Jovana Jezdimirovic Ranito

Why doesn´t it work? US regulatory challenges in outsourcing private use of violence in stability operations

Tese de doutoramento em Relações Internacionais – Política Internacional e Resolução de Conflitos, orientada por Prof. Doutor Daniel Pinéu e Prof. Doutor José Manuel Pureza e apresentada à Faculdade de Economia da Universidade de Coimbra

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Orientadores: Prof. Doutor José Manuel Pureza e Prof. Doutor Daniel Pinéu

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Acknowledgments

The journey of writing a dissertation tends to be long and mostly lonely, and mine was not different. I faced many obstacles, and even with all optimism I hold, there were times when I was wondering why I was doing this. Troubles how to turn research questions manageable and executable, financial burden to complete it, and finding solutions how to do my research within a topic considered to be sensitive due to protection of US national security, were just some of the most memorable obstacles. Looking back, they just turned this journey more exciting. In the course of this process, that culminates with this dissertation, I have grown professionally and learned many new skills, from how to interview a wide range of people, how to present effectively my research, not to fear to go beyond what I know, and explore other disciplines, to acquiring new skills that will certainly help me through my future career.

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Abstract

The outsourcing of security by states to private actors is an ever growing phenomena, and can be seen as a future template of how states will proceed in their civil-military operations abroad. Even though sovereigns have outsourced violence throughout history, the context of international inclusion of protection of human rights makes it different from what happened in the past. In addition, the end of the Cold War brought a market liberalisation of the state's monopoly over the use of force. In this context, some states suddenly assumed the role of regulator and supervisor of a private security market, rather than the more classical role of security provider. The regulation of security outsourcing in-post conflict scenarios by the US - the central topic of this dissertation - has often been seen as the product of a rapid build-up from a near regulatory vacuum, thus representing a patchwork of previously existing regulations for civilian contractors, with the Iraq and Afghanistan interventions only having highlighted its difficulties. The last decade has witnessed a growing body of scholarship looking at regulatory obstacles, and seeking to explain its pitfalls through well-established theoretical frameworks. Existing research has been fragmented among different disciplines, each approach often limited to a single regulatory dimension (legislative, contractual, economic or political). The reason for their failure to make regulatory analysis comprehensive is twofold. First, they failed to explain regulatory obstacles because - in attempting to fit this unorthodox, new type of regulatory process, which joins various stakeholders, and happens in specific conditions with low transparency and abroad - analysis was made to fit pre-existing structures (from the Cold War era), insisting on largely untenable public-private and domestic-international division. Second, in the process of doing so, scholars often reproduced commonly accepted wisdom, rather than look at the regulatory process itself, invoking the difficulties of access to information and the low transparency of the process. To overcome these obstacles, we propose a use of Bourdieu´s theory of practice to assist us in learning more about regulatory obstacles facing the US government's outsourcing of security. By applying Bourdieu´s concepts of field, habitus and doxa to this regulatory process, we sought to unpack the identities of all

stakeholders involved, establishing their heterogeneous nature, and learning about the motivations behind their actions and decisions. Such an analysis demystifies the regulatory process This resulted in identifying the various types of obstacles the US Government faces: from political, over organizational and bureaucratic ones, to legislative. The study of practices further allows us to propose specific alterations, which might improve the regulatory process.

Resumo

A contratação de actores privados pelos Estados para fornecerem serviços de segurança é um fenómeno em crescimento, e pode ser vista como um modelo a seguir no futuro quanto ao modo dos Estados procederem nas operações civis-militares fora das suas fronteiras. Embora os Estados soberanos sempre tenham subcontratado segurança ao longo da História, o contexto da inclusão internacional da protecção de direitos humanos torna o fenómeno diferente do que acontecera no passado. Além disso, o fim da Guerra Fria trouxe a liberalização do mercado, em relação ao monopólio do uso da força pelo Estado. Neste contexto, alguns Estados de repente assumiram o papel de regulador e supervisor do mercado de segurança privada, ao invés do clássico papel de fornecedor de segurança. A regulação da subcontratação da segurança em cenários pós-conflito pelos EUA – o tópico central desta dissertação – tem sido muitas vezes visto como o produto de uma rápida ascensão a partir de certo vazio regulatório, representando uma adaptação das regulações existentes para fornecedores civis, sendo que as intervenções no Iraque e Afeganistão apenas realçaram essas dificuldades. Na última década assistiu-se a um aumento do número de académicos a estudar os obstáculos à regulação, e a procurar a explicação para as suas lacunas através de explicações teóricas bem estabelecidas. A investigação existente tem sido fragmentada pelas diferentes disciplinas, cada uma limitada com o foco na uma dimensão da regulação (legislativa, contratual, económica ou política). A razão para o seu falhanço em fazer a análise da regulação compreensível é dupla. Primeiro, falharam em explicar quais os obstáculos à regulação porque – ao tentar ajustar este novo e não ortodoxo tipo de processo de regulação, que abrange várias partes envolvidas, e acontece em condições específicas de pouca transparências e fora das fronteiras nacionais – a análise era feita para se ajustar a estruturas pré-existentes (da era da Guerra Fria), insistindo em insustentáveis divisões entre público e privado ou doméstico e internacional. Segundo, durante o processo, os académicos muitas vezes reproduziram a sabedoria commum, em vez de olhar o próprio processo de regulação, invocando dificuldades de acesso a informação e pouca transparência do processo. Para ultrapassar estes obstáculos, propomos o uso da teoria de Bourdieu para nos auxiliar na aprendizagem acerca dos obstáculos à regulação que o governo dos EUA enfrenta na contratação de segurança. Aplicando os conceitos de Bourdieu como *field*, habitus e doxa, ao processo regulatório, tentámos deconstruir a identidade dos actores envolvidos, estabelecer a sua natureza heterogénea, e aprender acerca das motivações por trás das suas acções e decisões. Essa análise desmistifica o processo regulatório. Isto resultou na identificação de vários tipos de

obstáculos enfrentados pelo governo dos EUA: desde políticos, passando por organizacionais e burocráticos, até aos legislativos. O estudo das práticas permite ainda propor alterações específicas, que podem melhorar o processo regulatório.

Acronyms

CBO	Congressional Budget Office
CEJA	Civilian Extraterritorial Jurisdiction Act
CWC	Commission on Wartime Contracting
DFAR	Defense Federal Acquisition Regulation
DoD	Department of Defense
DoJ	Department of Justice
DoS	State Department
DRL	(Bureau of) Democracy, Human Rights and Labour
DS	(Bureau of) Diplomatic Security
FAR	Federal Acquisition Regulation
FOIA	Freedom of Information Act
GAO	Government Accountability Office
IC	International Community
ICOC	International Code of Conduct for Private Security Service Providers
ICOCA	International Code of Conduct for Private Security Service Providers´Association
IO	International Organization
IPOA	International Peace Operations Association
IR	International Relations

ISOA	International Stability Operations Association
JAG	Judge Advocate General
MEJA	Military Extraterritorial Jurisdiction Act
MOA	Memorandum of Agreement
NCIS	Naval Criminal Investigative Service
NDAA	National Defense Authorization Act
OMB	Office for Management and Budget
PSCs	Private Security Companies
SIGAR	Special Inspector General for Afghanistan Reconstruction
SIGIR	Special Inspector General for Iraq Reconstruction
SMTJ	Special Maritime and Territorial Jurisdiction
UCMJ	Uniform Code of Military Justice
UN	United Nations
US	United states
WPS	Worldwide Protective Services

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Introduction

2003, Abu Ghraib prison, Iraq: several suspicious deaths of prisoners are uncovered and investigated, where US military and CIA contractors (from CACI and TITAN, now L-3) were involved. Fast forward to 2004: 256 Iraqi detainees from Abu Ghraib prison sued CACI International and TITAN Corporation for participating in and directing acts of torture, war crimes, crimes against humanity, sexual assault, as well as cruel, inhuman and degrading treatment at that facility (Business and Human Rights Resource Centre, 2013). 2007, September 16, Nissour Square, in Baghdad, Iraq: Blackwater contractors working under a State Department contract kill 17 civilians and injure 20 during a firefight. Fast forward to September 11, 2009, Washington DC: a Court of Appeal dismisses the charges against contractors and claims they were under US government contractor immunity. More recently, in 2014 after number of appeals regarding the Court of Appeal and Supreme Court's decision about Abu Ghraib, which ended on a dismissal of charges, detainees again filed a suit against contractors, but still without a favourable outcome. Also, in 2015, in Washington, DC, four of Blackwater contractors involved in the Nisour square massacre heard a sentence from a federal judge, after years of dismissals and new trials. However, their lawyers are again challenging the sentence due to the unclear normative framework under which they have been judged.

Besides the consideration that justice delayed is justice denied, often we encounter the opinions of both academics and policy experts regarding how things would end up if the incidents described above would have taken place in 2016, and

they are not optimistic about different outcome. Inquiries about the apparent inefficiency of the US government's regulatory approach have been usually shot down with the same old answers for more than a decade now, and eventually these have become commonly accepted wisdoms. Such an approach leaves the problem of regulatory inefficiency unsolved and does not stimulate the search for productive solutions. As Ann Hagedorn explains, Iraq was the first contractor´s war (Hagedorn, 2014). Without an effective solution, most of the issues that the overseas operations in Iraq and Afghanistan raised will again surface, since the use of private security contractors, and the contracting of private lethal technology, is how conflict and intervention will most likely be addressed by the US, and other governments, in future (Aljazeera, 2014; Singer, 2015; Zenko, 2015).

Such a reality — the outsourcing of security — is not a new phenomenon, and throughout history it was a task often provided by mercenaries. However, the context in which they are used, the political and social circumstances surrounding the use of private force, has greatly changed. But has the mode in which such contractors have been regulated evolved over time, and with what implications? What are the historical differences in regulation, and are there lessons to learn? The possible lessons certainly seem limited by the changing context in which regulation occurs nowadays - outsourcing security in the 21st century is a very different proposition from the hiring of mercenaries in the past. From compliance with a variety of regulatory frameworks, including, but not limited to, international law, to the close relationship with liberal modes of governing by states, there are certain rules Private Security Companies (PSCs) must obey in order to have their business recognized as legitimate, and that *does* differentiate them from mercenaries (Axelrod, 2014; Kinsey, 2006). Moreover, acceptance of, and respect for, human rights as an international norm, which has been adopted by the majority of countries, has rendered the use of

mercenaries unlawful (Percy, 2013: 41–4). Thus, the companies that have operated in Iraq and Afghanistan, and those that still operate in many troublesome countries under US contracts today, are therefore corporate enterprises that need to comply with national and international laws and norms.

While there is a great variety of such corporate security actors, the present research is specifically focused on the contractors who potentially use violence and carry arms while providing their services, even though they are considered civilian contractors. For instance, there are companies like KBR that have specialized their role as a general service provider, and provide food, fuel or laundry services in complex/ hostile[1] environments. Those are not the focus of this research. Rather, my focus here is on companies like Triple Canopy, Armour Group, or Blackwater/Academi, which provided services of protection and transport for government representatives while visiting or working in complex/hostile environments. For instance, by State Departments´s WPPS II contract in 2006, was awarded to Blackwater, Triple Canopy and DynCorp with a mission to protect diplomatic personnel in Baghdad, where Blackwater responsibilities included embassy protection. Armour Group was contracted to do the same job in Kabul, and was responsible for number of contracts with different US Departments and agencies related to convoy protection in Iraq. These companies may provide security and transportation services (protection of properties, objects and people) or intelligence services – in the context of prison interrogation, for example[2] — and they represent

[1] Whenever I mention complex/ hostile environments in this research, I am specifically referring to post conflict settings, of the kind that have been called contingency environments by the Department of Defense (DoD), or stability operations by the State Department. These are environments where the security situation is volatile, often with a high probability for insurgency-type violence to occur.

[2] The decision to extend my analysis beyond Private Security Companies (PSCs), and add to it companies which provided other services (such as interrogation, and any other services that might involve the use of violence) was made as an attempt to demonstrate the extent of the use of violence, and not to merely follow existing typologies. Such an inclusion will be clearer when accountability

around 10% of all civilian contractors employed by the US government.[3]

Even though the outsourcing of security services by states is not new, the modern private security industry is relatively recent. Up until the missions in Iraq and Afghanistan, their presence in the market was residual, since their tasks had been mostly provided by states in the 20th century. It is therefore, perhaps, unsurprising that governments (and international regulatory agents) did not anticipate a need to invest much time and effort into a firmer regulatory framework until the presence of such private security actors was undeniable and represented both a political and an operational inconvenience.[4] As such, the regulation of outsourced security services in unstable environments burgeoned in what was essentially an institutional void, since the former contracting of civilians providing security in contingency and stability operations was sporadic and very limited (GAO, 2004a, 2004b, 2005). The relative vacuum in which the private agents began operating in 2003, in Iraq, highlighted the need to clarify their place in the existing regulatory structure, the need to create some sense of order regarding accountability, and to establish certain procedures for all to follow. Moreover, the input given by different organizational cultures (private enterprises, civil society and the public sector) has necessarily left a mark in shaping the regulation of the private security sector through the last decade, as we shall see.

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aspects are analysed, as there is a gap between the criminal liability of defense contractors (employed by the Department of Defense) and civilian contractors (employed by any other US Department), even if they provide the same type of services. However, to simplify matters, they will all be grouped under the PSCs acronym.

[3] One senior industry representative stated "people make it believe, like Peter Singer does, [that we are talking about] 100 billion dollar values, (...) [but]inside that entire portion is [the] entire industry, like KBR and logistics and all of it. I, by my calculation, find in its largest (2007) maybe 20 billion dollars. Of which security companies were maybe 10% of that" (interview 6). This information has been confirmed by Abrahamsen and Williams (2010: 20) as well.

[4] For instance, in World War II, contractors represented 10% of US force; in Iraq they reached over 50% and in Afghanistan the number was even higher (McFate, 2015).

