution of “military culture”, and the institution of “orientation in policymaking. These institutions laid important restrictions on the options that later policymakers would consider. In particular, these institutions are better explained using the cultural approach, rather than the calculus approach. The emphasis in these institutions lies in the culture that they have embedded in them, and which serve to condition the actions of policymakers that are pursuing adjustments in law and regulation. The analysis focuses on norms and patterns of behaviour that can explain why policymakers in the United Kingdom and the United States reached different outcomes. Indicators of these norms and patterns of behaviour are difficult to pinpoint, but have to be identified from official documents of parliament, government, experts, and work of other scholars to attempt to produce a good sense of what characterises these institutions and how it affects policymaking in the United Kingdom and the United States.

4. Methodology

The analysis of this thesis is based on a qualitative historiographical approach in which text and document based techniques⁵³ are employed to explain my dependent variable, namely domestic law and regulation responses of states to the problems concerning PMCs and the private military industry. In addition, the analysis will include the analysis of official documents produced by state institutions such as the parliament, foreign affairs offices, and government. Particular attention will be given to the historical context in which both states developed, as well as in what characterises both states, in regard to the three independent variables, and how certain norms and patterns of behaviour are embedded in them. I will also base my work on the analyses of other scholars that have identified differences between the United Kingdom and the United States relating to one of the three dependent variables that I

⁵³ Vromen (2010: 261)

use to explain the difference between both states in regulating and controlling the private military industry. I will start by defining the concepts that I use in my analysis.

Concepts

For my analysis, the precise definition of what a private military company is not relevant. The importance lies not in the nature of PMCs and what they are, but rather on the private military industry and the services that are provided in it. The focus of the analysis is to explain how both countries have decided to react to the lack of regulation of this industry, as well as why both states have followed different paths. However it is necessary to define the three concepts that help explain the variation in the dependent variable: Role perception, military culture, and orientation in policymaking.

Firstly, “role perception” refers to the manner in which policymakers of a given country view the role of PMCs to be in their state. In other words, policymakers possess preconceptions about the nature of PMCs and what their potential role could be relative to the interest of the polity. For example, as I covered in the literature review, South African policymakers were heavily influenced in their choice of regulating and controlling PMCs. This was due to the links that such private actors had with the apartheid regime. I build upon this argument, and look at how the perceived role of PMCs according to U.S. and British policymakers, prompted them to act differently to each other. Secondly, I will use the definition of “military culture” given by Cassidy:

Military culture can ... generally be defined as the embedded preferences within a military organization that shape that organization’s preferences on when and how the military instrument should be used. It is derived or developed as a result of historical experience, geography, and political culture. Core leaders inculcate it and perpetuate but it is most pronounced at the operational level because when armies have met with success in war, it is the operational techniques and the operational histories, by which enemies were defeated, which are consecrated in memory.⁵⁴

The importance of this concept is how the historical context in which wars are fought and won, as well as how states organise their military, helps to institutionalise certain norms and behaviours in soldiers. Different military cultures ask for different approaches to disciplining or rewarding soldiers. Thirdly, “orientation in

⁵⁴ Cassidy (2005: 54)

“policymaking” refers to the tendency, or embedded common procedures that are present in policymakers, which condition the options that they consider for solving government issues.

Case Studies

I have chosen the United Kingdom and the United States as my two case studies. These states are particularly interesting, since the vast majority of PMCs are based in these countries. Both states have a huge private military industry, and both were faced with similar problems concerning this particular industry during the first decade of the new millennium. The end of the Cold War, but perhaps more significantly the emergence of the War on Terror, and the involvement of both the United Kingdom and the United States in the wars in Afghanistan and Iraq, make comparing both nations regarding their approaches to domestic law and regulation of PMCs, particularly interesting. The analysis is mainly focused on explaining the reasons behind the choices that policymakers in both states have made regarding the lack of regulation that was present in the private military industry in the years after the Cold War.

Hypotheses

Based on my case studies and the concepts that I will use to help explain my dependent variable, I first hypothesise that the role perception that policymakers in the United Kingdom and the United States had institutionalised, conditioned the options that were considered seriously. Secondly, I hypothesise that the variance in military culture in the United Kingdom and the United States conditioned the options that were considered by policymakers and led to different outcomes. And lastly, I hypothesise that differences in the orientations of policymakers in the United Kingdom and the United States conditioned the options that were considered by policymakers in both states and led both states to different forms of regulating the private military industry.

5. Analysis

In the following sections I will analyse three factors that contributed to how the United Kingdom and the United States both reached different outcomes for controlling and regulating the private military industry of their states. Firstly, I will start by arguing that both states were presented with similar problems concerning the private military industry and the behaviour of PMCs. In the second section I portrait the current configuration of domestic law and regulation that are present in both states, and discuss some of the important characteristics. In the third section I will show how the role perception that U.S. and British policymakers had about the private military industry and PMCs conditioned the options that they gave serious consideration, as well as the outcome in domestic law and regulation. Fourthly, I will analyse how the military culture of both states influenced the United Kingdom and the United States in deciding how to regulate the private military industry. And lastly, I will look at how orientation in policymaking shifts that occurred in the United Kingdom impacted the British response to the problems associated with PMCs.

A. The PMC Problem

Making a strong case for the factors that contribute to explain why the United States and the United Kingdom responded differently in terms of domestic law and regulation to the PMC problem would have to start by making an equally strong claim that the PMC problem was indeed very similar, if not identical in both countries. The arguments that show how particular institutions explain the different behaviours of both countries, would be made much stronger if the factor that prompted both countries to respond in the first place, was the same. Therefore, it is important to understand the basis and nature of the concerns with PMCs and the private military industry, both in the United States and the United Kingdom. Identifying the PMC problem in both countries would also implicitly explain why both countries did respond to it, in some way or another. These points are the focus of this chapter. I will argue that the problem concerning the PMCs was very similar in both the United States and the United Kingdom, based on three arguments. Firstly, both countries have shown deep concerns about the abuse of human rights by PMCs in foreign operations, and how this reflected on them. Secondly, both countries were concerned with the possibility that PMCs would act in ways that were not aligned with their foreign policy. And Lastly, both countries came under

immense international pressure to control PMCs, mostly due to the first point mentioned above. First I look at the United Kingdom.

The United Kingdom

The 2002 Green Paper stated that “although successive governments have deplored the activities of mercenaries, no effective legislation exists to prevent either their recruitment or their participation in conflict”⁵⁵, highlighting the fact that the United Kingdom had to start thinking seriously about regulating the private military industry. Tracing back to the origins of the first instances were British policymakers start to voice serious concerns on the problem with PMCs, one would have to start on February 1999, when the House of Commons Foreign Affairs Committee recommended the British government to start working on “the publication, within eighteen months, of a Green Paper outlining legislative options for the control of private military companies which operate out of the United Kingdom, its dependencies and British Islands”⁵⁶. The concerns of the Foreign Affairs Committee were a direct reaction to the Committee’s inquiry on the involvement of Sandline International, a British-based PMC, in delivering weapons to Sierra Leone, a region where the United Kingdom was enforcing an arms embargo dictated by the United Nations⁵⁷. Although Sandline International had already gained some international exposure due to their involvement in Papua New Guinea in the Sandline Affairs, it was not until the company’s involvement in Sierra Leone that politicians in the United Kingdom started the discussion on PMCs. In 2002, the Foreign Affairs Committee pointed in its Ninth Report to some of the concerns that PMCs presented. It pays specific attention to the problems related to human right abuses⁵⁸. The Ninth Report documents how the United Nations Special Rapporteur warns the United Nations Human Rights Commission for the development of PMCs, and how they offer their services in increasingly aggressive ways, emphasising their efficiency and military expertise⁵⁹. However, he urges the Human Rights Commission to “remember that mercenaries base their comparative advantage and greater efficiency on the fact that they do not regard themselves as being bound to respect human rights or the rules of international humanitarian law. Greater disdain for human dignity and greater cruelty are considered efficient instruments for winning

⁵⁵ Ninth Report from the Foreign Affairs Committee, Session 2001-02, HC 922, para. 18.

⁵⁶ Second Report from the Foreign Affairs Committee, Session 1998-99, Sierra Leone, HC 116-I, para. 96.