When I mention the concept of regulatory process, I mean a wide array of mechanisms/tools. The concept is meant broadly, and it includes a variety of instruments such as: legislative proposals and the surrounding debates held in Congress; proposals and concerns raised by oversight bodies (such as the Government Accountability Office (GAO) or Commission on Wartime Contracting (CWC)); procedures and policies established by contracting departments (such as DoDI 3020.50, or the State Department's procedure of installing a recording device in every vehicle); the application of accountability and criminal liability measures (e.g. by the Justice Department with the application of MEJA, or by DoD with Court Martials); and private and public-private initiatives which impact the regulation of PSCs (for instance, trade associations´ Code of Conduct, and ANSI/ASIS PSC.1 standard). The decision to include all of the above is in order to provide both the most complete possible explanation of the stakeholders' impact on the process, and to be able to discern what may cause a lack of effectiveness in the regulation of PSCs by the US government. By studying not only the impact of the private security industry, but also that of congressional divisions, by examining the details departmental functioning and culture, and by occasionally including NGO contributions, it is possible to formulate a more complete representation of what really has been happening, and what has caused stalls, inefficiencies and blockages in the regulatory process. Demonising one stakeholder or presenting another as perfect, as it was common in media reports (Boone, 2010; Davenport, 2014; Fisher, 2014; Ghouri, 2011; Schmitt & Shanker, 2007), does not result in a better understanding of the process by which the US government regulates (or fails to do so effectively) the private security contractors it employs.

When observing the outsourcing of security services in unstable environments, as in Iraq and Afghanistan, one could easily conclude that a state-

centric perspective predominates. Even though there have been sporadic studies from the standpoint of the territorial state (Armendariz, 2013; Hameiri, 2011),[5] the majority of scholarly literature produced thus far looks at the contracting state. Internationally. When looking at multilateral arrangements to govern the provision of private security, what has been most studied is the Montreal document,[6] which is considered a major improvement of regulation and also, for the opposite reason, the United Nation´s Working Group, both of which focus on the role of contracting states. Looking more on a national level, academia has largely assumed that a homogeneous approach has been taken by the US government, since critiques of US Government consider it as unitary rather than plural actor (Carafano, 2008; Dunigan, 2014; Krahmann, 2013).

When looking at efforts by the US, one concept this dissertation will rely on heavily is that of the "regulatory state". The regulatory state concept is closely related to neoliberal, democratic systems of government where a shift has occurred, as some authors often refer to it, from *rowing* to *steering* (Osborne & Gaebler, 1992). The boat metaphor by Osborne and Gaebler alludes to changes whereby a state goes from rowing the boat to where it is only at the helm (steering), i.e., the state is no longer responsible for the provision of services, but rather becomes the supervisor / regulator of their provision.[7] There are diverse views on the changes that such a

[5] The Montreal document makes a distinction between the state contracting services and the one receiving them. Therefore, the receiving state is called territorial state, since services are provided on its territory.

[6] The Montreal document will be addressed in greater detail in the following chapter.

[7] This alludes to transitioning to an open market. Up to the end of Cold War, security services have been considered an inherently governmental function and therefore provided solely by states. The security sector, in neoliberal democracies, has been one of the last to transition to an open market, because of its sensitivity (Dunigan, 2014: 8, Eick, 2003). In that sense, some of the security services that were previously provided by governments (like site protection, or transportation of officials) started to be outsourced, and the role of the state currently is not so much that of a provider, as that of a market regulator. For instance, the Buereu of Diplomatic Security (State Department), up to the

transition to a regulatory state has brought (Moran, 2002; Scott, 2000; Sunstein, 1993), but here I embrace John Braithwaite's proposal (2000), which highlights the change from a Keynesian state — which he defines as state-centric, with a socialist orientation regarding the use of force, where the state does all the rowing and little steering — to a "new regulatory state", differentiated by deregulation, privatization, and the implementation of mechanisms for "governing from a distance"; i.e., changing from rowing to more *and better* steering. Applied here to the security sector, this translates into the state's monopoly on the use of force being eroded with the increasing liberalization of the market, as the state changed its primary role from service provider to managing (and regulating) the service provided.

Talk about the regulation of the use of force by private contractors gained ground with the expansion of the private security industry, first in the 1970s (Kakalik & Wildhorn, 1971) at a national level in the US, and from the 90s onwards, with its use in peace-building and state-building missions at the international level (Percy, 2006: 6). There is no consensus as to the reason for this momentum in the industry's expansion — the explanations range from the reduction of regular forces and multiplication of state threats, as a consequence of the end of the Cold War (Singer, 2003: 49), to rising international commitments with the growing number of peacekeeping missions (Wittels, 2010), to the global rise of neoliberal ideology (Abrahamsen & Williams, 2010: 68). Most recently, Mc Fate (2015, Chapter 5) included all those and added new elements, claiming that the spread of the industry was also a consequence of market thinking in policy circles and the high utility of private force, among others. Whatever the reason, its major expansion internationally

interventions in Iraq and Afghanistan, dealt solely with protection of diplomatic personnel, while in Iraq their range of duties expanded to include all of those working on state-building initiatives. They used to contract for peacetime operations, to provide perimeter security to US diplomatic and consular posts around the world (Elsea and Schwartz, 2008: 7) while Iraq and Afghanistan have been first operation that implied their involvement in hostile environments. Up to then protection in wartime/contingency zones was provided solely by DoD.

from the 90s onward led to the need to effectively monitor the sector across national borders. Avant (2005) advanced with an explanation of how control over violence is diffused among several actors, Dickinson (2013) proposed improving monitoring through contracts, and number of others generally agree with a lack of effective tools to do it (Chesterman & Fisher, 2009; Ettinger, 2014; Hurst, 2011; Percy, 2012; Terry, 2010).

Increased demand offered the opportunity for companies to dictate the rules of contracts and raise their cost to previously unthinkable amounts. In a state of advanced capitalism, with the apparent decline of states' role, and the extreme division between public and private values increasing (Mabee, 2009: 152), this "security market" gained a key role in international politics. With it came a greater need for political economic analysis of the private security sector. For instance, the political power of private security contractors (PSCs) has grown significantly during the latest Iraq war, with huge increases in demand for the services these companies provide. This, in turn, has made the market what Deborah Avant calls a *seller's market* (2005: 127); i.e., a market which operates under the rules dictated by the seller, in this case PSCs.

In such a context, one of the key problems of studying the effectiveness of PSCs regulation lies in studying it as a strictly legal issue, thereby often ignoring or downplaying the bureaucratic, political and economic challenges associated with it. There is a range of legal scholars who contributed in that sense. On one end are scholars as Sarah Percy (2007; 2013), who dedicated significant part of her work arguing that existing legal regulation is insufficient and unable to address on the ground circumstances. Elke Krahmann (2009) worked on the problem of the norm change considering the state monopoly of violence and outsourcing security.

Somewhere in the middle are scholars like Dickinson (2013), approximating even more to legal studies, who conducted in-depth study on how contractual changes would effectively affect regulation. And on other end are typically legal scholars, like Tiefer (2009, 2013) and Brown (2013) who dealt with accountability troubles caused by lack of legislation and problems caused by the limiting legal control of the private security contractors.

There were others disciplines studying regulation of the private use of force. One of the first was criminology, during the 1970s and 80s, on a domestic level in the US (Dralla, Honig, Port, Power, & Simmons, 1975; Shearing & Stenning, 1981; Wildhorn, 1975). Focusing on impunity issues, weak monitoring and its legitimacy[8] when compared to state provision, various studies contributed to building a solid domestic regulation, by adapting to the challenges of reality during the decades that followed (Kakalik & Wildhorn, 1971; Moore, 1987; US Department of Justice, 1976). Lessons that should have ostensibly been learned from this are that (i) regulation is not an act but a process, constantly evolving, and (ii) with efforts in expanding the monitoring system, and improving supervision as well as the effectiveness of punishments, it is possible to considerably reduce incidents resulting from inappropriate use of force, lack of training to perform the contracted functions, or lack of compliance with procurement rules (Furst, 2009: 17; Goldstein, 2010). However, despite these early conclusions in the scholarly literature, recent analysis demonstrates that even domestically, the US is far from having adequate regulatory procedures, and that a lack of transparency, bureaucracy problems and political obstacles still represent significant challenges (Horton, 2015; White, 2010).

[8] Legitimacy to use weapons and violence in the performance of their duties, not connected to the state use of force, for the first time in 20th century.

Internationally, in a post conflict context, regulation of the private use of force has primarily followed an international law standpoint. In the last two decades, the existing international framework for regulation of the private use of force - the Geneva Conventions (with Protocol I of 1977) - has been strengthened with the signing of the Montreal document (International Committee of the Red Cross // Swiss Federal Department of Foreign Affairs, 2008), the International Code of Conduct (Swiss government, 2010), and the draft International Convention on the Regulation, Oversight and Monitoring of private security companies (United Nations, 2010).[9] Interestingly, as most of these international norms are rooted in self-regulation of the industry, the focus of academics has fallen on the signatory states of such conventions and agreements, stressing the need to reinforce compliance (Jones, 2009; Leander, 2010; Mehra, 2010). Arguments presented by scholars working on this have covered various topics, ranging from who should have legitimacy to control PSCs (Bakker, 2009; Brickell, 2010; Chapman, 2010; Elsea, 2010; Leander, 2010), the necessity for stronger international regulation in this field (Hurst, 2011; Juma, 2011; Christopher Kinsey, 2002), and criticism of the unaccountability of companies (BBC news, 2010; Hedahl, 2009; Krause, 2011), to criticism of disrespect for human rights and international humanitarian law (Gathii, 2009; Christopher Kinsey, 2005a; Santa Cruz, 2012; Smith, 2008; Snell, 2011; The New York Times editorial, 2010).

One should stress that international regulatory mechanisms have had a strong influence on US domestic regulation, and from 2009 (after the signing of various international documents) greater emphasis was given to policies addressing oversight and contracting of PSCs by the US government (Committee on Armed Services United States Senate, 2010; GAO, 2012; Heddell, 2011). While not denying the importance of globalization of services, and even while recognizing that the

[9] US signed all documents mentioned above and has been an active participant in their negotiations.

companies hired by the United States are not always companies registered and operating on American soil, one can nonetheless argue that the US has so far demonstrated a poor ability to deal with the issue of PSCs misconduct in Iraq and Afghanistan. The incidents caused by such abuses of power, including the disproportionate use of violence causing civilian deaths, human trafficking, and human rights abuses, are examples of this weakness (Boone, 2010; Ghouri, 2011; Hedahl, 2009: 20; Santa Cruz, 2012). Despite the importance of existing procedures for deciding who exactly has jurisdiction over crimes committed in the country on whose soil the contract is performed, this research assumes that the contracting state is responsible and has an obligation to both control its contractors and prevent inappropriate behaviour (Jones, 2009).

In this context, research emerged on the regulation of the private use of force within the discipline of International Relations (IR) as a consequence of the sudden increase in demand for security services for states in unstable environments.[10] The multiplication of players involved in the regulatory process (now including companies and non-governmental organizations, as well as states) led some scholars to use multilevel analysis (sub-national, national and international) to study the obstacles to security governance in post conflict settings (Krahmann, 2005: 10–1). However, the key contributions to the discussion arose from problems stemming from the US-led international intervention in Afghanistan and Iraq. The already mentioned cases of PSCs misconduct by Blackwater employees (which has changed its name three times; first to Xe, then to Academi LLC, and has now been recently bought by Constellis Group) gave rise to an increase in scientific production favouring the

[10] This increase has been explained with reference to the drastic decline of standing forces after the end of the Cold War, as well as the political decision to use contractors instead of troops on the ground for all non-combat activities. For more see (McFate, 2015; Singer, 2003).

withdrawal of the private sector from peace missions (Loader & Walker, 2007; Rosén, 2008; Spearin, 2011; Wouters, 2010).

Another IR perspective was led by discussion on diminished control over the private use of force, since monitoring and management failed to meet this challenge (Avant & De Nevers, 2011; Cooper & Mutimer, 2011; Franke, 2010; Isenberg, 2009; Singer, 2003; Terry, 2010). The consequence of the increased complexity of stability missions led to this control being divided between the various players involved, such as enterprises, non-governmental organizations and states (Brayton, 2002; Holmqvist, 2005; King, 2007). As a consequence, the task of monitoring became more complex and challenging (Avant, 2004).

In addition to the continual criticisms of the inadequacy of the existing regulatory system, the US Office of the Inspector General of the Department of Defense recognized its ineffectiveness (Heddell, 2011). Questions therefore arose: Why there was no research directly addressing the question of why the regulatory process in US is not more effective? What obstacles are faced and what is their nature? From such curiosity five years ago emerged a final question: What are the obstacles to regulation of PSCs in unstable environments for the contracting states?

There is a need to clearly identify the obstacles to a more effective regulatory process, and to do that it is necessary to present a new theoretical framework, permitting the study of the regulatory process of outsourcing security abroad by a state. Meeting those goals would allow pursuit of feasible suggestions on how to improve the process and how to understand similar processes in a future.

What we know about regulation: Reviewing the state of the art

During contemporary history, no regulation has been transformed into self-regulation, and nowadays there is an international attempt at stronger regulation, being a global industry affecting all states, whether contractors or recipients of PSCs (Avant, 2000: 40). Change has happened at two levels: firstly, the private military has transformed from private military troops who fought in wars for other states, to private companies that provide highly qualified and somewhat regulated security services (Thompson, 1994: 146–149). Secondly, change has also occurred in the way these companies are approached: the evolution of "warlords" into a more entrepreneurial and structured entity was a process that lasted centuries (Avant, 2000: 41-42).

The literature covering the private security industry is vast. Singer´s (2003) introduction to the industry (which the industry considers highly exaggerated)[11] helped to focus greater academic attention on the existence of the industry, but at the time did not have much evidence to present. It did a great job of explaining where these companies come from, and their differences from the infamous mercenaries. A recent work by McFate (2015) further developed the similarities and differences between mercenaries and modern private security companies, and explained why he thinks that we are heading into the era of neo-medievalism.

Contracting services in war is not new to the US; it has done it since the American Revolution, and to a greater extent since the Korean war (Zenko, 2015). As the largest contractor of security services globally, the expectation is that it can exert

[11] All industry representatives interviewed for this research claimed numbers presented in the book are false and inflated.

strict supervision and hold providers of services accountable. The incidents in Iraq and Afghanistan, culminating in scandals such as those occurring in Abu Ghraib prison (CNN, 2015), the Kabul embassy (Thompson, 2009), Baghdad (Schmitt, 2007), and Nisour Square (BBC news, 2008) demonstrated the inability and unpreparedness to both control and hold contractors criminally accountable.

Regulation of PSCs has been studied by various disciplines, the IR probably being the least represented. Criminology, international law, anthropology, economy, sociology and history are just a few of the disciplines that contributed to a better understanding of the (re)rise and growth in the use of private violence in international contexts. However, the mark they left on the theory of regulating PSCs, at least concerning ways to better understand the challenges of regulatory process, was not very strong.

The change in the reality of seeing the use of force no longer monopolized by the state, but coming from market, signalled the inclusion of a vast network of state institutions, industry and civil society, who needed to be involved in the crime control task (Abrahamsen & Williams, 2010: 67; Garland, 2001: 19). What can be observed is a paradox in relation to attitudes towards PSCs: on one hand the provision of security by private means has become depoliticized, and is now a technical and bureaucratic mater dependent on adopted mechanisms; and on the other hand, both security provision and punishment of crimes have become increasingly politicized by the high level discourse on specific policies (Abrahamsen and Williams, 2010: 70), on a national and international level.

While looking for an explanation for the minimal effectiveness of regulatory mechanisms, there was an apparent oversimplification of the problem and too much

of a guess, rather than solid study of the industry and US governmental approaches in addressing regulatory troubles. More reading brought more frustration, since there were no ground reality studies about the US regulatory process itself, no deconstruction of the “state” and industry identity, and no consideration of the agents´ influence on the regulatory process. Existing IR approaches did not help much in addressing such challenges. The realism-neoliberalism paradigm does not assist in learning more about how security is outsourced and controlled out of national borders. Founded on a state-centric perspective, outsourcing of security in general has been understood as a consequence of neoliberal governance, where the state seeks to outsource service provision to the market, favouring a market economy. Even though there are significant divergences between the realist and neoliberalist approach, in the outsourcing of security they have a lot in common. Both consider outsourcing of security desirable, if it helps to achieve other political goals. For instance, works of Stanley (2015) and Avant (2005) use elements of both the neoliberal and realist paradigm to explain the changes brought about by an outsourcing of security. While both of them apply their analysis to US foreign policy, Avant focuses more on the power shifts that happen as a consequence of the outsourcing, while Stanley´s argument has theoretical support for the supply/demand dichotomy. Liberalism can also be used to explain regulatory responsibilities by state, as shown by Andrew Alexandra (2012).

Therefore, due to their state-centric nature, traditional IR perspectives do not help in the understanding of the nuances and obstacles of the regulatory approach. The governance assumed cost-saving approach, where the market can offer a less expensive and often more politically acceptable solution than can be put forward by the government. Hence, such approach is strongly dependent on governmental structure and the capability to oversee and control its contracts. In practice, it has

been demonstrated that this is not the case; the culture of agencies is diverse, and their readiness and willingness to make structural changes varies (GAO, 2005, 2012; Kennedy, 2011). In addition, there has been no attempt to identify the real stakeholders' interests and motivations behind their actions in the regulatory process. Any analysis offered has been by regulatory theorists who compared, for example, a neoliberal approach to regulatory capitalism (Braithwaite, 2005; Glaeser & Shleifer, 2003; Levi-Faur, 2005; O'Brien, 2005)(. Hence, such explanations were questionable regarding the capability/availability to hold accountable private agents (Beerman, 2000; Hedahl, 2012; MacKenzie & Martinez Lucio, 2005; Scott, 2000).

Constructivism did move from a state-centric perspective, and included other stakeholders, admitting that interests are shaped by the context. The problematic part is that it assumes a social construction of reality, which leads to homogenization of agents within their groups. What practice has shown is that there are different sub groups within all actors, with no clear division of "good" or "bad" agents, so industry representatives may take some positive steps or they may act as the economic perspective describes them. It also means that governmental agencies may demonstrate behaviour lacking in democratic values, such as transparency, accountability or rule of law. An example of such a perspective are security assemblages, proposed by Abrahamsen and Williams (2010), who tell a story of forms of public-private partnership. Their goal is not to understand "public" and "private", instead they study how they can together form compatible modes to provide better security.

An alternative view to take when studying regulation of PSCs is an economic one, where it is assumed that the industry is driven solely by economic gains, and so will act in a contrary manner to how it should in order to maximize these gains (Ogus,

2004; Sökmen, 2007). The most used economic approach is Principal-Agent Theory, which analyses the relationship between the employer (Principal) and the employed (Agent), and assumes that the Agent would use any opportunity of uncertainty and information asymmetry to gain a comparative advantage over the Principal (Feaver, 2003: 70–71). The opportunity to do so in unstable environments is huge, since there is a shift of power that occurs in the contracting relationship between state and PSCs (Avant, 2005). Dogru (2010) develops the argument further with the identification of two obstacles in the contractual relationship, adverse selection and ethical problems, and suggests how they might be overcome. However, his premise is that there is enough political compromise to do so. What practice has demonstrated is that this is not really the case.

Then there are proposals like that of Laura Dickinson (2011), who does not offer a theoretical bent to understanding regulatory obstacles, but rather approaches them from legal point of view; suggesting how the contracting process might be improved, which in turn would render the regulatory process more successful. The merit of her work is in the recognition that there is a strong political factor on which regulatory efficiency depends. Hence, her goal is not to explore it further. From a legal perspective, her study has been complemented by Kimberly Brown (2013), who admits the existence of an accountability vacuum and claims that the cause of it is the public-private dichotomy present in Constitutional law. The legal perspective offered by Dickinson and Brown has merit in helping to understand regulatory challenges, but there is no comprehensive theoretical framework that would explain other obstacles that are not of a legal nature, such as political, bureaucratic and economic.

The more comprehensive approach of regulatory process was certainly impossible in 2005, since regulatory initiatives were just on their beginning and the

first difficulties just gave notion of potential problems (Singer, 2003). In 2010, as demonstrated above, there was significant number of scholars intrigued by this problematic, though explanations were sought in well-established theoretical frameworks. The state-of-the-art in 2016 is more promising, since some steps have been undertaken to search alternative explanations when addressing regulatory process of PSCs. The ultimate example is the book edited by Abrahamsen and Leander (2015), two scholars who have most contributed to distancing from traditional approaches when studying private security outsourcing. Interesting enough, their volume already counts with a separate section dealing with regulatory issues and covers variety of topics from norms (Percy, 2015), to state regulation by improving legal framework (Sossai, 2015) and contracting process (Krahmann, 2015), to transnational initiatives (DeWinter-Schmitt, 2015) and even extension of the international human rights law to PSCs (Katz & Maffai, 2015) Even though this book had touch a concept of studying practices in order to understand better PSCs, there is no even one mention to Bourdieu´s theory of practice or the concept of *habitus*.

After failing to find an approach that would explain the apparent contradictions between theory and practice, there was obviously a need to grasp where the division occurs, which would facilitate not only comprehending the PSCs regulatory process, but others that contain similar obstacles where transparency is limited (such as contracting private military firms, beside PSCs, to use technology; for example, drones or other robotics, that might cause civilian victims).

Overview of the argument

The aim of this dissertation is to seek out, both from a theoretical point of view, as well as in practice, challenges to the US in the regulation of PSCs in unstable environments. We will argue that in order to discover regulatory obstacles, it is necessary to approach the regulatory process from a more comprehensive standpoint, both by considering the multiplication of agents involved and their input to the regulatory process, as well as by expanding what is considered within the regulatory process. The regulatory process is a complex mix of public, private and other diverse agents, all contributing initiatives and opinions, and achieving the present results. By understanding their input and their stance regarding legislation, the regulatory procedures of contracting agencies and the accountability process, it is possible to develop a more informed view of possible challenges. We determined there are two prerequisites for the success of our research. Firstly, it is necessary to make the stakeholders´ structure as transparent as possible. As neither the process nor the stakeholders in this particular case are very transparent, there is a need to establish who is involved in the regulatory process and how. Secondly, it is necessary to break free from socially constructed identities in order to understand fully where the players are coming from and what are the origins of their behaviour.

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To address regulatory inefficiency, it is necessary to have the ability to identify obstacles that are preventing it from being more efficient. Often these obstacles are classified in a broad category without proper examination of their nature (Leander,

2007a: 1). Simplifying analysis by “boxing” issues usually leaves them under-examined; for example, attributing the private security industry´s behaviour solely to economic drive, alienates further research of practices that might bring other conclusions. The neoliberal baggage of formed identities, such as state is public, business is private, and state is welcoming regulation Vs industry who is against it, attributes to agents and structures values that do not correspond to practices, and has facilitated easy acceptance of conventional wisdom as truths, rather than stimulating thorough examination of practices. When studying new phenomena, it should be mandatory to look closely at practices and learn from the ground reality, since there is no comparative example to learn from. For that reason, it is necessary to go beyond the black-and-white divisions and plunge into the gray area of what is actually taking place.

With that aim in mind, this theoretical proposal is rooted in the application of Bourdieu’s theory of social practices (1977, 1990) to study the regulatory process – a new approach to observing and analysing regulation of PSCs, and other low transparency regulatory processes.[12] The advantage of using it is that it will allow comprehensive understanding of the regulatory process, and even present the possibility of contributing to more efficient policy making.

This new approach permits deconstruction of pigeon-holed identities immersed in the public-private dichotomy, and offers tools to reveal the contents of the “boxes” named politics, economic gains and bureaucracy from ground reality. Departing from the sociology of practices, by introducing Bourdieu’s (Eagleton & Bourdieu, 1992; Leander, 2010) concepts of *habitus*, *doxa* and field, it is possible to

[12] Bourdieu´s theory of social practices has been previously applied to PSCs by Leander (2007b) and Abrahamsen & Williams (2010), though not in seeking the effects on the regulatory dynamics in the state regulation.

deconstruct conventional wisdom by refuting them with practices. Studying practices assists in separating from the public-private dichotomy, permitting identification of multiple facets of the stakeholder. Following more recent academic contributions, it is explained how practices influence regulation, emphasizing their dual focus. On one side they are influenced by the actions of players, on another they are influenced by the context in which the process occurs. Separation from the social construction of identities assists in identifying the impact of both cultural aspects and organization influence on the regulatory process.

Application of this framework to the PSCs regulatory process allows uncovering of the dynamics hidden by simplification of conventional wisdom, such as strains of single level analysis or public-private division. Inter-crossing of various levels of analysis allows perception of the motivations and interests of stakeholders, and better comprehension of why they are motivated to act in certain way.[13] It also gives the liberty to observe the political and bureaucratic process of regulation with a critical eye, and focus on how individual behaviour can create serious impediments or impulses in the regulatory process. In sum, the regulatory process exists as an interplay between individuals and structure, and by undertaking deeper behavioural analysis of each, obstacles are becoming clear.

Deconstruction of conventional wisdom permits observation of the obstacles that are usually labelled as economic, political and bureaucratic. Their content is presented and explained in the context in which it occurs. Political obstacles are caused by ideological division, but not solely. There is a lack of political interest in/ability to prioritize improving accountability, due to a lack of funding and/or

[13] As Anna Leander stressed “Different groups and individuals in society always have varying and incompatible priorities and some may have no preconceived political priorities at all but develop these through the process of deliberating with others” (2007b: 51).

consensus at a legislative level. Bureaucratic obstacles within the regulatory process, which to our knowledge have not been studied before, include the impact of departmental culture, institutional memory loss, personality, and personal connections.[14] Here they will undergo detailed deconstruction of their elements.

Such perspective offers the opportunity to identify possibilities for improvement at different levels, and formulate a starting point for future research of possible policy-making suggestions and alternatives.

Methodology

The case study examined, which forms the empirical backbone of this thesis, is that of US regulatory process of PSCs in the period 2003 to 2015. The option to have a single case study as opposed to make comparative study resulted from uniqueness of the US case, regarding its own political system, as well as its importance as the biggest state contractor globally. The US has unique political system where the Congress and president share legislative and executive powers, turning effectiveness of policies related to the majority of one of the parties in both White House and Congress. This system is different from majority of European democracies, where both executive and legislative branch are in the parliament. However, understanding dynamic of regulatory process in the US might shed light on the constraints which could be avoided in other states. This choice is supported by the fact that the US has been the country awarding the highest number of contracts in

[14] The only study concerning bureaucratic obstacles focused on the bureaucratic interests. See Cusmano & Kinsey, (2015).

unstable environments, particularly considering the massive contracting that took place during their missions in Iraq and Afghanistan, and contracting has been executed by several departments, which turns regulatory environment more complex. The choice of the private security industry stems from the small amount of analysis carried out on it, claimed to be caused by the secrecy of the industry. It is important to have an approach that would allow future analysis of other industries that are covered with veils of secrecy (Horton, 2015), since nowadays, national security is rather often used as an excuse for lack of transparency. This research aims to demonstrate that even the secretive industries are available enough to give their standpoint when approached without preconceptions.

There are two main methodological tools applied; process tracing and interviews with elites. The process tracing necessary for this research implied, as Guzzini called it (2012: 47), “certain kind of process tracing that opens up a black box of the domestic setting”. This method is recommended as an essential form to conduct within-case analysis (Collier, 2011: 823) and arguably the best method to study causal mechanisms (George & Bennett, 2005: 224). It refers to “…attempts to identify the intervening causal process – the causal chain and causal mechanism – between an independent variable (or variables) and the outcome of the dependent variable” (idem: 206-207). Between three variants of process tracing (Beach & Pedersen, 2011) this research assumes the theory building which has ambition to “to build a theoretical explanation from the empirical evidence of a particular case, resulting in a systematic mechanism being theorized” (idem: 6). To accomplish this goal, I examined the forums, events and documents that influenced the process: national and international regulatory initiatives; events where the regulatory theme was addressed by several stakeholders; consulted official documents representing regulatory milestones, such as bill proposals; various US Congress Committees’

hearings; and departmental regulations. Process tracing permitted both observation of different venues and identification of the structure of existing regulatory tools, which was a starting point for seeking obstacles. The official documents, national and international, served as a skeleton in the construction of the regulatory structure of PSCs. They were used as a guide to where the obstacles might be found and, since there was neither any previous study of the bureaucratic processes of PSCs regulation nor any research addressing the human factor on either an organizational or agency level, it was clear that to complete a study it was necessary to conduct a series of interviews that would dig below the surface generalizations that already existed.