⁵⁷ Ninth Report from the Foreign Affairs Committee, Session 2001-02, HC 922, para. 1.

⁵⁸ Ninth Report from the Foreign Affairs Committee, Session 2001-02, HC 922.

⁵⁹ Ninth Report from the Foreign Affairs Committee, Session 2001-02, HC 922, para. 57.

the fight”⁶⁰. The Ninth Report states the opinions of some of the important industry actors such as ArmorGroup and Tim Spicer, founder of Sandline International and Aegis Defence Services. According to the Ninth Report, these players believe that their own vetting procedures are more than capable of eliminating the possibility that their employees would abuse human rights in any way. Tim Spicer told the Foreign Affairs Committee that “we [Sandline International] do have the ability to vet our employees carefully and to ensure that they behave, in so far as we can ... I cannot think of anybody who works for my organisation or is likely to work for my organisation who might transgress and disappear into the depths of Eastern Europe because I would not employ him in the first place if that were where his nature bolt hole was”⁶¹. However, the Foreign Affairs Committee was not entirely convinced by these statements. As the Ninth Report states:

We are not, however, convinced that the checks and balances that apply to national armed forces can ever be applied with equivalent strength to employees of PMCs. Though companies’ vetting mechanisms may go some way towards ensuring that the individuals involved in private military operations are appropriately qualified, we also share the Green Paper’s conclusion that “it is not an accident that the business of fighting for money often brings in unattractive characters”⁶².

This statement by the Foreign Affairs Committee of the House of Commons illustrates the view that the PMC industry needs regulating, which is reinforced by the fact that “the demand upon states to intervene in situations of instability and human right abuses is not declining”⁶³.

As I mentioned earlier in this chapter, the discussion about regulating the PMC industry was prompted by two events, where the involvement of Sandline International caused embarrassment for the British government, as well as contradict, in certain aspects, the foreign affairs policy of the British government. The first event, which was popularly labelled as the ‘Sandline Affair’, served as an example for the British government how the actions and behaviour of PMCs could have an impact on their international reputation. As Michael Bilton argued “a nightmare scenario where a company is licensed by the British Government to undertake training of a foreign army, that the trainers become combatants, and that massive overkill leads to heavy loss of innocent life. Where would the finger of blame point: the

⁶⁰ Ninth Report from the Foreign Affairs Committee, Session 2001-02, HC 922, para. 57.

⁶¹ Ninth Report from the Foreign Affairs Committee, Session 2001-02, HC 922, para. 58.

⁶² Ninth Report from the Foreign Affairs Committee, Session 2001-02, HC 922, para. 62.

⁶³ Ninth Report from the Foreign Affairs Committee, Session 2001-02, HC 922, para. 9.

British Government would surely be in the firing line”⁶⁴. This fear for possible damages to the international reputation of the United Kingdom was realised with the Sandline Affair. This political scandal began when Sandline International closed a deal with the government of Papua New Guinea, in which the PMC would provide the government of Papua New Guinea with the manpower, equipment and skills required to assist the armed forces of the country to fight against "the illegal and unrecognised Bougainville Revolutionary Army", as the opposition army was referred to in the agreement⁶⁵. Disagreements between the PMC force and the armed forces of Papua New Guinea regarding the deployment of an additional 80-man PMC force outside of Port Moresby, which arguably was not included in the agreement between both parties, angered the army and almost caused a military coup⁶⁶. Further developments included riots, mutinies, and the biggest political crisis in Papua New Guinea in 22 years⁶⁷. The operation of Sandline International in Papua New Guinea was opposed not only by the United Kingdom, but also by Australia and New Zealand, both regional Commonwealth allies of the United Kingdom⁶⁸. This event constituted an embarrassment for the British government, as it led to a position where the British government had to solve this conflict, and where it had to repair any damages caused to its relationship with Australia and New Zealand.

The second event also involved the British-based PMC Sandline International, as the company provided weapons to Sierra Leone, in violation of the United Nations arms embargo, as well as British Law. This is probably the clearest example of a PMC acting in a way that is against the foreign and defence policy objectives of the United Kingdom. One of the main conclusions of the Foreign Affairs Committee was that “It is the view of the Committee that Mr Spicer should have known the law about arms sales to Sierra Leone”⁶⁹. However, it was not only the PMC that was at fault during the Sierra Leone affair. The British government, as well as the Foreign Affairs Committee in other wording, have stated that “the report (referring to a previous independent report executed by Sir Thomas Legg and Sir Robin Ibbes about the same affair) concluded that Mr. Penfold (the British High Commissioner in Sierra Leone at the time) gave the Sandline project a degree of approval, and that he had no authority to do

⁶⁴ Ninth Report from the Foreign Affairs Committee, Session 2001-02, HC 922, para. 76.

⁶⁵ Corrs Chambers Westgarth (20 July 2001) Available at:
<http://www.mondaq.com/australia/article.asp?articleid=12836>

⁶⁶ Corrs Chambers Westgarth (20 July 2001)

⁶⁷ Corrs Chambers Westgarth (20 July 2001)

⁶⁸ Ninth Report from the Foreign Affairs Committee, Session 2001-02, HC 922, para. 77.

⁶⁹ Second Report from the Foreign Affairs Committee, Session 1998-99, HC 116.

so”⁷⁰. The Sierra Leone Affair prompted the United Kingdom to rethink how it communicated internally, as well as how it could prevent such events from happening. Some of the practices that the British government changed as a direct result of the recommendations of the Foreign Affairs Committee included “that the requirement for written licences should be included in all relevant Orders in Council under the United Nations Act 1946, not only in those dealing with arms embargoes”, as well as a promise to produce “within 18 months, a Green Paper on mercenary activity, taking account of discussions with our partners in the UN, the EU and other international fora. The paper will address both the international and the UK context”⁷¹. This would become the 2002 Green Paper, perhaps the most comprehensive official document about the intent of the United Kingdom to regulate and control PMCs. This appears to be the moment that the United Kingdom seemed to have realised that regulation for the private military industry was much needed. The Ninth Report states that “an important objective of regulation must be to ensure that any operation undertaken by a British-based and licensed company is in line with the United Kingdom’s overall foreign and defence policy objectives”⁷². No doubt this illustrates an important lesson that British policymakers learned after two scandalous events that hurt their image internationally and conflicted with their foreign (and defence) policy objectives.

The United States

Perhaps the first scandal that the United States faced concerning a PMC and human right abuses was the DynCorp International incident in the Balkan wars, where a number of DynCorp employees allegedly ran a prostitution business, selling the services of girls as young as twelve⁷³. The man that disclosed the activities of his work colleagues was Ben Johnston. DynCorp fired him and did nothing in particular to discipline its employees⁷⁴. The United States Department of Defence went on to write a proposal to prohibit activities of sex trafficking of defence contractors. Perhaps unsurprisingly, but certainly illustrative of the culture within some of these companies, was the fact that some PMCs, including DynCorp International, attempted to stall the adoption of the prohibition of sex trafficking of defence contractors into U.S. Law⁷⁵. Johnston, when talking about the DynCorp incident in Bosnia,

⁷⁰ Response to the Second Report from the Foreign Affairs Committee, para. 12-13-14.

⁷¹ Response to the Second Report from the Foreign Affairs Committee, para. 29 and 31.

⁷² Ninth Report from the Foreign Affairs Committee, Session 2001-02, HC 922, para. 77.