The benefit of the complementary method, particularly the use of the elite interviews together with process tracing, has been recognized (Tansey, 2007) and in the research that has limited documentation regarding particularly industry´ behaviour, the interviews were a necessity in order to form all-inclusive framework.

With that being my purpose, I was a research fellow at American University, Washington DC, during 2015 Spring semester. In a three month period I did over 50 interviews, but due to a lack of knowledge of some interviewees on specific issues (senior Congressional staff), they have been excluded from later analysis. For the purpose of this research, 50 interviews conducted with all stakeholders involved in regulatory process have been considered. The interviews were set with a duration of one hour, and they were focused on four main clusters. The first consisted of the legislative and executive branch. Among people interviewed were a US Congressman, former and present senior Congressional staff (both working on Committees and in the Congressional office), former and present senior DoD officers (including those who hold/held the rank of deputy assistant secretary, director of

office, Inspector General of DoD and colonel), and former and present senior State Department officers. The second cluster consisted of oversight bodies, and included people in positions such as senior officers at the Congressional Research Center (CRS), GAO, Special Inspector General for Iraq (SIGIR), Special Inspector General for Afghanistan (SIGAR), former CWC Commissioners, senior staff from NGOs conducting governmental oversight, president of ICOCA and the International Corporate Accountability Roundtable.[15]The third cluster consisted of industry representatives who executed positions such as president and vice-president of industry associations, a vice-president of a PSCs, a business developer in a PSCs, director of governmental relations in a PSCs and a lobbyist for PSCs/industry associations.[16] The last cluster were academics from different disciplines working on the regulation of PSCs. Of course, these categories are very wide and there is a large percentage of interviewees that might be included in several clusters. The list of potential interviewees which I took to my fieldwork counted 138 people; however, during the course of scheduling, almost half of them claimed not to be knowledgeable enough to give an informed opinion (even though they had participated in the elaboration of certain documents or made public statements related to PSCs regulation). Other parties, mainly political elites, were unavailable to talk to me, with the exception of one US Senator who is retired. Even the Congressmen/women who had left office were not available to talk, and on one occasion, when a former US Congressman deeply involved in the regulatory process did accept the invitation to talk to me, he later changed his mind after consultation with his current legal colleagues.

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[15] All senior staff interviewed from GAO, SIGAR, SIGIR, Congressional Research Center and international associations are referred to as senior oversight staff, to protect the source of facilitated information.

[16] When referring to them in the course of research, it is as an industry representative, in order to further protect their anonymity.

The interviews produced the desired snowball effect and I was able to reach people that I otherwise would not have known about, or would not have been able to reach, namely high Governmental officials and industry representatives. This snowball effect resulted in 20 interviews and several informal conversations. The interviewees were open to share their opinions and knowledge under anonymity, and in order to get the most information possible, all interviewees were offered that option.

There were several obstacles that I encountered while interviewing. The first was the terminology used by people involved in the regulatory process. While I had picked up some acronyms by reading documents, there were a number of acronyms that I initially needed to ask interviewees about; for example, acronyms for certain (DoD) directives, the use of the word “Member” to refer to a Congressman/woman, or acronyms for the issuer of certain documents, such as the Office of Management and Budget (OMB). Those obstacles however, added to the concept of *habitus* used in our theoretical proposal.

The second type of obstacle was the unavailability of State Department to share their standpoint. I tried to do an interview with more than 10 people, all of them senior State Department officers involved in the regulatory process in some way. Particularly difficult, and unfortunately unsuccessful, was my attempt to talk to officers from the Diplomatic Security Bureau. The first difficulty was to get names and contact details of the people who are/were involved. When that bridge had been crossed, those who agreed to talk to me did not get clearance to do so. There were 4 people in that situation, and even after pressure from other offices within State Department, and personal favours being asked by other interviewees, there was no clearance granted. They were advised not to do an interview without clearance as it may put their job at risk. When I mentioned this obstacle to others during interviews and in informal

conversation, it was suggested that it was not personal, rather it is standard procedure from State Department – “business as usual” was quoted quite often. Aside from this I did get an interview with 3 senior officers that work(ed) for State Department, and I used the official statements of Under Secretary for Management, Patrick Kennedy, to fill that gap.

The last obstacle had to do with my personal security. After a couple of weeks of interviews I began to be followed, and later learned it was the FBI. After noticing the same people appearing in the places I had scheduled interviews – which were at very different parts of the city and ranged from early morning to late afternoon, then discovering distortions in the frequencies of my voice recordings, and then suddenly finding my clearance for entrance into the GAO building for scheduled interviews had been revoked,[17] I mentioned those deterrents to my supervisor at American University. After making several (personal) calls, he told me that I was on the FBI surveillance list. That much I was able to confirm by the presence of the FBI surveillance van in front of my residence, particularly in the late afternoon and during the night.[18] My supervisor suggested limiting my movements from then on, avoiding walking alone, and careful use of the phone. Besides anxiety, fortunately there were no further consequences. However, it did limit my time at the public archives, such as the Library of Congress, and limited the questions I was able to ask interviewees, as I did not wish them to be compromised for sharing information. All recordings were kept in the safe, private place and were encrypted. Even though as many obstacles as possible had been foreseen, these disrupted my fieldwork.

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[17] Fortunately, interviewees agreed to leave the building and meet me in the public building nearby, where I did not need special permission to enter.

[18] Several times I captured phone screen shots of wi-fi networks by my house named FBI surveillance van number 3.

The unexpected factor was the ease with which I was able to get in touch with industry representatives, the reverse of which is usually put forward by academia as the reason for the lack of knowledge about the industry. I admit it might have been a facilitating factor that I was a foreigner, and that fact probably did contribute, to some degree, to more openness and willingness to freely talk to me. Personal recommendations from people who had already been interviewed by me, also opened the door to diverse companies' representatives. Since the subject matter (regulatory process vs contracting/bidding process) was less sensitive, that was probably another factor in my favour.

The interviews were the crucial part of gathering information that was otherwise unavailable, and they are the main source used in empirical chapters. They are, whenever possible, complemented with other sources, such as articles, books or official documents. Document analysis was used for primary and secondary sources. A number of official documents have been analysed, as well as bill proposals, hearings, testimonies and reports. Archive research for this purpose was carried out at a Departmental level, for the oversight bodies (GAO, SIGIR, SIGAR, CWC) and in the more general archives, such as the Library of Congress, and National Archives and Records Administration, located in Washington DC. Secondary sources are used for the historical analysis and theoretical framework. Besides IR, other disciplines are used in this research, namely: criminology, history, sociology, economics, and similar interdisciplinary, insight-enriched research.

Layout of dissertation

After this introduction, which is chapter one, will be five more chapters. Chapter two will seek to find similarities in the regulatory approach used in 21st century, to that used at various periods in history. Its goal is to demonstrate that action by agents can be found in the present, but that throughout history, being held accountable by a public agent (now considered state) was a high priority. This will be done by undertaking an historical survey and completing it with a network of recent national and international initiatives.

Chapter three explains how the neoliberal approach inhibited study of the regulatory process by its assumptions of formed identities, existing structures, and public-private divisions. In continuation it constructs a theoretic framework rooted on Bourdieu's social practices, but adjusted to allow observation of the regulatory process. Applying concepts of *habitus*, *doxa* and field, it demonstrates where the motivations for behaviour should be observed and allows us to look beyond socially constructed identities. Such a framework opens up space for the deconstruction of conventional wisdom.

Chapter four is dedicated to deconstruction of both identities and commonly assumed misconceptions in the regulatory process. After the presentation of stakeholders in US regulatory process it moves onto the deconstruction of misconceptions. Firstly, it considers the level of analysis, explaining why the regulatory process needs to take into account different levels of analysis, and not be limited to one. Secondly, it deals with the multiplication of stakeholders and demonstrates why they should be included. Thirdly, it explains the benefits of a comprehensive multidisciplinary approach to regulatory issues, rather than addressing only one discipline at time. Fourthly, it stresses the importance of studying the regulatory process over time, not simply

limiting study to periods of high public pressure. Lastly, it deals with the issue of lack of transparency, and demonstrates the futility of division on public and private values.

Chapter five takes on the deconstructed identities and continues deconstructing; firstly, the political process of regulation and then the bureaucratic. It demonstrates that both agents and structure cause obstacles in the regulatory process and analyses each of them in more detail. By discussing current practice it demonstrates where those obstacles are visible and introduces the conditions that gave rise to regulatory process.

Chapter six presents conclusions, and in addition to answering the question of what are the obstacles to the regulatory process of PSCs in the US, it summarizes how it is theoretically possible to observe it. It explains the utility of such an approach for other research and offers recommendations for more effective policies. It finishes with new questions and concerns resulting from the present research.

Chapter 2

Regulation of private use of violence throughout history

During most of contemporary history (period considered from the Napoleonic wars to the present day), the outsourcing of security internationally has been omnipresent. Although outsourcing violence until the 20th century has been a routine (Herbst, 1997: 117), its use has never been unanimously accepted or favorably viewed.[19] Distrust towards these services goes far back in time, and was well documented with disdain in Niccolo Machiavelli´s writings, being referred to as dangerous and uncertain, armies without discipline, faithless in front of God and without loyalty to people (Machiavelli, 1515: Chapter XII). The Condottieri in Italy, Swiss Mercenaries, and the Foreign Legion in France are some examples of mercenaries that evolved along with modern state military troops (Janin & Carlson, 2013; Mallett, 2003: 68). Even though corporate outsourcing of violence abroad by democracies is a relatively new phenomenon, the roots of this practice might be found throughout history. The aim of this chapter is to learn historically about the behavior of public entity hiring those services and consider possible lessons to retain from it. Secondly, this chapter will provide an overview of the regulatory frameworks and their relevant actors to facilitate contextualizing of regulatory analysis in the following chapters.

[19]Throughout history, several sovereigns have been dependent on the use of private force, since their own troops were limited. That did not, however, made their use less controversial. For example, even though Napoleon contracted large number of private troops, he referred to them as "rogues …[who] roll in insolent luxury, while my soldiers have neither bread nor shoes" (Sanderson, 1900: 302–2).

To achieve these aims, this chapter provides an overview of the regulatory evolution of the private use of force throughout history, by emphasizing two particular aspects of the regulation and use of private violence. The first of these is nowadays commonly known as the contracting process and oversight, and the second is a punitive aspect today acknowledged as a criminal accountability. The period considered here extends from the times of the Ancient Egyptians, with an overview of the supervision by the Greeks, Romans and Condottieri, as well as an overview of the Middle Ages and the suppression of mercenary activity at the end of the 18th century. Particular emphasis is given to a historical analysis of the 20th century and the evolution of the relevant regulations, both internationally and in the USA. The purpose is twofold: on one hand, to highlight multiplication and variety of actors involved in regulatory processes, and, on the other hand, to learn how predecessors dealt with supervision and oversight issues, and the consequences in cases of misconduct by contracted troops.

Therefore, the chapter is divided into two parts. The first part addresses the evolution of informal international regulations worldwide until the 19th century, while the second analyses US and international regulations from the 19th century onwards, placing particular emphasis on the control of PSCs in the context of the complex interventions, as they have been used in Iraq and in Afghanistan.

Historical evolution of regulations until the 20th century

The presence of soldiers of fortune, mercenaries or private military troops, is as old as history itself, and an examination of existing records of their activities shows that since there has been an organisation in societies and the conquest of territories, there has been the presence of such a professional class. Even though there is no data on record (none written, at least) before the time of the Ancient Egyptians, it is believed that mercenary activity is as old as man (Lanning, 2007: 1). For the existence of such a profession, the fulfillment of three conditions was necessary, namely: a war to be fought, readiness to pay for contracting such service out, and available professionals to contract. These could have been accomplished since the appearance of the first man, as it is commonly believed that the practice of war is as old as mankind (Lanning, 2007: 2).

Throughout history, in the absence of international law and well established norms regarding the behavior of mercenaries, the main tool used to execute regulation was through contracts (Lanning, 2007; Mallett, 2009: 79). The contracts would establish the conditions under which they are employed (number of contracted mercenaries, their ranks and salaries), as well as their responsibilities, for instance, their duties and expected behavior (Waley, 1976: 337–47). Contracts have usually been overseen within contracted units, by officers mandated by sovereign nations, as it will be explained above in the case of Greek rulers. Beside regulation throughout contract, there are authors like Trim (2002), who defend that through history, private warriors have been defending their professionalism with a use of a chivalric code to distinct their professionalism from other rogues. That chivalry code might be considered the first code of conduct used by professionals of this business.

Even though information about the regulation of private soldiers in the earliest period of its use is lacking, the written record which proves the existence of the profession is an important milestone.[20] First ones to establish firm rules were Ancient Greeks, who introduced rational and technical approach to regulatory issues. By the middle of the 4th century BC was a common and well-established procedure, in the relationship between the state and contractor, to define who was responsible for the hiring and control of the mercenaries. Greek rulers executed oversight by implanting their own commanders on the ground, with contracted troops, to supervise the behavior in the name of the sovereign; these commanders multiplied considerably with the goal of maintaining discipline among the soldiers (Trundle, 2008: 137). Their priority was to maintain order and regulate behavior of contracted troops.

Later on, Greek mercenaries have been hired by different rulers to fight in their lines. Persia hired Greek generals to join Persian *hegemons*, name given to people responsible for the oversight of the "loyalty and actions of the Greek" (Trundle, 1996, Chapter 5). As it is possible to foresee, such a mechanism was not faultless, and did not always guarantee the fulfillment of the contract that was celebrated, as, at times, the number of mercenaries who abandoned the battlefield reached thousands (Diodorus, 1983, p. 16.78.5–6; Xenophon, 1998).[21] Yet, it represented one of the first

[20] For more about rise of mercenaries and their organization see Pappas, 2004: 662–3; Trundle, 2013; Yalichev, 1997.

[21] Even though, in general, Greeks were known as being loyal to their sovereigns (they would provide continuously their services to same sovereign to whom they were contracted in comparison to the Condottieri, who appeared later in Italy), their exit from the battlefield was usually influenced by personal issues (Trundle 2008: 146).

known mechanisms in history used for the supervision and oversight of private forces in combat.

Ancient Egyptians, during the New Kingdom, hired mercenaries from Asia, Europe and Libya (Spalinger, 2008: 7–8), but the largest contingent of fighters belonged to Greeks. Ancient Egyptians had mixed army, consisted from hired mercenaries and Egyptians, where Egyptians had a role of “overseer of the foreigners” or “overseer of the Greeks” (Mieroop, 2011: 299). The Greek presence in Egyptian troops was very strong and long lasting (ibidem).

After the ancient Greeks, the Romans with their troops[22] contributed to the large increase in mercenary activity in Europe. The Roman army was, in fact, semi-private; the Empire would establish goals that would often be achieved mostly by contracted troops. These would receive salaries from the Empire, but they would also receive whatever they could walk off with after conquering a certain region. Such possessions included money, all movable property found to be valuable, the occupation of valuable buildings and the profit obtained by selling the prisoners of war (Backman, 2003: 10–1). With such rules established, and private soldiers integrated in an architecture that resembled a modern military, the Romans treated contracted soldiers in the same manner as those belonging to the imperial army, applying the same rules and laws as to their own military (McMahon, 2014: 65–6).

Those troops were known as Foederati and had participated in the Roman Empire’s forces when needed. They had a direct supervision of the sovereign inside these units, by those known as the *optiones.* The *optiones* initially held a solely

[22] Although we call them Roman troops, the fact is that those troops were more German than Roman, since at the end of the 3rd century they had more Germanic origin troops contracted than any other(Singer, 2003: 21).

administrative position in the relationship between mercenaries and the Roman government and were later incorporated into the Roman army (idem: 38). They were serving under Roman military leaders and their accountability was to them. However, the Roman Empire's military did not prioritize discipline and punished misconduct when it did not hurt directly their goals. They were famous for a lack of discipline in its lines and the misconduct, if committed towards civilians, was generally not punished (idem: 39-40). The contracts between the Roman Empire and the Foederati were merely indicative, since promises made by the Roman Empire were not always fulfilled.[23]

In the Middle Ages, Europe fell into a period of feudalism in which lords and vassals were committed to the orders of feuds to combat within the borders of the territory belonging to their feud.[24] However, outside of those borders, if the monarch chose to conquer new territories, he would often need to contract mercenaries (Thompson, 1994: 27). Therefore, in order to conquer new territories, sovereigns introduced a tax giving individuals the option of paying instead of being militarily involved abroad.[25] Such regulations assisted with the spread of mercenaries, and by the end of the 15th century, mercenaries had almost entirely replaced the involvement of feudal predecessors in battles outside of borders (van Creveld, 1997: 158).

[23] Even though the Romans generally promised land and inclusion in the Roman Empire to those soldiers and their families, that was not always the outcome.

[24] For more about mercenaries in the middle ages see, for instance, France (2008) and Mallet (1999, 2009).

[25] The first to introduce this tax was King Henry II of England in 1159 in his campaign against the Count of Toulouse (Clark, 2008, p. 180). He gave possibility to individuals to buy their way out of the military obligations and used those revenues to purchase manpower he needed wherever he could (Thompson, 1994, p. 27). It was the precedent followed by sovereigns in future to use the willing individuals instead of forcing their participation, which ultimately led to all voluntary army present in most western democracies in 21st century. Such tax represents the legitimization of the use of private violence and pre-modern outsourcing of use of violence.

Gaelic mercenaries, operating in Scotland through the 13th, 14th, and 15th centuries, have been noted for the absence of any supervision by their employers (Cannan & Brógáin, 2010: 28–9). The sovereigns who contracted them allowed them to thieve and intimidate as they wished, apparently without apprehension. The most common complainant against such behavior was the Church, as numerous archbishops represented complaints about the mercenaries involving extortion and robberies, not only from the general population, but from the Church as well (idem: 30). The supervisors of the contracted mercenaries generally did not seem to react to accusations of inappropriate and abusive behavior, unless they involved disobedience towards their superior, which was considered a capital offense (ibidem).

In the 14th and 15th centuries, Italian city-states became the greatest contractor of mercenaries in Europe, with the procurement of the Condottieri to fight for various monarchs.[26] The structure of the Condottieri enterprise was similar to the modern-day army, which is one of the reasons they are considered to be one of the most organised mercenary groups of their time, with mechanisms reinforcing team spirit, collective decision making and the distribution of rewards (Garin, 1997: 25). As their reputation could make a difference in acquiring new contracts, the Condottieri were well known as being capable of controlling the behavior of their troops and

[26]The origin of the name Condottieri comes from Italian word *condotta,* which means both conduct/ behavior and it is a term for "contract" that regulates it. The Italian city-states employed foreign fighters for certain period (from as few as a month period to usually six month period) of time and stipulated in *condotta* the terms of contract from which type and how many individuals they would need, over the expectations they should accomplish over their payment, maintenance and division of profits resulting from campaign in which they took part. For more about condotta and Condottieri see Mallet (2009: 79–87).

containing the opportunism[27] that war could bring (idem: 31–2). Their best-known mechanism for that purpose consisted in the close monitoring of mercenaries on the battlefield by civilian commissioners or *provedditori*, whose function was to report any misconduct of the contracted soldiers (Garin 1991: 34; Mallet, 2009: 88).

The ability of contracting rulers/commanders to control mercenary activity was not uniform across Europe and, at the end of the 15th century, there were signs of an incapacity to regulate and supervise mercenary behavior in some states. The clearest example was the attempt to officially prohibit mercenary activity in Switzerland, where the government openly admitted its incapacity to apply the law in practice (Mockler, 1969: 94). These difficulties, however, did not last long, and from the 16th century onwards, the discipline and control of mercenary behavior was achieved once there was a synchronization between them and the state forces in most of Europe. To extent, that put an end to the problematic behavior rooted in robbery, illicit gains and unnecessary deaths (idem: 103) until the abandon of the use of mercenaries by nation-states.

During the Renaissance, with the formation of nation-states, and with their own patriotic-inspired troops, the international environment was not prosperous for private military contractors, whose activity was considered barbarous and criminal (Mockler 1969: 105). These factors have been examined by Deborah Avant (2000), who analyses the probable causes that led to the transformation and abandonment of the private use of force, and the training of citizen-armies in three key European countries (France, Prussia and Britain). Among other conditions, Avant highlights the combination of (i) the influence some concepts of the Enlightenment period (e.g. the development of the idea of a social contract, as well as human and civil rights has

[27] Regarding extraordinary profit.

strongly influenced the relationship between the state and the army),[28] (ii) the increase in states´ territory and population, and (iii) the domestic context after military defeats and indifference of ruling coalition about reforms tied to citizen armies, as being responsible for the formation of citizen armies, first in these countries and then spreading out across the world. There were other factors which incentivated rise of the modern citizen armies and prohibition of the use of the private violence by states, like consequences of privateering (generated organized privacy) or use of mercenaries (at occasion they draw their home state at war at other states´wars) (Thompson, 1994: 43). Lastly, motivation of the state troops (as opposed to private troops) was rooted in nationalism and moral obligation, and gains were above material: they were protecting their land and their people and families with their lives and therefore were less propitious to abandon battlefields (Percy, 2007: 141; Posen, 1993: 83–4).

The formation of such citizen-states introduced international norms and laws, starting with an anti-mercenary norm, which turned to be essential element in the regulatory process (Percy, 2007: 123). By the late 18th century, the modes of regulating the private use of violence had an informal and limited extent, always within the local trend, with each employer being responsible for defining the rules that they found most effective in meeting their own goals. The first attempt to regulate the use of private force in modern history, from a formal point of view, was driven by the American War of Independence, when the United states issued the Law of Neutrality[29] to protect itself from involvement in European conflicts. Essentially, the purpose of the Neutrality Law (which prohibited US citizens from participating in foreign conflicts) was to ensure that private individuals would not in any way compromise the state´s

[28] The willingness of citizens to fight and be prepared to die in the name of their state (with the sense of belonging that sovereignty brought) increased compared with professional troops who fought for the Crown for the money that paid the most (Avant, 2000: 45).

foreign policy goals. That provision had another important message behind it: states are responsible for their citizens and must regulate citizens´s behavior through local and national laws, and these will have international consequences.[30]

The principles established in this law were subsequently adopted by most European countries and Russia, to a greater or lesser degree, ranging from restrictions related to recruitment and enlistment, to general restrictions on the private use of force (Deàk & Jessup, 1939: fig. 4.2; Fenwick, 1913). Moreover, the roots of this regulation are presently still visible, though slightly more evolved and with greater coverage.[31] The decline and (almost) disappearance of the private use of violence, from the 19th century onward, had two main causes. On one hand, Western states had begun to form their own armies, established by citizens acting under direct orders of the state (citizen-armies), and on the other hand, an increasingly normative line in international relations arose, whereby the states were responsible for their own actions and those of their citizens as well (Percy, 2007). The regulation of violence

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[29] The Neutrality Act of the United states, 1794, represents the first embedding of the local laws (national) to international standards, as it led to the institutionalisation of the national doctrine of neutrality, which in turn led to its application to be internationalised, and eventually becoming universal doctrine (Seavey, 1939: 2–3). The “principle of neutrality” considers that states whose citizens are used as mercenaries in conflict lose their neutrality with respect to that dispute (Hall, 1874, pp. 20–1, 47).

[30] The competence of the states is needed to regulate the standards of behavior and enhance compliance within their borders, thereby setting the example for the standard of behavior expected of other states, thus causing an impact on international behavior. For more see Thompson, 1994: 55–6.

[31] Modern states are responsible for the acts of not only their citizens, but also their companies, and their behavior outside of their borders is regulated by national laws in the first place (Thompson, 1994: 89). In more recent history, UK and US employed companies to perform security services for them in places like Iraq and Afghanistan, and are responsible to hold them accountable under their national laws and regulations. For instance, US DoD applies the UCMJ to hold accountable contractors that are working under their orders.

became a priority and “the eradication of non-state violence was not a goal but the unintended consequence of interstate politics” (Thompson, 1994: 69). As a consequence, the provision of security and the use of violence has become a commodity increasingly provided exclusively by the states (Giddens, 1985; Weber, 1968). Failure to legitimize the use of private violence in this context, and the consequent decline in demand, led to the establishment of a monopoly on the exercise of force by modern states (Avant, 2005: 66; Weber, 1968).

Looking back throughout history, it´s easy to conclude that the regulatory process moved from being a technical issue to a political one, and it is possible to establish a connection between prioritization of discipline and oversight, with fewer cases of misconducts. The common denominator of controlled and disciplined mercenaries can thus be linked with direct, constant oversight of sovereign countries' employees and contracted forces. While the Ancient Greeks saw regulation of a contracted force as mostly technical issue, and the multiplication of the oversight agents as a necessary mean to execute their tasks successfully, throughout history, and particularly with the US adoption of the Neutrality Act, regulatory issues became effectively more political.

The regulatory evolution in the USA: 19th and 20th century

The reason behind the US´ acceptance, with ease and without much controversy, of the privatization of security services, compared to the rest of the world, is an important issue in this debate. While such a question is not central to our argument, it enriches and facilitates the comprehension of the current strategies by the US Government with regards to the outsourcing of private security services. The

earliest evidence of the widespread political acceptance of the use of private force in the US dates back to the period of the American Revolution, in the late 18th century. British colonization of North America was limited by the lack of available forces to combat and to succeed, British complemented their troops with available force from Germany and France (Gradish, 1969). Private hired force has been employed to combat in Canada, where German troops, known as Hessian, were arguably claimed to be more barbarous and incompetent than others (Gradish, 1968: 45).

Those troops were not well-seen by their southern neighbour.[32] Following the ideals of citizen-army, American position toward mercenaries was stated in the Declaration of Independence, where the hiring of foreign troops is explicitly associated with uncivilized behaviour and revolutionary identity in direct opposition from Britain.[33] However, a year later, those ideals have been confronted with reality where all voluntary militia was not viable. Leaders have overestimated the number and quality of volunteers (Buel Jr., 1984: 142) and the time they were available to serve. By March 1776 there was 3.000 men available to serve (Middlekauff, 1982: 364) which presented obvious obstacle to maintain the necessary number of soldiers who would fight in the War of Independence. As a consequence, George Washington suggested the hiring of a private force to combat such deficiency, giving as the main reasons to hire private force their professionalism, preparation and confidence in fulfilling the contract, in comparison to the militias on which he had previously relied

[32] In the beginning of 1770, Americans considered employment of European mercenaries (men “such as have neither property nor families to fight for, and who have no principle, either of honour, religion, public spirit, regard for liberty, or love of country” (Moore, 1860: 213–4)) a threat to their ideals (Atwood, 2002: 31).

[33] Declaration of Independence available at http://www.law.indiana.edu/uslawdocs/declaration.html/.

(Washington, 1776). As the US Constitution declared mercenary activity disgraceful, and to avoid connection to it, their services were contemplated under the proposal of a Standing Army (Underwood, 2012: 329–30). After the arrival of Hessians to Staten Island, Congress formed committee to elaborate plans to encourage them to defect to the American side (Neimeyer, 1996). Their use lost pejorative connotation, term standing army would be considered as a synonym for mercenary, and over the time, employment of hired force to use violence was politically accepted by the Congress.[34] The Congress received the power to regulate the armed forces (government and contractors) through legislative means and by appointing/approving the organization of civilian and military units (Michaels, 2004: 55–6; Underwood, 2012: 331–2).