⁷³ Stinnett (2005: 215)

⁷⁴ O'Meara, *Insight Magazine* (2002)

⁷⁵ Simpson, *Chicago Tribune* (2005)

voiced one of the main concerns regarding human right abuses and the international reputation of the United States:

The Bosnians think we're all trash. It's a shame. When I was there as a soldier they loved us, but DynCorp employees have changed how they think about us. I tried to tell them that this is not how all Americans act, but it's hard to convince them when you see what they're seeing. The fact is, DynCorp is the worst diplomat you could possibly have over there.⁷⁶

A few years later it was the U.S. PMC Blackwater, which has since changed its name several times and is currently operating under the name 'Academi', that found itself in headlines all over the world. It is quite possible that Blackwater is the most popularly recognisable name when talking about PMCs. The company became well known when in March 2004 two Blackwater SUVs were ambushed in Fallujah, Iraq, and four of its employees were killed and hung above a bridge over the river Euphrates⁷⁷. The incident angered many Americans and precipitated an American response, which came in the form of *Operation Vigilant Resolve*, which simply put consisted of a force of U.S. marines retaking the city of Fallujah. A few years later in 2007, the House Oversight Committee reported that Blackwater "delayed and impeded" a congressional probe into the 2004 killings of four of its employees in Fallujah". In October 2010 certain facts concerning PMCs in Iraq were leaked by WikiLeaks as part of the 'Iraq War Documents leak'. In this document, employees of Blackwater were reported to have been seen shooting indiscriminately at civilians on the scene after an Improvised Explosive Device (IED) strike⁷⁸, as well as an incident in which Blackwater employees shot a civilian car, killing a father and wounding his wife and daughter. There appears to have been an "escalation of force" by Blackwater employees on the years leading to the Nisour Square shooting⁷⁹. Furthermore, the leaked documents reveal how an Iraqi ambulance was destroyed by "uncontrolled small arms firing" by Blackwater employees, and in 2006 the killing of an Iraqi civilian by Blackwater employees, and other incidents in Kirkuk and Hilla, led to civilian demonstrations⁸⁰.

There are two conclusions that can be made after reviewing the activity of some of the U.S. PMCs. Firstly, human rights abuse is an important factor of concern for the U.S. government, if not for the moral argument that human rights abuse is wrong, then for the

⁷⁶ O'Meara, *Insight Magazine* (2002)

⁷⁷ CNN.com (2004)

⁷⁸ NYTimes.com (2010)

⁷⁹ NYTimes.com (2010)

⁸⁰ NYTimes.com (2010)

argument that human right abuse by U.S. PMCs lead to international embarrassment and significantly deteriorates the international reputation of the United States. Secondly, it becomes crucial for the United States that PMCs act in ways that are in line with the strategic concerns of the United States. Especially looking at the incident where four Blackwater employees were killed and hung from the bridge in Fallujah, this incident precipitated an American response, something that the U.S. probably had not initially planned, and forced the country's hand to adjust its military activities. As argued by Isenberg, it is important for the United States to regulate its PMCs in order to make sure that these companies act in accordance with its strategy⁸¹. This is the case because "The United States ... increasingly views PMCs as part of the total force"⁸². This means two things. Firstly, that the United States wants to assure that PMCs act in accordance with U.S. military strategy. And secondly, that the United States needs to assure that PMCs act in ways that do not abuse human rights. As Isenberg notes:

Its [of the United States] concerns tend to be administrative: how to ensure co-ordination between theatre commanders and PMCs, how to prosecute PMC personnel if they commit a crime, how to ensure common standards for issuing and implementing contracts⁸³.

The International Context

An important factor that influenced both the United Kingdom and the United States and that I am discussing here in relation to both states, is the negative perception that the international community had of PMCs and the private military industry, often seen as nothing more than mercenaries. This international context was embodied by many actors within the United Nations, and in particular by the supranational body's firm stance against the use of PMCs. This stance is to a large extent based on moral objections to private force⁸⁴. Percy argues that "abolitionism ... has been strongly institutionalized within the UN and is still actively advocated by some players within it"⁸⁵, and notes that:

The creation of international laws dealing with mercenaries early in their appearance on the world stage left many with a sense that mercenaries and

⁸¹ Isenberg (2009: 85)

⁸² Isenberg (2009: 85)

⁸³ Isenberg (2009: 85)

⁸⁴ Percy (2009: 24-6)

⁸⁵ Percy (2009: 24)

PMCs are banned by international law, even though in reality no such explicit ban exists⁸⁶.

It appears that the fact that feelings of anti-mercenarism were often included in official documents of the UN, international law, and even the Draft Code of Crimes against the Peace and Security of Mankind, gave many individuals the impression that mercenaries were “illegal actors needing control”⁸⁷. This institutionalisation of anti-mercenarism in the UN provided, in a very present way, an international context in which PMCs and those involved in PMC affairs, either by hosting them or hiring them, would have to operate. Both the United Kingdom and the United States were affected by this, as the UN would increasingly attempt to go out of their way to discredit PMCs and PMC operations, and those that would hire such companies. For example, in 2005 the UN established a Working Group on the “Use of Mercenaries as a Means of Violating Human Rights and Impeding the Exercise of the Right of Peoples to Self-determination”, a group that would investigate PMC missions and attempt to find any signs of unethical and illegal acts⁸⁸. However, in 2010 the United Nations changed its position and stated that it would start to use PMCs for U.N. peacekeeping missions⁸⁹. It has been quite a shift for the UN from being the strongest critics of PMCs, to practically becoming their clients. This will undoubtedly have implications for the future of PMCs in the international community. It seems that PMCs are here to stay.

B. Domestic Law and Regulation in the United States and the United Kingdom

In the previous section I discussed how both the United Kingdom and the United States encountered similar problems concerning the activities of PMCs. Both countries had issues with human right abuses by PMCs, and had concerns about PMCs acting in conflict with the country’s foreign and defence policy objectives. In this section I will show how the United Kingdom and the United States chose to regulate and control the activities in behaviour of PMCs. This will show that, although both countries were affected by similar issues, they also reacted to these issues differently. I will start by looking at the domestic law and regulation in the United Kingdom.

The United Kingdom

⁸⁶ Percy (2009: 25)

⁸⁷ Percy (2009: 25)

⁸⁸ Estrada and González, *IPS News* (2007)

⁸⁹ Lynch, *Turtle Bay* (2010)

In 2008 there was a motion in the House of Commons which stated the following:

This House is concerned by the exponential growth of private military and security companies (PMSCs) since the invasion of Iraq; is disturbed by the substantial rise of reported incidents of civilian killings and human rights abuses by PMSC guards in Iraq who remain unregulated and unaccountable; further notes that problems posed by proliferation of PMSCs were highlighted in a Green Paper in February 2002 that originated in a request from the Foreign Affairs Committee but that, six years later, there is still no United Kingdom legislation regulating PMSCs; believes that self-regulation by the industry is not appropriate in this instance; and urges the Government to bring forward legislative proposals for the control of the PMSC sector as an urgent priority.⁹⁰

The 2002 Green Paper that the House was referring to, brought forth several policy recommendations concerning PMCs. In this paper the Foreign Affairs Committee (FAC) analysed the British government's engagement with PMCs, which led them to request the contracts between the Foreign and Commonwealth Office (FCO), the Ministry of Defence, and the Department for International Development on the one hand, and PMCs and private security companies on the other⁹¹. However, they were not able to receive the contracts. As the FAC states in their report:

The FCO was unable to supply us with this information [the contracts] ... The reason given for the FCO's inability to supply information about these contracts was that they are "managed locally and details are not held centrally"⁹².

The FAC concluded in its report that "the lack of centrally held information on contracts between Governments Departments and private military companies is unacceptable". The FAC further recommended that "the Government take immediate steps to collect such information and to update it regularly". Yet the most intriguing part of the report is when the FAC states the need for a licensing regime in the United Kingdom. The FAC states that under this licensing regime companies would be required to "obtain a license for each contract for military and security services abroad". The FAC recommended such a license regime in addition to recommending the Government to "consider carefully how to ensure that a licensing regime allows companies to operate with necessary speed without compromising the effectiveness of the vetting process". According to the FAC, this licensing regime would be effective because it would reward those companies that demonstrate "high professional

⁹⁰ House of Commons , early day motion 785 (24.01.2008), available at <http://www.parliament.uk/edm/2007-08/785>

⁹¹ 2002 Green Paper on Private Military Companies

⁹² 2002 Green Paper on Private Military Companies , p. 8.

standards, levels of transparency, appropriate staff recruitment and training”⁹³. The FAC further recommended that “as part of the application procedure for registration, private military companies be required to disclose to the Government in some detail the company structures, the experience of permanent personnel, recruitment policies, and other relevant information”⁹⁴.

The FAC realises not only the need for regulation of PMCs, but also the lack of this regulation. This was ten years ago. In 2008, the House of Commons further attempted to reopen the issue by introducing the motion to revisit the points discussed in the 2002 Green Paper. As the motion stated, nothing had changed since the recommendations of the 2002 Green Paper, up to January 2008. This is, however, not entirely true. In 2003, the Security Industry Authority (SIA) was founded to regulate the private security industry. This could be seen as the reaction that was talked about and discussed in the 2002 Green Paper. It also typifies the British preference for “light licensing regimes”, rather than imposing direct contracting requirements. As was voiced in the 2002 Green Paper, the House of Commons opted for measures that reward PMCs that have the appropriate conduct and performance relative to the preferences of the British government. In addition, this system would also sanction PMCs that do not comply with the requirements. PMCs would be required to register to a British “light regulatory framework” in order to be eligible to provide private security services. This register would “facilitate the development of a responsible private military sector by rewarding companies which could demonstrate high professional standards, levels of transparency, appropriate staff recruitment and training. It would provide significant incentive for companies to be transparent and to maintain high professional standards, because failure to meet the standards demanded to join this general register would constitute a clear indictment of a company’s credentials”⁹⁵. The SIA, however, did not manage to have the impact that was expected of the licensing regime. It is also worth mentioning that the United Kingdom is mostly focused with this sort of regulation, instead of implementing policy changes in contract practices, as the United States did in 2008. Ironically, the FAC implied in the Green Paper, as the motion presented in the House of Commons in 2008 stated, that the United Kingdom was doing poorly in regulating PMCs, as well as acknowledging “the long experience of the United States government in working with private military companies”. This view prompted the FAC to recommend the government to “examine carefully the United

⁹³ 2002 Green Paper on Private Military Companies, p. 34.

⁹⁴ 2002 Green Paper on Private Military Companies, p. 35.

⁹⁵ 2002 Green Paper on Private Military Companies.

States government's regime for regulating and monitoring the activities of private military companies" when considering options to regulate PMCs.

The United States

The FY2008⁹⁶ National Defense Authorization Act (NDAA) calls for significant implementations and adjustments to the contents of future contracts for "contractors performing private security functions"⁹⁷ in the United States. In the NDAA it is stated that:

Not later than 180 days after the date of the enactment of this Act, the Federal Acquisition Regulation issued in accordance with section 25 of the Office of Federal Procurement Policy Act ... shall be revised to require insertion into each covered contract ... of a contract clause addressing the selection, training, equipping, and conduct of personnel performing private security functions under such contracts.⁹⁸

The NDAA includes clause requirements, the implications of noncompliance of personnel with clause, and the requirement to submit a report on a pilot program on imposition of fines for noncompliance of personnel with clause. Firstly, the clause minimum requirements stated in the NDAA include that the contractor shall "register, process, account for, and keep appropriate records of personnel performing private security functions in an area of combat operations"⁹⁹, as well as "authorize and account for weapons to be carried, or available to be used by, personnel performing private security functions in an area of combat operations". In addition, they are also responsible for the "registration and identification of armored vehicles, helicopters, and other military vehicles operated by contractors and subcontractors performing private security functions in an area of combat operations", and the reporting of incidents in which "a weapon is discharged by personnel performing private security functions in an area of combat operations, personnel performing private security functions in an area of combat operations are killed or injured, or persons are killed or injured, or property is destroyed, as a result of conduct by contractor personnel"¹⁰⁰. These requirements account for the number of personnel that PMCs use in an area of combat operations, and the weapons and armored vehicles that they have to their disposal, as well as require the reporting of incidents of injury and casualty of PMC personnel.

⁹⁶ Fiscal Year 2008.

⁹⁷ FY2008 NDAA P.L. 110-181 Sec. 862.

⁹⁸ FY2008 NDAA P.L. 110-181 Sec. 862.

⁹⁹ Iraq has been designated by this act as an area of combat operations.

¹⁰⁰ FY2008 NDAA P.L. 110-181 Sec. 862.

Secondly, the NDAA further requires that contractors ensure that their personnel are briefed and understand their obligation to comply with “qualification, training, screening, and security requirements established by the Secretary of Defense for personnel”, “applicable laws and regulations of the United States and the host country, and applicable treaties and international agreements, regarding the performance of the functions of the contractor”, and “orders, directives, and instructions issued by the applicable commander”¹⁰¹. In addition, the contractor is required to cooperate with “any investigation conducted by the Department of Defense ... by providing access to employees of the contractor and relevant information in the possession of the contractor regarding the incident concerned”.

Thirdly, the NDAA states the implications of noncompliance of personnel with clause. They are as follows:

The contracting officer for a covered contract may direct the contractor, at its own expense, to remove or replace any personnel performing private security functions in an area of combat operations who violate or fail to comply with applicable requirements of the clause required by this subsection. If the violation or failure to comply is a gross violation or failure or is repeated, the contract may be terminated for default.¹⁰²

The U.S. government retains the power to remove PMC personnel when they fail to comply with the agreements of the contract, and, if necessary, cancel the contract with the PMC. And lastly, the NDAA calls for the reporting by the inspector general of the Department of Defense on the pilot program on sanctioning for noncompliance of personnel. According to the NDAA the report should include “an assessment of the feasibility and advisability of carrying out the pilot program”. If deemed so, the report shall also include “recommendations on the range of contracts and subcontracts to which the pilot program should apply”, as well as a “schedule of fines to be imposed under the pilot program for various types of personnel actions or failures”¹⁰³. The adjustments to U.S. domestic law on PMC contracting that are stated in the FY2008 NDAA clearly represents the U.S. government effectively communicating to any PMC that they hire, what is expected of them, and what the consequences are of noncompliance. The fact that the U.S. needed to implement these policy adjustments as late as 2008, might imply to a certain extent that they were lacking them in previous years. The NDAA specifically mentioned the Iraq, as well as the Afghanistan War

¹⁰¹ FY2008 NDAA P.L. 110-181 Sec. 862.

¹⁰² FY2008 NDAA P.L. 110-181 Sec. 862.

¹⁰³ FY2008 NDAA P.L. 110-181 Sec. 862.

and how old practices were not sufficiently capable of assuring the accountability of contracting¹⁰⁴.

The enactment of Public law 110-181 introduced several changes in policy that improve the US government's ability to obtain information about the PMC. The FY2008 NDAA called for the establishment of a "commission on wartime contracting in Iraq and Afghanistan"¹⁰⁵. The commission was given seven core duties, but two of them are particularly interesting. The commission would assess "the performance exhibited by Federal contractors for the contracts under review ... and the mechanisms used to evaluate contractor performance"¹⁰⁶, as well as "the appropriateness of the organizational structure, policies, practices, and resources of the Department of Defense and the Department of State for handling program management and contracting for the programs and contracts under review"¹⁰⁷. In addition, the United States has included four specific policy changes that improve the government's ability to obtain information about PMC activities and behaviour, which became public law after the enactment of FY2008 NDAA. PMCs are now forced to cooperate with any investigation conducted by the Department of Defense. In addition, as part of an ethics program, the government has the ability to obtain information about PMC performance by having an "internal audit or review programs to identify and address conduct that may violate applicable requirements of law and regulation"¹⁰⁸. Furthermore, PMCs are required to provide certain information to the Comptroller General¹⁰⁹ when requested by this person. The NDAA states "...each major defense contractor shall provide the Comptroller General access to information requested by the Comptroller General that is within the scope of the report required by this section [Ethics Program]"¹¹⁰. These new rules give the United States the right to obtain information at any time. Additionally, since the enactment of FY2008 NDAA, PMCs are required to "register, process, account for, and keep appropriate records of personnel performing private security functions in an area of combat operations"¹¹¹. Furthermore, they are required to account for all the weapons that are at the PMC personnel's disposal, as well as report incidents of injury and deaths. And as part of the ethics program, PMCs are required to meet "self-reporting requirements, under which contractors report conduct that may violate

¹⁰⁴ Ibid.

¹⁰⁵ FY2008 NDAA P.L. 110-181 Sec. 841.

¹⁰⁶ Ibid.

¹⁰⁷ Ibid.

¹⁰⁸ FY2008 NDAA P.L. 110-181 Sec. 848, p. 245.

¹⁰⁹ The director of the Government Accountability Office.

¹¹⁰ FY2008 NDAA P.L. 110-181 Sec. 848, p. 245.