After this key moment, the use of private security services in the USA continued in domestic settings, as demonstrated by the establishment of the Pinkerton agency in 1850, and the widespread use of private security services that continues to the present day (Churchill, 2004; Weiss, 1978). The privatization of the security services within the US was extended in the 20th century to prison facilities, security guards and the ever-growing private protection of people, places and objects. Those policies satisfied internal demand for security services, but external demand continued. The expansionist policies South, toward Central America, was conditioned by the lack of the volunteer troops, the same problem George Washington faced earlier. To fulfil their need US resorted to a use of private forces. The most notorious were filibusters, who had contributed to US expeditions to Panama. Interesting

[34] For more about the discourse of inclusion and acceptance of mercenaries as a standing army see A Report of the Record Commissioners of the City of Boston, containing the Boston town records, 1770-1777, at p. 133 (Boston, Rockwell & Churchill 1887); Petition and Memorial of the Assembly of Jamaica (Mar. 23, 1775), in 2 American Archives, Fourth series p.167 (Peter Force ed., Washington, D.C. 1837), available at http://lincoln.lib.niu.edu/cgibin/amarch/getdoc.pl?/var/lib/philologic/databases/amarch/.2178; Caractatus On Standing Armies (Aug. 21, 1775), in 3 American Archieves,fourth series p. 219 (Peter Force ed., Washington, D.C. 1837), available at http://lincoln.lib.niu.edu/cgi-bin/philologic/ getobject.pl?c.6216:1.amarch.

enough, US took mercenaries acting in their behalf in protection from Spanish laws in Mexico and Cuba (claiming neutral territory), and planned to protect itself from violating neutrality act with a claim that filibusters were emigrants bound to California, by the way of Panama (Thompson 1994: 121-5). The imprisoned filibusters were requested to be returned to US, and justice to be served by US justice system. Hence, after a trial in the United States, all charges were dropped in March of 1851 (Brown, 1980: 70). The other example are mercenaries known as Banana men, who acted throughout Central America. They were involved in many other businesses, like mining, rail roads and shipping, but their biggest profit was coming from fruit export. They have been working with a consent of the US Government, who unofficially supported their actions as a part of US strategic interests, but never had an official support because that would directly go against neutrality laws (Langley & Schoonover, 1995: 30–2).

Internationally, with a normative approach that neutrality law brought not only in US but across Europe as well, mercenaries virtually disappeared and nineteenth century was clearly marked by their absence in interstate wars (Percy, 2007: 167). Their abrupt and spectacular comeback in a militia context marked the 1960s, a topic often associated with the great atrocities carried out by those forces in the Congo war (McFate, 2015: 37). The United Nations, and particularly the Security Council, strongly criticized the absence of any international law establishing monitoring mechanisms and/or the prevention of mercenary acts (Percy, 2007: 374; Stein, 2005: 8–9).[35] We can see this as the first attempts at the *international* regulation of private forces. In fact, during the 20th century, the biggest leap in the evolution of regulating the use of private force occurred precisely in this period, beginning with the expansion of the contracting security services from the ’60s by the US in the context of war

[35] See for more UN Security Council Resolution S/Res/405 (1977). The resolution reiterates a 1967 resolution regarding mercenaries in the Congo.

(Zenko, 2015) to their employment, from the ’90s, as the capable replacement of the United Armed Forces in contexts outside of combat, in settings of unstable environments (Abrahamsen & Williams, 2010; Kees, 2011).

The tendency by states to monopolize the use of force was overturned during the second half of the 20th century, with an increase in demand for services,[36] implying non-state use of violence (McFate, 2015: 36). The Western countries were faced with the problem of needing capabilities for providing security and collective defence, while also pursuing their foreign policy interests (which sometimes required involvement in conflicts), and simultaneously defending the principle of freedom of choice in a free society, thereby giving its population the option not to participate in the defence of the state.[37] As a consequence, the legitimacy of the private use of violence was resuscitated by the states’ inability to meet their domestic and international security needs but, compared to previous centuries, the issue of regulation was becoming more complex this time around, since other international treaties were introduced, beyond the laws of neutrality, to govern conduct in war and the misconduct of mercenaries, as we shall see next.

[36] Outsourcing services that were not directly related to combat was growing trend, particularly in the US context, but it is applicable in less extent to other Western style democracies. In Vietnam war, for instance, US government has outsourced services like maintenance of the military base (laundry, cooking and cleaning) to private entities (Zenko, 2015). The main goal of such policy was decreasing of the necessary troops and their allocation to direct combat.

[37] Compulsory military service had decreased dramatically in Western liberal democracies by the end of the 20th century, being now considered a free choice, in most countries. At this point, less than one-third of world's countries relies solely on conscription in order to fulfil their needs (Eichler, 2014: 601). For more on compulsory military service and its decrease see Boss, König, & Melchers, 2015; Burk, 1992; Eikenberry, 2013; Leander, 2004.

This evolution of regulation has come through several phases, from non-formal regulation to self-regulation, and a current attempt to reinforce formal regulation at the international level. These attempts are particularly important to examine, since the security industry is global and affects all states, either as contractors or recipients of services (Avant 2000: 40). Changes in the late 20th century occurred on two main levels: 1) mercenaries, consisting of private military troops who fought in wars for other states/actors, practically disappeared and were replaced by private companies that provided highly skilled and (somewhat) regulated security services in settings other than war (Thompson 1994: 146–9). And 2) a change also followed to the way in which we look at these companies: the evolution from “warlords” to a more entrepreneurial and structured image was a process that lasted a considerable period of time (Thompson 1994: 146–9; Avant 2000: 41–2). What happened is an evolution of the industry, and as McFate (2015: 27) put it, the single thing mercenaries and modern private security companies share is a DNA. The modern companies are professional, corporate entities that share structure and organization as any other industry, who follow regulations and legislation of the country in which they are located (Axelrod, 2014: 188). Hence, public perception does not always keep up with the effective evolution of the industry. This was particularly true after Nisour Square and Abu Ghraib incidents, where the lack of accountability for crimes committed while under contract, led to a massive (ab)use of term mercenary, when calling on the actions of those involved (Fainaru, 2008; Gaston, 2008; Scahill, 2008).

As we have already mentioned, the formal regulation of the use of private violence began with the US Neutrality Act of 1794, whereby states that chose to be neutral in a conflict could not a) let their citizens be hired to participate in it, or b) hire other citizens to fight on their behalf, without losing their status of neutrality. The Act

had no formal implications in terms of international law, but did serve as an impetus for the development of The Hague Convention, the first international treaty to include provisions related to the treatment of mercenaries. In fact, in 1907 this convention banned the recruitment or enlistment of mercenaries by states at the national territory (Oppenheim, 1957: 703), or the state would be considered belligerent regarding law of neutrality. With its formalization, the norm initially established by Neutrality Act turned into actual international legislation.

However, these changes in international law did not address other key issues related to the participation of mercenaries in combat. This was only addressed much later, since the ideological conflict between the US and Soviet Union, followed by World War II, essentially redirected the attention of the International Community (IC) away from the matter of private force. Although the introduction of some rules had been positive, they had failed to anticipate the problems that would emerge in the following decades, such as the hiring of private armies for combat, as it happened during decolonization period throughout Africa (Botha, 1999; Hughes, 2014; Kritsiotis, 1998) and contracting advisory activities in the context of war, as it happened in Angola or Rwanda (Cilliers & Douglas, 1999: 111), outside of national borders. Since then there have been several attempts to address such issues, but it took until the 1980s to provide the first actionable results.

The decolonization period in Africa, particularly in the 1960s, was one instance that clearly show the weaknesses of existing norms. There was a lack of *effective* international rules that would punish inappropriate behaviours and the use of excessive force by mercenaries. At the time, the International Community pleaded its inability to respond due to the limitations imposed by Article 2 (4) of the UN Charter.[38]

[38] "All members shall refrain in their international relations from the treatment or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the

In the late 1960s, members of International Community reacted through the UN with the proclamation of mercenary activity as a criminal act in the General Assembly Resolution 2465.[39] Leaving aside the good intentions behind this document, it was not implemented in either through international legislation, or through the domestic laws of UN member states, therefore only representing their aspirations. The by-side positive result was the pressure exerted by some members of the UN, under the resolutions related to the process of decolonisation, with the intention of to prohibit the exercise of mercenary activities on their territory, through the introduction of specific national laws (Kinsey, 2005a: 273).

The regulation of mercenary activities gained new impetus in the 1970s, particularly after the trial of 13 alleged mercenaries in Angola (Kinsey, 2008). This was evident in the preparation of the Draft Convention on the Prevention and Suppression of Mercenaries in 1976, known as the Luanda Draft Convention. Although it was never translated into actual law, the proposal served as a step forward in the introduction of international standards prohibiting mercenaries. The culmination of attempts to adopt these anti-mercenary standards came with the adoption of the Additional Protocol to the Geneva Conventions in 1977, Article 47 of which defines a mercenary based on six criteria. However, it made virtually impossible (Dinstein, 2010: 51; Singer, 2003: 531) the conviction of the alleged mercenaries.[40] The attempt

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purpose of the United Nations". UN Charter Article 4, paragraph 4.

[39] Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, General Assembly Resolution 2465, 23 UN GAOR Supplement (Nº 18) at 4, UN Document A/7218, 1968.

[40] The mercenaries are identified as: 1) being specifically recruited locally or across national borders in order to fight in armed conflict; 2) effectively participating in hostilities; 3) having as their primary motivation an economic gain substantially higher than national soldiers involved in the conflict; 4) not being a citizen of the state in conflict or residing in the territory of that state; 5) not being part of the armed forces of the state in conflict; and 6) not having been sent officially by the state that is not involved in the conflict to fight on their behalf.(Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I),

to control the behaviour of mercenaries in Africa was reinforced by the Organization of African Unity, which in 1972, aside from highlighting the criteria established by Article 47, also criminalized any involvement in mercenary activities (Kinsey, 2008).

Finally, in 1989, the UN drafted the International Convention against the Recruitment, Use, Financing and Training of Mercenaries (UN, 1989). The advancement was in an extension of the mercenary activity considered so far (i.e. solely in armed conflicts) to encompass any other situation in which mercenary acts occurred. As this dissertation stressed out, the contexts in which misconduct might occur (by those who provide private violence) are plural and private violence has been mainly used in context of peace operations since the end of the Cold War. Beside the expansion of the contexts in which private violence was used, the United Nations still took time to recognize the change that had occurred in the field of private military contracting, especially during the late 1970s and ´80s, with the establishment and operation of these activities as part of legal firms (Kinsey, 2005: 274). Such a change needed regulations capable of controlling their activity because these companies did not fit within the definitions of mercenary thus far established, once they transformed into structured companies that sold security and defence services to interested stakeholders, globally. Another component that obstructed the regulation of their activity from the 1990s onwards, was the extension of the UN missions, beyond peacekeeping, to missions such as peace-building and state-building (Østensen, 2011). With it came extended performance in post conflict settings where those companies, despite holding and using weapons to perform certain tasks, were considered to be there under civic engagement.[41]

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article 47).

[41] The PSCs are considered civilians and not military elements (Ostensen, 2011: 16).

The failure to recognize the difference between military and private security companies on the one hand, and mercenary activities on the other, was acknowledged with the establishment of the UN Human Rights Council's Working Group On The Use Of Mercenaries (better known as the Working Group) in 2005, whose initial mandate had as an explicit goal to analyse the issues related to the activities of private military companies. At the same time, the UN acknowledged that current international law had failed in its goal to prohibit and criminalize both traditional and new forms of mercenarism.[42] The Working Group established the definition separating private military and security companies from mercenaries, with which the UN distinguished this group as a new legal entity, recognizing the need for its regulation separately from the mercenaries. Following this recognition, the UN, through the Working Group, received the news of the signing of the Montreal document (more on this later) favourably,[43] because it signified an advancement in the regulation of the industry; the industry was still in self-regulation mode, but had underlined its determination to achieve formal international regulation.[44]

The regulation of non-state actors providing security services exhibits various weaknesses in terms of the monitoring and punishing of multinational actors, due to difficulties in the execution of such tasks (Keohane & Nye, 1977), when compared with the overseeing of mercenary acts, whose regulation has been advanced and improved over decades (Percy, 2007). The first international reinforcement of this was the signing of the *Montreal document on Pertinent International Legal Obligations and*

[42] ECOSOC Resolution 7, UN doc. E/CN.4/2005/23, January 18, 2005. Percy (2007) called this situation of differentiation between mercenaries and private security companies “strong norm, weak law”.

[43] At the press conference held by Amanda Benavides and Alexander Nikitin from the Working Group and Dan McNorton from UNAMA on April 9, 2009.

[44] Oral declaration by Alexander Nikitin (president of the Working Group) to Human Rights Council, 10th session, March 6, 2009.

Good Practices for states related to Operations of Private Military and Security Companies during Armed Conflict, better known as a Montreal document (International Committee of the Red Cross // Swiss Federal Department of Foreign Affairs, 2008). This document represents a set of recommendations for good practices for both the states who contract and who receive contractors. By 2015, it was signed by 53 states and served as a stepping stone for several others international and national regulatory initiatives. One of them was an international initiative that joined representatives from private security industry, governments and NGOs involved in the security work, known as the International Code of Conduct for Private Security Service Providers (ICOC) (Swiss government, 2010). The main purpose of this initiative was again to promote best practices, and to encourage states and companies to engage more actively in the control of their employees and their activities. As part of an evolution of ICOC, 2013 saw the establishment of the International Code of Conduct Association (ICOCA), an organization tasked with the objective of translating the demands of the ICOC into practice. In the beginning of 2016, ICOCA is in the last phase of defining the accountability standards and measures that will allow the monitoring of those companies that are members, and will put in place the monitoring procedures necessary for their continuous supervision. However, it should be noted that these documents have no legal authority, and besides being seen as an encouraging element in promoting awareness of the companies themselves, there are no legally established supranational mechanisms that could call on other legal consequences besides exclusion from the ICOC (Avant, 2016; White, 2014).[45]

[45] ICOC is a private, non-profit entity that does not have capacity to impose legal consequences and is dependent on the interests of member states to extend those rules and mechanisms on national level. Avant (2016) has discussed about US input in ICOC/ICOCA initiatives and called on political interest in expanding international results nationally.

This is probably the most successful international attempt at self-regulation, but it is hardly a lone example. Before ICOCA, there were Voluntary Principles on Security and Human Rights, adopted by companies an early mechanism that would provide sets of guidelines for best practices to be followed.[46] Despite the goodwill of companies in signing up to those principles, they lived up to their name: voluntary. There was no intention to institutionalize any mode of accountability for those members who did not follow through with the commitment.[47] There were other examples of self-regulation that arose in the last couple of decades; however, they were not specific to the private security sector. Examples include the UN Global Compact initiative (which can be read at http://www.un.org/ Depts/ptd/global.htm), Fund for Peace (which can be read at http://global.fundforpeace.org/aboutus) and different professional standards on which the industry worked, for instance trade association (IPOA/ISOA) Code of Conduct (can be read at http://www.stability-operations.org/?page=Code) or individual company Code of Ethics and Business Conduct (see for example the site of DynCorp International at http://www.dyn-intl.com/about-di/values-code-of-conduct/). The latest such example is the PSC.1 Standard, which is in the process of certification to become an internationally recognized ISO standard (ISO 187088) (Globe News Wire, 2015). Those standards, as well as all other self-regulatory initiatives, have at their root the principle that companies are best punished economically, in the sense that customers will not hire them if they don't meet certain internationally accepted standards of operation.[48]

[46] Voluntary principles were adopted in 2000 by US and UK Government and number of NGOs with interest in protection of human rights and corporate social responsibility. They have been adopted by extracting (mining and oil) industry companies with an aim to protect human rights of local population from the public and private security contractors. Those were defined as best practices companies should adopt and follow when contracting security services. For more see Börzel & Hoenke, 2010; Freeman, Pica, & Camponovo, 2000; Gill & Caramola, 2014, pp. 758–9.