¹¹¹ FY2008 NDAA P.L. 110-181 Sec. 862.

applicable requirements of law or regulation to appropriate government officials”¹¹². By focusing on the importance of self-reporting requirements for PMCs, the US government assures itself of plenty of information concerning the acts of PMCs.

Conclusion

Comparing the domestic laws and regulations of both the United Kingdom and the United States, shows just how different the approaches are that each country has adopted. Whereas the United Kingdom has opted for a light self-regulatory scheme to control and regulate the private military industry, the United States has instead implemented far tighter domestic laws and regulation for PMCs. In the previous section I discussed how the problems related with the lack of regulation and control of PMCs were quite similar in both the United Kingdom and the United States. After the discussion on the different approaches that both countries have chosen to regulate and control the private military industry, I will focus on the main factors that have led each country to adopt a different path to regulate and control PMCs.

C. The Domestic Role Perception of PMCs

In this section I will explain how the differences in domestic role perception of PMCs influenced both the United Kingdom and the United States in adopting diverging responses to the lack of regulation and control of PMCs. My argument is based on the notion that due to the preconceptions institutionalised in both the United Kingdom or the United States, conditioned the choices that each country had when choosing the path to regulating and controlling PMCs. I will argue that the different institutionalised “norms and patterns of behaviour” present in the United Kingdom and the United States had a strong influence on policymakers in both states. Under “domestic role perception of PMCs” I refer to the worldview that policymakers in a particular country have about the role of PMCs in their society and abroad. For example, some scholars have explained that the strong regulatory framework in South Africa is to a large extent caused by the view of most South African policymakers that PMC employees are troublemakers, due to their connections to the apartheid regime¹¹³ and their formation years during this period of time¹¹⁴. This conditioned the options to regulate PMCs, as South African policymakers increasingly saw such

¹¹² FY2008 NDAA P.L. 110-181 Sec. 848, p. 245.

¹¹³ Liu (2010: 150)

¹¹⁴ Isenberg (2009: 85)

companies in a suspicious way. I will start by looking at how the domestic role perception of PMCs in the United Kingdom conditioned its policymaking.

The United Kingdom

Studying the official documents in which British policymakers discuss the options for controlling and regulating PMCs, one can identify how British policymakers thought of PMCs and what they believed the role of such companies should be in the United Kingdom. In addition, looking at the character and nature of the SIA reveals certain views on the private military industry in the United Kingdom.

Policymakers in the United Kingdom often express the importance of the market for services that PMCs provide, as well as stress the impracticality of certain approaches to PMC regulation that would impede PMCs from doing their job effectively and according to the needs of the specific missions. The Foreign Affairs Committee reported that “there is a void in the international community’s toolbox ... for adequate nation building and stabilising the situation ... in many respects the market is demanding these [PMC] services”¹¹⁵, as well as recommend the British government to “consider carefully how to ensure that a licensing regime allows companies to operate with the necessary speed without compromising the effectiveness of the vetting process”¹¹⁶. In other words, the Foreign Affairs Office considers it crucial that PMCs are regulated and controlled, but does not ignore the fact that PMCs often need to act speedily and with conviction. Even so, the Foreign Affairs Office stresses that “despite private military companies’ concerns about client confidentiality, we conclude that the need to ensure that the sector is properly regulated overrides the private interests of PMCs and their clients”¹¹⁷. The 2002 Green Paper, which was at its core a call out to all involved for a discussion on how to regulate the private military industry, stated that one of the main benefits of regulating this industry was the fact that “it could help establish a respectable and therefore more employable industry”¹¹⁸. The 2002 Green Paper stated several options for regulation including a complete ban of PMC activity, a ban of U.K. PMC activity abroad, a licensing regime for military services, registration and notification, and self-regulation¹¹⁹. In all cases, the document states concerns about the negative or positive effects that each option

¹¹⁵ Ninth Report from the Foreign Affairs Committee, Session 2001-02, HC 922, para. 9.

¹¹⁶ Ninth Report from the Foreign Affairs Committee, Session 2001-02, HC 922, para. 124.

¹¹⁷ Ninth Report from the Foreign Affairs Committee, Session 2001-02, HC 922, para. 126.

¹¹⁸ 2002 Green Paper, HC 577, para. 64.

¹¹⁹ 2002 Green Paper, HC 577, para. 70-76.

would have for the private military industry from a market-oriented approach. This is done either by stating the negative side of banning PMCs for weak states that would require their services, or by highlighting the advantage that a self-regulatory framework would have for foreigners in separating the reputable companies from the others. For example, regarding a total ban the 2002 Green Paper states that “such legislation [a total ban] could deprive weak but legitimate governments of needed support – which the international community is unable or unwilling to offer”, and that “a blanket ban would deprive British defence exporters of legitimate business – services are often a necessary part of export sales”. Furthermore, when discussing the disadvantages of a licensing scheme for military services the 2002 Green Paper states that “licensing could give rise to delay. This could work to the disadvantage both of British companies and their customers” and that “unless special provisions were made a licensing regime could put British defence exporters at a competitive disadvantage”¹²⁰. These statements say something about the way that British policymakers view the private military industry. In sharp contrast to how South African policymakers viewed PMCs¹²¹, British policymakers see the benefits of having a healthy private military industry in the United Kingdom. Unlike the United States, as I will argue in the next section, British policymakers are more concerned about having a healthy private military industry than with concerns about coordination between PMC operations and the national soldiers. At the core of regulating the private military industries, and the language used in official documents discussing possible options for regulating the industry, one can find the United Kingdom’s interest in maintaining a strong and competitive private military industry that does not conflict with British foreign and defence objectives, and that respects human rights. PMCs are seen as actors contributing to the British interest as well as providing much needed services to foreign clients. In this light, it makes more sense that British policymakers have found the light self-regulatory scheme of the SIA sufficient for the purposes of the private military industry in the United Kingdom.

The United States

In contrast to the light self-regulatory scheme for controlling and regulating PMCs, the United States has developed a much tighter and extensive regulatory framework. There are undoubtedly many factors that influenced this policy path. However, it seems likely that the

¹²⁰ 2002 Green Paper, HC 577, para. 73.

¹²¹ The historical contexts of the emergence of PMCs in South Africa led many policymakers to view them with suspicion.

role perception held in the United States about PMCs in U.S. society and abroad had an important impact. Unlike the United Kingdom, the United States is less involved in maintaining a healthy private military industry. Instead, PMCs are seen by U.S. policymakers as an integral part of U.S. military and defence strategy. The United States is mostly concerned with coordinating PMC operations with operations of U.S. armed forces, and making sure that these companies behave according to human rights and the interest of the United States¹²². A clear example of this is the formation of the Coalition Provisional Authority (CPA), a body that provided a legal framework for PMCs active in Iraq¹²³. Interestingly, the CPA also provided PMCs legal immunity from Iraqi law. The CPA provided PMCs in Iraq with some minimum standards and a framework from which to keep expanding as needed. An additional example of the United States attempting to coordinate the efforts for reconstructing Iraq, was the 2004 Interagency Policy Memorandum ‘Contractor Security in Iraq’ prepared by the Deputy Secretary of State and the Deputy Secretary of Defense which “proposed guidance for all US government contractors working in Iraq and for government offices supporting and co-ordinating those contractors” and provided “an initial blueprint for eventual adoption of common contractor coordination and security rules for all nations providing contractors for the reconstruction of Iraq”¹²⁴.

The Fiscal Year 2008 National Defense Authorization Act (NDAA) calls for significant implementations and adjustments to the contents of future contracts for “contractors performing private security functions”¹²⁵. In the NDAA it is stated that:

Not later than 180 days after the date of the enactment of this Act, the Federal Acquisition Regulation issued in accordance with section 25 of the Office of Federal Procurement Policy Act ... shall be revised to require insertion into each covered contract ... of a contract clause addressing the selection, training, equipping, and conduct of personnel performing private security functions under such contracts.¹²⁶

These adjustments to U.S. domestic law and regulation of PMCs is yet another example of how U.S. policymakers were interested in making the inclusion of PMCs in U.S. military and defence strategy as beneficial as possible, as well as an example

¹²² Isenberg (2009: 85)

¹²³ Isenberg (2009: 85)

¹²⁴ Isenberg (2009: 86)

¹²⁵ FY2008 NDAA P.L. 110-181 Sec. 862.

¹²⁶ FY2008 NDAA P.L. 110-181 Sec. 862.

of the focus that these policymakers had in assuring that the behaviour of PMC personnel was in accord with the rules of conduct laid out by the U.S. government.

The emergence of PMCs as fundamental pieces in U.S. foreign military strategy is important in understanding how U.S. policymakers view the role of these companies. There were three factors that contributed to this particular view. Firstly, during the Clinton administration, but also under the Bush administration and the Obama administration, the United States downsized their military¹²⁷. Secondly, the military activity of United States in foreign lands¹²⁸ increased as a result of the attacks of September 11, prompting the United States' war against terrorism¹²⁹. And thirdly, increased domestic pressure about the United States' presence in Afghanistan and Iraq made using PMC employees instead of U.S. soldiers more attractive. This is particularly apparent in the increasing PMC-to-U.S. soldiers ratio in the past decade, and in Obama's order to pull out all U.S. soldiers from Iraq in 2011¹³⁰. The figures and facts reported in a congressional research of Department of Defense contractors in Afghanistan and Iraq in May 2011 showed that "DOD [Department of Defense] relies extensively upon contractors to support overseas contingency operations. As of March 2011, DOD had more contractor personnel in Afghanistan and Iraq (155,000) than uniformed personnel (145,000)"¹³¹. This was before Obama pulled back U.S. troops from Iraq.

Conclusion

I have attempted to show the importance of the perception that policymakers and officials have about the role of PMCs in the interest of their nation, and how the different institutionalised patterns of norms and behaviour in the United Kingdom and the United States influenced their choice for PMC regulation. I used South Africa as reference to show how the historical context of the apartheid regime in that country influenced South African policymakers when adopting and implementing domestic laws and regulation for the private military industry. I believe that the policymakers in

¹²⁷ The Washington Post (2012) Available at http://www.washingtonpost.com/opinions/repeating-a-mistake-by-downsizing-the-army-again/2012/01/05/gIQA8fHfdP_story.html

¹²⁸ Especially Afghanistan and Iraq.

¹²⁹ Isenberg (2009: 83)

¹³⁰ The New York Times (2011) Available at <http://www.nytimes.com/2011/12/25/world/middleeast/us-loses-leverage-in-iraq-now-that-troops-are-out.html?pagewanted=all>

¹³¹ Schwartz and Swain (2011: 6)

the United Kingdom and the United States have different views about the role of PMCs for the interest of their country. This in turn conditioned the regulatory options that both countries seriously considered. Firstly, the main concerns of British policymakers is that the country can host a healthy private military industry that benefits British companies as well as foreign customer that are in need of security services, and that these PMCs do not act in ways that are in violation of human rights, and in conflict with British foreign and defence policy objectives. The United Kingdom, unlike the United States, is not a big customer of PMCs, with an estimated 148 million pounds spent on PMCs in recent years¹³². This amount is very small compared to what the United States is spending on PMCs. For example, one contract that the British PMC Aegis Defence Services obtained from the U.S. government during the Iraq War was valued at 293 million dollars, twice the amount of the total budget of the United Kingdom. The United Kingdom is a supplier of military and security services, and the choice of British policymakers to opt for no state regulation, and instead have a self-regulatory body such as the SIA, is a reflection of that. On the other hand, the United States is far more concerned with its own operations abroad than with providing security and military services to foreign customers. The United States is concerned with coordinating the operations of its own armed forces with PMC operations. U.S. policymakers see PMCs as a fundamental part of their foreign military policy. For the United States, the purpose of PMC regulation is to assure that these companies behave and act according to the interest of the United States, and that PMC employees respect standard rules of conduct and human rights. However, in contrast to the United Kingdom, the United States is focused on the activities of its PMCs (the country hires them after all), and therefore it seems logical that U.S. policymakers opted for a tight regulatory framework.

D. Military Culture

In this section I will explain how the differences in military cultures in the United Kingdom and the United States influenced both states in adopting diverging responses to the lack of regulation and control of PMCs. Military culture is in respect to PMCs a very relevant institution, for a large part of PMC personnel have a background in their nation's military. Military cultures have in each country often been institutionalised as a result of past military

¹³² War on Want (2009) Available at <http://www.waronwant.org/news/press-releases/16692-licence-to-kill-for-private-armies>

experiences, contributing to the development of a culture that conditions how individuals understand war and what constitutes a military victory. Culture can be described as “what a group learns over a period of time as that group solves its problems of survival in an external environment and its problems of internal integration”¹³³. Hillon argues that

The values underpinning the world’s military cultures evolved throughout history in response to the needs of men attempting to succeed in combat, that is, as a result of occupational necessity. Quite simply, soldiers need codes of conduct, values, methods, procedures, and organizations characterized by what we might quaintly term the “military virtues”¹³⁴.

I will argue that the pre-existing institutions of military culture in the United Kingdom and the United States in the decades running up to the twenty-first century, were fundamentally different, which in turn has had an impact on how policymakers perceived the necessity of different forms of PMC regulation. I will start by looking at the United Kingdom.

The United Kingdom

British military history has been strongly influenced by the commonwealth and the managing of the old British Empire. As Mockaitis argues:

The British Army has excelled in small-unit, antiguerrilla warfare as they did in other aspects of counterinsurgency. History had given them an army that was relatively small and decentralized and, therefore, ideally suited to such warfare. Since Britain is an island nation, the navy and not the army has been its first line of defense. Distrusted and underfunded, the junior service was thus relatively unaffected by the revolution in size and organization experienced by continental armies during the nineteenth century.¹³⁵

The United Kingdom has had a large amount of experiences in counterinsurgency missions during the 19th and 20th century, adding to the military knowledge of the British military institutions as well as becoming embedded in British military culture.¹³⁶ Looking at the recent wars in Afghanistan and Iraq, as well as the United States involvement in the Korea and Vietnam War, it becomes apparent that enemies of great military powers are reluctant to combat them in a conventional way. The tendency has been for modern warfare to be asymmetrical, fought in small wars, and non-force-on-force battles, a type of warfare that is not new for the British army. This shift from conventional wars to asymmetrical ones has benefited the British army in the sense that they are already accustomed to the dynamics of

¹³³ Schein (1990: 111)

¹³⁴ Hillen (1999: 153)

¹³⁵ Mockaitis (1990: 146)

¹³⁶ Cassidy (2005: 53)

this new way of waging war. Dynamics present in the missions of counterinsurgency in Afghanistan and especially Iraq.

The British approach to warfare was first documented in the Peninsular War against Napoleon, acknowledging inferiority in numbers. The Duke of Wellington, Arthur Wellesley was well aware of Napoleon's superiority on terrain¹³⁷, and as such chose to distract the French Army by pulling them out of the south. This opened a window of opportunity for Spanish guerrillas to attack "French outposts and lines of communication"¹³⁸. As Cassidy argues "the British way of war was in fact highly specialized, which contrasted sharply with war as fought between great industrial powers"¹³⁹. The British approach was focused on small wars, as well as on the skills of the soldier, rather than the system. War for the British was about small victories and low casualties, not about long sizeable battles and significant troop losses¹⁴⁰. This had its disadvantages, as became apparent in the Boer Wars and the two world wars. It also had the effect of creating an exotic view of war in British minds, seeing war as an exciting adventure in foreign lands¹⁴¹.

After the Second World War, British soldiers¹⁴² were already accustomed to and experienced with techniques of military insurgency and guerrilla warfare. The British army adapted their knowledge of rebel tactics it had learned from its imperial past¹⁴³. When discussing the advantages that this brought the British army, Pimlott notes the fact that "the British advantage in a tradition of flexibility, based upon the fact that throughout the colonial policing campaigns of the past they had been forced to make do with only limited resources"¹⁴⁴. Perhaps the most important factor of British success in counterinsurgency was its integrated civil-military approach, in which command was held by civilian officials that kept the overall political strategy in mind, while the army accepted this civilian control and recognised the need to employ minimum force¹⁴⁵. The British Army was flexible and extremely capable of adapting to local circumstances and requirements, while identifying when large scale wars were not being successful and switching to small scale tactics¹⁴⁶.