[47] Interviews 8, 36 and 42.

[48] Former DoDIG stated that companies are best thought accountable by attacking their bottom line. If the client opt next time not to award contract to company that committed misconduct than it will affect the company's bottom line, and these companies are trying to make profit (interview 16). See also Singer (2010).

These self-regulatory tools had as a main goal the improvement of the contracting process by setting higher standards and requirements for the companies that wanted to apply to such contracts in the future. As such, they contributed by raising quality demands for future contracts, and anticipating a better quality management of delivered services (Avant, 2016: 10).

The latest attempt at international legal regulation was the UN Draft of International Convention on the Regulation, Oversight and Monitoring of Private Security Companies, a project which did little to advance the monitoring mechanisms, or establish specific bodies (United Nations, 2010).[49] This project did not result in effective Convention, and has been invoked as a source of more political problems than potential solutions: from attempt to define inherently governmental functions, to establishment of national centres for collection, analysis and exchange of information and national legislative schemes that would regulate register and licensing of the PSCs by government, specific requirements for their training and experience and in off-shore activities of registered PSCs (Gomez del Prado, 2011). Thus, having no binding international legal directives or regulations, and having self-regulation as a basic regulatory principle, academic criticism has largely focused on the potential signatory states of these conventions and agreements, stressing the need to enforce national-level compliance with norms (Jones, 2009; Leander, 2010; Mehra, 2010). This line of inquiry has dominated scholarly debates on various related topics: from the debate as to who should have the authority to control PSCs in the post-conflict context (Bakker, 2009; Brickell, 2010; Chapman, 2010; Elsea, 2010; Leander, 2010), criticisms of the absence of strong, binding international regulations (Hurst, 2011; Juma, 2011; Kinsey, 2002; Tiefer, 2009), and of the unaccountability of companies (BBC news, 2010; Hedahl, 2009; Krause, 2011), to complaints about the disrespect

[49] The USA signed all of these documents and, in the case of documents signed in the last decade or so, was the key player both in the negotiations and in their ratification.

for human rights and international humanitarian law (Gathii, 2009; Kinsey, 2005b; Santa Cruz, 2012; Smith, 2008; Snell, 2011; The New York Times editorial, 2010). As this burgeoning scholarship demonstrates, it is undoubtedly of great importance to strengthen the internal regulations of those countries that practice the hiring of security services.

Unfortunately, as Avant (2016) recognized, US Government, even as the biggest contractors of these services, was not ready to undertake political initiative to implement firmer regulation of the industry. Next section will demonstrate evolution of US regulatory process of governmental contracting of private violence abroad, focusing on the period following Second World War up to the point where it stands nowadays.

The USA´s internal regulations for contracting, oversight and criminal liability of the private use of violence

The national-level regulatory mechanisms put in place by the US Government have indeed come a long way. Certainly, the current system evinces a lot of loopholes, but we have to recognize the merit of tracing a path from the absence of any regulation after the Second World War, to a strong attempt during last decade to monitor and supervise the activities of the PSCs in unstable environments.

Historically, the most important document regarding the organization of the US security sector is undoubtedly the National Security Act of 1947, which

establishes the operation of the various US defence and security services in an organized and systematic manner.[50] The document did not yet deal with the non-state elements/civilians providing security and defence services,[51] but it did join the State Department and Department of Defense in National Security Council and traced that they would both be crucial for delineating security policies in future (Falk, 1964). The regulation focusing on the civilian sector was only established with the Goldwater-Nichols Defense Reorganization Act in 1986, when the first major reform leading to the modernization of the armed forces took place. The main accomplishment of this document, regarding private security contracting, was to recognize the participation of civil elements in military operations and consequently increase the state's ability to control contractors, as well as its effectiveness in how the services link up in chain of command (Bruneau, 2011: 83).

Even with such developments, specific legal framework concerning the hiring of security services in post conflict operations did not exist in the early twenty-first century, before the interventions in Iraq and Afghanistan.[52] Before that, the hiring of security services had been covered by two key documents: the first was the Federal Acquisition Regulation (FAR),[53] which remains a reference point regarding the

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[50] In the aftermath of Second World War, National Security Act, signed by president Truman, provided major foreign policy and national security bureaucracy reform. It established what will in 1949 became Department of Defense (including Department of War, Department of Navy and Department of Air Force), but also Central Intelligence Agency (CIA) and National Security Council both Secretary of State and Secretary of Defense to advise president on issues regarding national security. For more about its importance see (Berkowitz & Goodman, 1991, pp. 9–43; Hogan, 2000; State Department, 2010; Stevenson, 2008).

[51] As Taylor (1970, p. 92) said “Under the National Security Act of 1947 military and civilian distinctions were blurred by law and in the bureaucracy they were blurred in practice”.

[52] The Goldwater-Nichols Defense Reorganization Act, from 1986, was the last big reform undertaken by DoD. The security contractors were not particularly approached at that time because the outsourcing of these services in 1986 did not justify greater involvement (Bruneau, 2011: 107).

[53] See Subpart 25.302 which defines staff undertaking the tasks of private security, hired to operate outside the borders of the United states and the conditions under which these can be hired.

acquisition of services by the US government and is, therefore, constantly updated.[54] The second was the International Traffic in Arms Regulation (ITAR), which regulates US companies selling security services and arms to foreign entities. This regulation was established (during the Cold War period) in 1976 (and has been amended several times since then) and was initially designed to control the export of weapons and security services to countries of the Eastern Bloc, but with time spreading to other countries throughout the world. Control of the companies was exercised through registering with the State Department, Office of Defense Trade Control (Collins, 1997: 2693; Holmqvist, 2005: 51). All companies interested in exporting services (training, defence or security) had to ask permission for each specific export contract, provide relevant information and, in case of agreement, the State Department issued a license for the implementation of the contract (Avant, 2005: 149–51; Kinsey, 2006: 136–8; Percy, 2013: 26–8).[55] Although the suitability[56] of this structure to fulfil these tasks has often been challenged (Avant, 2005; Holmqvist, 2005: 51), it represented the early stages of state control over the export of security services and was largely considered sufficient, since the export of US PSCs' services during the 1990s was residual (interviews 27, 38 and 41). With the increasing demand for services, especially with the invasions of Iraq and US involvement in Afghanistan, such a framework has become seemingly ineffective, and clearly insufficient. This was the main factor leading to the strengthening of the legal framework for the procurement of security services by the US Government, starting from the end of the last century and becoming even more evident during the first decade of this century.

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[54] The last update at the time of this writing had happened on July 21, 2013.

[55] The latest full document can be found at http://www.pmddtc.state.gov/regulations_laws/itar_official.html.

[56] There are various departments and offices administering contracts without consistency (Avant, 2005: note 65, Holmqvist, 2005: 51).

Presently, the legal framework that applies to American PSCs and American citizens involved with military operations in the context of war (or stability operations) is very extensive; its main focus is to extend the jurisdiction of US federal courts outside its borders, and to give them the authority to prosecute individuals who act against the laws applicable in these contexts. Such a framework spans several legislative "levels"; and it includes federal, various state agencies, bilateral agreements with other states, and the individual contracts themselves.[57] However, the existing legislation remains very limited in relation to the actual mechanisms that establish a stable structure responsible for the monitoring and supervision of contracted services in volatile environments. For instance, DoD senior officers considered that often enough more effective oversight is due to personal involvement of officers on the ground (both from DoD and from PSCs) than actually due to application of existing regulation (interviews 27 and 41). The result, as we shall see, is not due to a lack of attempts to establish a more rigorous control of PSC´s in these contexts, but rather the absence of the political will to adopt it (interviews 31, 39 and 40).

These existing regulations have received special attention from the year 2000 onwards, with federal documents adopted in order to regulate the activities of the PSCs in contexts other than war. These documents include the 1996 War Crimes Act (USC, 1996),[58] the Military Extraterritorial Jurisdiction Act (USC, 2000),[59] and the

[57] Annex 1 provides a chart elaborated by Lanigan (2008) that resumes the regulatory patchwork. Also, see US private security and military companies regulation database available at http://www.privatesecurityregulation.net/countries/results/taxonomy%3A236.212.

[58] Document No. 18 USC § 2441 empowers US courts to prosecute for serious violations of Article 3 of the Geneva Conventions, which are committed by or against US citizens.

[59] Doc. Nº 18 US C. §3261-67 Adoption of this document extends the jurisdiction of US federal courts to prosecute any element following US military operations abroad that violates the established rules at Special Maritime and Territorial Jurisdiction (SMTJ) and whose sentence would be more than one year in prison.

extensions of the Uniform Code of Military Justice (UCMJ) and USA PATRIOT Act of 2001 (USC, 2001).[60] Such legal framework has been reinforced with an executive order[61] issued by President Obama in 2012, to strengthen protection against human trafficking in federal contracts, with the aim of criminalizing these behaviours, particularly with regard to contractors of the US government.

Many of these regulatory efforts originated from initiatives directed at the Department of Defense (DoD), since they were the main contractor of these services, especially since the 1960s and the war in Vietnam. The first major expansion of existing regulation directed to *all* contractors in contingency operations, and with the express purpose of addressing criminal liability of armed contractors, was an extension of the Military Extraterritorial Jurisdiction Act (MEJA). The MEJA was originally established to cover a legal loophole: America's inability to prosecute family members of the military working in military bases abroad when they committed a crime, because of the lack of tools to hold them accountable on foreign soil. MEJA was further extended in 2001 as a consequence of the inability to hold accountable civilian contractors who had committed misconduct on active duty, first during the mission of the US military to Bosnia during the 1990s (Hackman, 2007; Rarick, 2015). That was one of the first missions in which the US used a larger contingent of contractors for those services that were not logistics or training. The inability to hold contractors who committed crimes during the performance of their contracts for the US DoD criminally accountable, provided the incentive for considering their regulation

[60] Publ. L. Nº 107-56,§804 with this document SMTJ was extended beyond national borders to include US military bases and US embassies abroad, and certain offences committed by and to US citizens.

[61] After years of complaints against PSC misconduct against its own personnel, resulting in atrocities that included sex crimes against both workers and civilians, as well as human trafficking (see Committee on Oversight and Government Reform House of Representatives, 2011; Isenberg, 2009; Shavers, 2012; Snell, 2011), president Obama issued an order to reinforce US Government zero-tolerance policy toward human trafficking. His order has been upgraded to a Federal Acquisition Regulation (FAR), named *Ending Trafficking in Persons,* in January 2015 (FAR, 2015; Pope, 2015).

(interviews 16 and 34). The extension of MEJA was relevant in those settings where the contractors were living and operating on the same ground, closely, with DoD personnel, as in the specific circumstances of the Bosnian mission. However, it was not adequate for the new circumstances that of the interventions in Iraq and Afghanistan, where DoD contractors were not necessarily living in the same place as the military, and DoD was not the only agency contracting security personnel. The latest legislative reinforcement of criminal liability of DoD contractors was the National Defense Authorization Act (NDAA) of 2008, which extended the jurisdiction of the UCMJ to include civilian contractors working for the DoD, as a reinforcement of the MEJA regulation (Elsea, 2010: 18; Schwartz, 2010: 4).

Until the Nisour Square shooting, where the State Department's contractor caused a massacre, US Congress involvement, regarding outsourcing use of force, concerned solely DoD, so called military, contractors. Hence, reality is US missions in Iraq and Afghanistan expanded from contingency operations to the state-building initiatives, and, as consequence, multiple agencies and departments of the US have been involved in the operation. Up to 2007 civilian contractors employed by other agencies were not even considered by regulatory standpoint (Isenberg, 2012).The MEJA was originally intended to cover civilian contractors related to DoD missions, but given the absence of appropriate legislation, as it occurred in the case of Nisour shooting (Brown, 2013; Fidell, 2008; Jackson, 2007), US Courts has been using it to cover civilian contractors of the State Department as well. Hence, there was an obvious need for a piece of legislation equivalent to MEJA, which would address the same issues but regarding civilians, where by the contractors of other agencies and departments (such as State Department or USAID) would fit (DeWinter-Schmitt, 2016). The first attempt at such a bill was proposed in 2007 by then Congressman,

now president, Barack Obama (2007). Since then, it has been reintroduced several times (Leahy, 2010, 2015, Price, 2007, 2010), but never reached consensus.[62]

External regulatory mechanisms have also influenced domestic regulations, and since 2009 (after the signing of international documents such as the Montreal Document, and the negotiations for ICOC), greater importance and scrutiny was given to the monitoring and oversight of PSCs in the US (Committee on Armed Services United States Senate, 2010; GAO, 2012; Heddell, 2011). Despite the importance of the judicial process in assisting in the decision of who has jurisdiction over crimes committed on the soil of the host state, it was hereby assumed that the contracting state has a responsibility and obligation to control and prevent misconduct, recognized as such by the state receiving these companies (Jones, 2009). Domestically, in the US, the importance of a better contracting process was recognized by DoD (interviews 27 and 41), and Congress discussed the need for better supervision tools that would allow closer oversight of the PSCs activities on the ground (Committee on Armed Services United States Senate, 2010; House of Representatives, US Congress, 2007; Waxman, 2007). In fact, where DoD and PSCs reached agreement was that the adoption of a set of standards allowing prioritizing higher quality contracting, and minimizing the possibility of misconduct. This resulted in the establishment of the PSC.1/ANSI[63] (quality management) standard, business led initiative whose result was adopted as an American national standard (ASIS International, 2012, interviews 8, 27 and 41).