¹³⁷ The British had by far the strongest Navy, but were far inferior on land.

¹³⁸ Cassidy (2005: 54)

¹³⁹ Cassidy (2005: 54)

¹⁴⁰ Cassidy (2005: 54)

¹⁴¹ Cassidy (2005: 54)

¹⁴² Including colonial police.

¹⁴³ Cassidy (2005: 55)

¹⁴⁴ Pimlott (1985: 16-19)

¹⁴⁵ Cassidy (2005: 56)

¹⁴⁶ Cassidy (2005: 56)

Cassidy illustrates how the British army was capable of achieving political outcomes that benefited the United Kingdom:

The British Army fought its post-World War II campaigns in the predominantly rural jungle conditions of Malaya, Kenya, Borneo, Guyana, and Dhofar to the desert conditions of Palestine; Muscat and Oman; Radfan; and Kuwait and was successful in small-scale and medium-scale operations. The British Army helped bring about favourable political outcomes for Britain. In almost every case of devolution, newly independent states allowed the British Army to retain facilities in their countries”.¹⁴⁷

These past experiences and successes that the British army had in its imperial as well as post-World War II period, became embedded and institutionalised in British military culture. The British army saw counterinsurgency and small wars as “the norm”¹⁴⁸. The historical, as well as the geographical context of British military operations have helped shape a “pragmatic, indirect British approach to strategy”¹⁴⁹. These factors make the British military culture an advantageous one for soldiers that need to operate in counterinsurgent operations such as Afghanistan and Iraq. The important fact that many British PMCs hire ex-British military soldiers, means that this British military culture goes with them, and helps them be successful in the type of operations that PMCs are often hired to do. The choices of British policymakers, when it comes to military questions, are strongly conditioned by the historical heritage of the British military’s past and the culture it has formed throughout the years. This is no different in the case of regulating and controlling the private military industry of the United Kingdom. Since British soldiers are seen to have this military culture embedded in them, they are also perceived to have the right skills and experience to act successfully and appropriately in the type of operations that PMCs often undertake. The British military culture conditions the options that British policymakers consider when regulating PMCs, by minimising the perceived necessity of regulating soldiers (or now PMC employees) that have the values and norms of the British military culture embedded in them. The light self-regulatory framework that is present in the United Kingdom is in my view a reflection of this.

The United States

In contrast to the United Kingdom, the United States has historically little knowledge or experience with counterinsurgency and small wars. Indeed, Hillen argues that “the post–Cold

¹⁴⁷ Cassidy (2005: 56)

¹⁴⁸ Mockaitis (1991: 75)

¹⁴⁹ Cassidy (2005: 58)

War shift in U.S. policy toward preparing for peacekeeping missions such as in Bosnia, Somalia, Haiti, and Rwanda will challenge a traditional military culture rooted in the heroic efforts of past wars”¹⁵⁰. Similarly, it could be argued that the wars in Afghanistan and Iraq, representing the shift towards counterinsurgency operations, will also challenge the traditional U.S. military culture¹⁵¹.

One of the fundamental factors in determining the military culture of a nation is the organisation of its army and the manner in which it conducts its missions¹⁵². The United States has for a long time based its military strategy on logistics, “overwhelming superiority”, and a strong emphasis on technological superiority. The latter has been a particularly important cornerstone of U.S. military strategy in the last decades, since the downsizing of the U.S. military has prompted U.S. policymakers to believe that the United States needed to compensate for its shrinking numbers with technological advancements¹⁵³. It is no surprise then that the U.S. military culture does not particularly suit the dynamics of counterinsurgency and small wars that are characteristic of the Afghanistan and Iraq War. In these types of conflicts, U.S. soldiers often lack the skills and experience that their British counterparts have in communicating with the locals, and achieving outcomes that are beneficial to their country. Furthermore, Cassidy argues that the U.S. army has always had a preference for fighting large scale wars, while maintaining certain reluctance to adapt to the new challenges of counterinsurgency and “low-level warfare”. The United States remained stubbornly loyal to their traditional approach based on technological and numerical superiority¹⁵⁴. The First and Second World Wars only reinforced this believe in traditional U.S. military culture.

Due to this traditional approach to warfare, and in contrast to the British counterpart, the U.S. army has had little experience and gathered little applied knowledge on how to handle situations in which soldiers need to operate in uncertainty and numerical disadvantage. This has had consequences for how U.S. soldiers are perceived by the locals of Afghanistan and Iraq. Whereas the British soldiers and British PMC employees know how to handle delicate situations, and understand and know how to win the minds and hearts of the locals, the U.S. soldiers and U.S. PMC employees isolate themselves from locals and keep their distance. In

¹⁵⁰ Hillen (1999: 155)

¹⁵¹ Hillen (1999: 155)

¹⁵² Hillen (1999: 156)

¹⁵³ Murray (1997: 57-69)

¹⁵⁴ Cassidy (2008)

addition, U.S. military culture influences the tendency of American soldiers to be distrustful of locals, which have the negative consequences of missing out on crucial information, as well as causing accidents that could have otherwise been prevented¹⁵⁵. It can be argued that the U.S. military culture was not yet prepared for the Afghanistan and Iraq War. Many cases were documented of unprovoked killings of locals in Iraq¹⁵⁶, bringing to light the problems that the U.S. military culture brings for counterinsurgency operations of U.S. soldiers and U.S. PMCs. The same way that British policymakers are conditioned by the military culture of their state, U.S. policymakers are influenced by the military culture of theirs. U.S. soldiers in general lack the skills and knowledge to handle sensitive situations of counterinsurgency missions, as well as to win the hearts and minds of the locals. This lack of experience during the Afghanistan and Iraq war prompted U.S. policymakers to implement a tighter regulatory framework in order to control the behaviour of their soldiers and the PMCs that they hire. The norms and values embedded and institutionalised in the U.S. military culture has had a relevant impact on how the perception was created under U.S. policymakers that regulation was indeed needed.

Conclusion

British military history has been strongly influenced by the commonwealth and the managing of the old British Empire, where low-level battles, counterinsurgency operations and small wars were common. This historical heritage has equipped British soldiers with the right skills and experience to act successfully and appropriately in the type of operations that PMCs often undertake. In contrast to the United Kingdom, the United States has historically lacked this knowledge or experience with counterinsurgency and small wars. U.S. military culture is often said to condition American soldiers to be distrustful of locals, which have the negative consequences of missing out on crucial information, as well as causing accidents that could have otherwise been prevented. The military cultures of these states are important because a large part of PMC employees have a background in their national army, taking with them the norms, values, and behaviours that are embedded and institutionalised in their national military culture. The policymakers of both states were conditioned by the military culture of their state. The British approach is characterised by the limited perceived necessity of regulating soldiers. The light self-regulatory framework that is present in the United

¹⁵⁵ Cassidy (2006: 4)

¹⁵⁶ Washington Post (2007) Available at: <http://www.washingtonpost.com/wp-dyn/content/article/2007/10/11/AR2007101101030.html>

Kingdom is a result of these considerations. In sharp contrast, U.S. soldiers in general lack the skills and knowledge to handle sensitive situations of counterinsurgency missions, as well as to win the hearts and minds of the locals. U.S. military culture condition policymakers to consider tighter regulatory measures in order to keep under control the behaviour of U.S. PMC personnel.

E. Orientation shifts in Policymaking

In this section I will explain how orientation in policymaking influenced both the United Kingdom and the United States in adopting diverging responses to the lack of regulation and control of PMCs. I will argue that choices of both the United Kingdom and the United States for regulating PMCs were conditioned by the way of thinking and the orientation of domestic policymaking in general. I will argue that the different institutionalised norms and patterns of behaviour present in the United Kingdom and the United States had a strong influence on policymakers in both states.

As was mentioned in the literature review, the United Kingdom has been in a process of privatisation since the 1980s, under the Thatcher administration and later the Blair administration, in which many areas that traditionally were considered part of government's tasks were now being outsourced to private companies¹⁵⁷. Part of the reasoning for the privatisation of government tasks, is that Britain no longer was an imperial power, and therefore needed to reduce its activities abroad and strive to make the British government smaller, but also it was often seen as a reaction to the 1973 Oil Crisis. Neo-liberal thought, and a strong believe in market-approaches was embedded in policymaking rationale in the United Kingdom for much of the last three decades¹⁵⁸. Experts and policymakers in the United Kingdom often display a strong believe in market forces and see government intervention as hindering the proper functioning of an industry. As Krahmman argues:

The British government has thus from the start adopted a market-oriented approach to the emerging private military service industry. The outsourcing of military functions to private firms has been designed to draw on the existing expertise of private businesses in producing services at maximum value for money. Governmental involvement in the privatized sector has been perceived

¹⁵⁷ Krahmman (2005: 280)

¹⁵⁸ Krahmman (2005: 280)

as hindering this aim because it would restrict the ability of companies to operate according to market principles.

Krahmann, in her discussion comparing Germany and the United Kingdom in how they regulated and controlled private actors providing security services, illustrates how Germany held a far tighter control on the private security industry due to strong strategic concerns in the form of corporate shareholding and joint ventures¹⁵⁹. The United Kingdom, on the other hand, gave more importance to the argument that market forces would better regulate the industry, and less to the strategic concerns that the German policymakers had. Self-regulation is often the preferred choice of British policymakers. This could be seen as a sign of the predominance of the neo-liberalist thought in the United Kingdom, and the strong impact it had on the speed of privatisation of the defence industry, as well as the strong focus on self-regulation. The United Kingdom has privatised British Aerospace, British Telecom, water and electricity, as well as the National Health System and the Royal Mail¹⁶⁰. In each area of privatisation, productiveness and efficiency are often arguments that are used to support them. British policymakers are particularly comfortable, much more so than most European governments, to privatise important governmental sectors, as well as letting the industry regulate itself. Even the Labour Party, traditionally a party considered to be positioned on the left of the political spectrum, found it relatively easy to adopt aspects of the neo-liberal ideology, as the Blair administration kept privatising more areas of government. Neo-liberalism seems to have been embedded in British politics since the oil crisis of 1973, influencing how British policymakers approach domestic issues. It seems unsurprising then that British policymakers strongly considered options to regulate the private military industry that were aligned with what was common and institutionalised in British policymaking behaviour. Self-regulation and strong faith in market forces to deliver positive outcomes is at the core of the choices that are made in the United Kingdom. Institutionalised neo-liberal norms and values held by most British policymakers conditioned the choices that were seriously considered, and the result has been the choice to do nothing as a government, and instead to actively support the self-regulation of the private military industry.

Whereas the Thatcher administration reintroduced the neo-liberal ideology into British politics after years of the social democratic orientation of government, such reintroduction

¹⁵⁹ Krahmann (2005: 285)

¹⁶⁰ The Guardian (2012)

was not needed in the United States, since the country has long had a strong liberal¹⁶¹ economic ideology, showing preference for small government over intrusive government. The Second World War has proved to be an important factor in explaining why European nation states adopted social welfare programs to help their citizens rebuild after the chaos of two world wars. The United States did not suffer to the same degree as European states did from both world wars, and therefore never became a social welfare state as the United Kingdom¹⁶² and other European states did. British policymakers during the Thatcher years changed and restructured many of the social programs that had been implemented throughout the years since the Second World War¹⁶³. The United States did not undergo a transitional period in which the country shifted from a liberal laissez-faire system to a social democratic regime after the Second World War, to then reintroduce core liberal principals in a new way in the years after the 1973 Oil Crisis. The Reagan administration was also characterised by neo-liberal principals, but it did not represent a change in orientation in civil servants and policymakers. When needed, policymakers in the United States have shown to be willing to consider options that are not entirely aligned to either neo-liberal principals, or options letting market forces regulate industries. A good example of this has been the 2010 healthcare reform that took place in the United States, whereas the National Health System in the United Kingdom has seen elements of privatisation, especially in management of hospitals under the Health Act¹⁶⁴. Due to their historical context, certain norms and patterns of behaviour have been institutionalised in both states. In the case of the United States, the fact that liberalism has always been the main approach to government, the state only acts in areas where it believes government intrusion is required. In addition, the fact that the United States has had to take on the role of a superpower, it has had to increase the reach of its government to manage this new role. The United Kingdom, on the other hand, comes from being a superpower, and has had to adjust to its new role by reducing the tasks that the British government is responsible for. The orientations of policymakers in both countries have arguably conditioned the options that policymakers seriously consider when adjusting domestic law or regulation. In this case, the orientation of policymaking in the United States is one that is not afraid or phobic about increasing the reach of government in certain areas. On the other hand, the transition that the United Kingdom underwent in the 1970s and 1980s

¹⁶¹ Liberal refers here to the economic tradition of Liberalism, not to the use of the word “Liberal” in U.S. politics which often is used to mean progressive and non-conservative.

¹⁶² BBC (2011) Available at http://www.bbc.co.uk/history/british/modern/field_01.shtml

¹⁶³ BBC (2011) Available at http://www.bbc.co.uk/history/british/modern/field_01.shtml

¹⁶⁴ The Guardian (2011) <http://www.guardian.co.uk/society/joepublic/2011/nov/22/nhs-bill-privatisation-stealth>

created an orientation towards self-regulation and laissez-faire approaches, which made British policymakers more prone to opt for an approach more aligned with neo-liberal principals, as well as place more faith in market forces to regulate industries. In the case of the private military industry, the United States and the United Kingdom differed in approach, which from my point of view can be partially explained by the institutionalised orientation of policymakers in each country.

6. Conclusion

The aim of this thesis has been to explain why the United Kingdom and the United States arrived to different legislative and regulatory outcomes concerning the regulation of the private military industry. The research question was: *What factors account for the different legislative and regulatory responses of the United Kingdom and the United States to the issues related to private military companies?* This thesis provides three main findings.

Firstly, it shows the importance of the perception that policymakers and officials have about the role of PMCs in their state. I argued that the main concerns of British policymakers were that the country can host a healthy private military industry that benefits British companies as well as foreign customer that are in need of security services, and that these PMCs do not act in ways that are in violation of human rights, and in conflict with British foreign and defence policy objectives. In contrast, U.S. policymakers see PMCs as a fundamental part of their foreign military policy. The purpose of PMC regulation is to assure that these companies behave and act according to the interest of the United States, and that PMC employees respect standard rules of conduct and human rights. These different institutionalised patterns of norms and behaviour in the United Kingdom and the United States influenced their choice for PMC regulation.

Secondly, it shows the importance of military culture. I argued that the historical military heritage of the Commonwealth and the British Empire has equipped British soldiers with the right skills and experience to act successfully and appropriately in the type of operations that PMCs often undertake, leading policymakers to not see the necessity of regulating British PMCs other than with a self-regulatory licensing scheme. On the other hand, U.S. soldiers in general lack the skills and knowledge to handle sensitive situations of counterinsurgency missions, as well as the skill to win the hearts and minds of the locals. U.S. military culture condition policymakers to consider tighter regulatory measures in order to keep under control the behaviour of U.S. PMC personnel.

And lastly, it shows the importance of the orientation of policymakers. I argued that the United Kingdom underwent a transition from social democracy to neo-liberalism in the 1970s which created an orientation towards self-regulation and laissez-faire approaches, which made British policymakers more prone to opt for an approach more aligned with neo-liberal principals, as well as place more faith in market forces to regulate industries. The orientation

of policymaking in the United States on the other hand, is one that is not afraid or phobic about increasing the reach of government in certain areas. The different orientations of policymakers affected the choices to which both states arrived.

Before presenting the analysis, I started by reviewing the academic literature that attempts to explain what the factors are that influence the choices that policymakers make when regulating the private military industry and other quasi-military private actors. I then explained the use of historical institutionalism to answer my research question, followed by the methodology used to come to my main findings, which consisted mostly of a historiographical approach in combination with text and document based techniques.

Further studies should focus on three things. Firstly, they should attempt to test the three independent variables used in this thesis on other cases, despite the limited amount of states that would meet the requirements. Secondly, they should seek to find new variables that help us understand why different states reach different outcomes. A more comprehensive explanation is required to fully explain the dependent variable. And lastly, they should focus on broadening the theoretical scope to explain in different ways what makes states regulate PMCs, as well as explain why they do so in a certain configuration.

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