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[62] In 2007, Barack Obama introduced the Security Contractor Accountability Act, which was later, in 2010, reintroduced with some changes as a Civilian Extraterritorial Jurisdiction Act (known as CEJA) by Representative David Price and Senator Patrick Leahy. The CEJA proposal has been reintroduced again in 2015, still without success.

[63] PSC.1 standards have been registered at ASIS International (international body responsible for certification of quality management standards) and at American National Standard Institute, private, non-profit organization that oversees development of voluntary standards for products, services, processes, systems and personnel in the US.

As we can already begin to see, the USA does not have a single approach regarding the contracting and supervision of PSCs on the ground. Rather, it has multiple approaches, and each agency or department has its own set of requirements that are applied to security contractors on the ground. Moreover, various bodies are involved in the management of contracts with PSCs outside US national borders, and, generally speaking, these can be categorized as those who deal directly with the supervision of their activities (like the State Department and the Department of Defense)[64] and the various agencies and Committees that implement the control of supervision by the State Department and Defense, like Committee on Armed Services (supervise DoD) and Committee on Oversight and Government Reform (both DoD and State Department) (Schwartz, 2010: 4).

The Department of Defense

The agency within the US Government with the most developed regulatory framework is the Department of Defense. Regulation of the contracting, monitoring, auditing and supervision of the activities of PSCs contracted by this department

[64] Even though USAID had large number of contractors under their programmes (CSIS Defense-Industrial Initiatives Group, 2012), it is not considered in this analysis. The reason for this stems from their decision to remain separate from overall regulatory process, as their organisational structure is minimal and their work is done through the contracts they award on the ground. This means that USAID does not directly contract security companies, rather the PSCs are contracted by the organisation that is subcontracted by USAID, and those PSCs are not obligated to follow any of the requirements that, for example, DoD contractors are, or to be responsible for any misconduct they commit. This is considered both by the State Department and DoD officers to be very disturbing, since the humanitarian organisations that are contracted by USAID are exactly those which will seek the lowest price over the quality provision of security services (interviews 8, 20, 27 and 41).

consists in several rules adopted over the last few decades, among the most important being the adoption of specific standards required in relationships with the PSCs, particularly in the bidding/contracting process (Mayer, 2015). The approach undertaken by the DoD regarding PSC regulations has had both bottom-up and top-down initiatives, which complemented the regulations provided by Congress. In the words of a senior official in the DoD, the department's approach to include both perspectives in the regulatory process made it very precise in addressing problems with DoD contractors, the lack of major incidents in either Iraq or Afghanistan in the last eight years seemingly marking it as a success (interview 41). Among high-level senior officials (interviews 16, 27, 38 and 41) in the Department of Defense, the real efforts to address the regulatory problems of PSCs occurred with the media attention given to the Nisour Square incident, even though it happened under the State Department´s watch. There was an overall understanding that the DoD did not really succeed in managing contractors in stability operations. In that sense, the first impulse of Congress came with the 2007 NDAA and particularly with Section 854, which called on policy direction and the oversight of contractors in stability operations.[65] For that purpose a specific office was established within the DoD to deal with policy orientation, as well as accumulating and learning from the experiences that should be addressed inside the DoD, with a view to making the regulation and management of contractors more efficient. That office is the Deputy Assistant Secretary of Defense (Program Support).[66]

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[65] As senior DoD officer stated “we had to change a law in 2006, which was in 2007 NDAA, which placed substantial requirements under DoD to manage their contractors in general in contingency operations. Which we were not, quite frankly, doing really well. But it was in the law, it was mandated and (...) I got tagged with that global responsibility for contractors in contingency operations to provide policy direction, oversight, all that, we call up a section 854 of the 2007 NDAA. Nisour Square hit in Iraq which was one of those seminal events that causes government to relook at and see what is going on.” (interview 41).

[66] See annex 2 for organizational chart for the offices involved.

The Nisour Square incident highlighted the fact that the US Government was not consistent in regulating PSCs in Iraq, especially since different agencies and departments were contracting them for different purposes. Aside from the different missions that PSCs were performing, depending on the different agency/departments that they were serving, there was a misunderstanding regarding the meaning of certain concepts, as rules of engagement (State Department) Vs rules of use of force (DoD).[67] Therefore, in 2007, Congress ordered clarification and agreement between the State Department and the DoD regarding the terminology used, as well as some common procedures. This resulted in the Memorandum of Understanding between those two Departments in December of 2007 (DOD & DoS, 2007), as well as the Memorandum of Understanding (DoS, DoD & USAID, 2008) signed in July 2008. These documents served to create uniform terminology in both departments, and some common procedures regarding vetting, training and using PSC personnel and coordinate convoy movements (Frisk, 2009: 15; Solis, 2009: 23). This was important because it allowed sharing information on convoy movements and information about "hazardous" areas, which would allow the de-escalation of violence on the ground, as well as clarify the role of private security contractors and their limitations.[68] However, that did not mean that there was convergence on other levels; namely, policies that

[67] Senior DoD officer explained this: "There was a huge amount of confusion between us and State Department. They used Rules of engagement (RoE) and we used Rules of use of force (RoF). And to the common people who were operating with soldiers and general population that was a huge confusion. So, generally, we have consistently RoF within particular region. The RoF might not be the same everywhere, because it´s situation depending, but the terminology and contents of RoF between us and State are supposed to be pretty well consistent" (interview 41).

[68] Senior DoD officer stated "The other thing we needed to ensure was that we had common rules of use of force. We (DoD) do not let, and early on there was a confusion, we don't let our contractors operate under the rules of engagement. Rules of engagement are for the military personnel only. And they are generally offensive in nature. We had to change paradigm, even the terminology, where we (State Department and DoD) don't talk about the rules of engagement for contractors, it´s rules of use of force." (interview 41).

would guarantee the same rules and requirements for contractors in both departments (Commission on Wartime Contracting in Iraq and Afghanistan, 2011).

In the following years, between 2009 and 2011, the DoD adopted several directives and instructions (DoDD 3020.49 and DoDI 3020.50 (DOD, 2009),[69] DoDI 3020.41 (DOD, 2011) and DoD 5128.34 (DOD, 2010)). However, the department's leadership considered that the best way to discipline PSCs was through raising the standards by which they were contracted, and by which they needed to operate. Their intention was to thereby weed out the low bidding companies which did not invest in their own personnel training or in their management (interviews 27 and 41). Those intentions have been supported by part of the industry, who sought a mode to detach from Nisour Square incident (interviews 6, 24 and 32). Finally, NDAA of 2011 required definition of standards for private security functions (NDAA, 2011, sec. 833). In this context, surged support in establishment of national quality standards regarding contracting PSCs by Government. The first fruits of the process came in 2012 with the establishment of the first version of the ANSI standards, known as PSC.1, eventually incorporated in 2015 as a prerequisite in the bidding process for DoD contracts.[70] The root of the standards was to set up certification that uses audits and the monitoring of the PSCs to verify whether various established criteria have been enforced by

[69] In 2009 the Department of Defense, through the DODI.3020.50 statement, set out its policy on the monitoring and controlling of activities of PSCs in a hostile environment, by giving the Geographic Combatant Commander the task of control. The document includes the procedures that should be established for each operation by the Commander in charge, including the presentation of the report in the case of misconduct and coordination with the mission leader on issues related to the supervision of contractors´ activities and compliance with the rules of contracts under which they operate. This directive was supported by the final DoD rule in 2011 (DoD Final Rule 32 CFR Part 159 "Private Security Contractors Operating in Contingency Operations").

[70] These standards were developed by non-governmental, non-profit organisation, ASIS (the organisation was formed in 1955 on behalf of the American Society for Industrial Security, but in 2002 changed its name to International ASIS to demonstrate its international character, since it brings together representatives of 125 states). The organization is working on the certification of the quality and management standards, and this certification is an industry led process.

implementing rules and procedures in a particular company. These certifications are renewable and have a validation period of two years during which the company will also be subject to audits to confirm the ongoing improvement process of management skills to reduce the possibility of misconduct and to ensure standard procedures in case of their occurrence.[71]

The idea behind such standards is rooted in an economic perspective. The DoD is not a law-making body, as Congress is, and due to the limited availability of Congress to address the criminal liability and consequences of PSCs misconduct, as much in other departments as in the DoD, the idea of creating standards is to set some criteria that would exclude those companies which are more likely to commit misconduct and to make others more aware of the possible loss of profit in the case of misconduct (Avant, 2016, interviews 16, 27 and 41).

The supervision tool that is still the main oversight mechanism of contracts was adopted in 1999. Known as the Army Regulation AR 715-9, it deals specifically with matters relating to contractors accompanying the military in operations other than war.[72] The document (DOD, 1999) recognizes the need for closer control and supervision of contracts, with the periodic monitoring of equipment and quality of services.[73] The tools that the document outlines as essential to achieve compliance in the oversight and supervision of contractors are the existence of a Contract Officer (CO) and/or its connection on the ground, as well as a Contract Officer´s

[71] The process of certification and the requirements that companies interested in PSC.1 (and following versions) certification need to undertake have been extensively explained by Lisa DeBrock, specialist in this certification process, at webinar, organized at American University, on new ISO 18788 standard (DuBrock, 2015). Audio recordings from webinar are available on the page of respective event.

[72] See the supporting (more detailed) discussion of this in Kidwell (2005: 34–5).

[73] "A rigid contract surveillance program is necessary to ensure that the associated contractors maintain the required readiness posture. This surveillance program should provide for periodic inspections of equipment and performance tests of some or all of the covered services." (DOD, 1999).

Representative (COR);[74] together, these would control the monitoring and satisfaction of the requirements established by the contract. Such a tool represents a major step forward in this area, and currently exemplifies the only direct mechanism of supervision of PSCs in the field. However, the document also stresses the importance of the exercise of self-control by the companies themselves.[75]

These rules were incorporated via their inclusion in Field Manual 3-100.21 (Contractors on the Battlefield) in 2003 (DOD, 2003), but the implementation of the rules refers to a specific program, without further elaborating on the processes.[76] Then, in 2005, the DoD (DOD, 2005) issued an instruction that focused on the relevant steps of engaging contractors in deployment with the US military. In Article 6.3.3 of that document, the responsibility of disciplining contractors is discussed, putting the focus on the obligation of the contractors to control their own human resources, and the lack of power of the armed forces to do so, beyond the suspension of the contract or the prohibition of access to armed forces' facilities.[77]

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[74] The responsibilities of CO and COR are distinctive. As COR Handbook (DOD, 2012: 9) claims, "Contracting Officer is responsible for ensuring performance of all necessary actions for effective contracting, ensuring compliance with the terms of the contract, and safeguarding the interests of the United States in its contractual relationships. To perform these responsibilities, Contracting Officers are afforded wide latitude to exercise sound business judgement. Contracting Officers must ensure that no contract is entered into unless all requirements of law, executive orders, regulations, and all other applicable procedures, including clearances and approvals, have been met and that contractors receive impartial, fair, and equitable treatment". Contracting officer perform his/hers job in Pentagon, while COR represents his/hers eyes and ears on the ground. As same handbook stated "CORs monitor contract performance and provide the Contracting Officer with documentation that identifies the contractor's compliance or noncompliance with the terms and conditions of the contract." (idem: 10).

[75] See article 3.2 (f) of the same document.

[76] See article 4.43 of this document.

[77] "Defense contractors are responsible for ensuring employees perform under the terms of the contract; comply with theater orders, and applicable directives, laws, and regulations; and maintain employee discipline. The contracting officer, or designee, is the liaison between the commander and the defense contractor for directing or controlling contractor performance because commanders have no direct contractual relationship with the defense contractor. (...) Contingency contractor personnel shall conform to all general orders applicable to DoD civilian personnel issued by the ranking military commander. Outside the assertion of criminal jurisdiction for misconduct, the contractor is responsible

The conclusion was that any problems should be resolved by the COR and the contractor management team collaboratively. This instruction (DOD, 2011) was updated in 2011, but without any changes with regard to the supervision of contracts.

Institutionally, the body directly supervising contracts related to the provision of security by PSCs is the Defense Contracting Management Agency, part of the DoD, under whose command Contract Agents and their field representatives work (DOD, 2016).[78] The measures that have been published are still in the process of being assimilated by the DoD´s structure, and senior officials consider a 2015 to be an "educational year"[79] for staff in the Defense Contracting Management Agency, as well as for military staff on the ground.

State Department

The regulatory process in the State Department cannot, however, be followed in such a straightforward manner as in the DoD. The State Department's principal vehicle of regulation of private security contractors is contract, namely through Worldwide Protective Services (WPS) Program. In the latest WPS Task Order, the requirement was to have both PSC.1 Certificate and to be in good standing as a member of ICOCA, which is great improvement since the last bidding process in 2010

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for disciplining contingency contractor personnel. Commanders have limited authority to take disciplinary action against contingency contractor personnel. However, a commander has authority to take certain actions affecting contingency contractor personnel, such as the ability to revoke or suspend security access or impose restriction from installations or facilities." (DOD, 2005: 15).

[78] As stated on website "DCMA professionals serve as "information brokers" and in-plant representatives for military, Federal, and allied government buying agencies – both during the initial stages of the acquisition cycle and throughout the life of the resulting contracts." (DOD, 2016).

[79] In 2015 a manual was going to be published for those working with PSCs that should serve as an educational tool for establishing new routines and updating the procedures and knowledge of military staff in regard to what is allowed and what is not (interviews 27 and 41).

when there was no standards required (Government and Contract Bid, 2015). The office responsible for oversight and management of these contract is the Bureau of Diplomatic Security (DS), subordinated to the Under Secretary of Management. Other path used by State Department to participate in regulatory process of private security contractors is through international initiatives, where they participated in elaboration of the Montreal Document, has collaborated in the negotiations of the ICOC agreement and has consequently adopted in their contracting process standards (ICOC) that were negotiated there (DoS, 2013).[80] The office that is responsible for participation in international initiatives is the Bureau of Democracy, Human Rights and Labour (DRL), working under the Under Secretary for Civilian Security, Democracy and Human Rights.[81] There does not appear to exist an institutional, clear connection between those two bureaus.[82] As the internal directives governing these bureaus are not accessible to the general public, it was not possible to identify them.[83] It was, however, possible to determine that the structure of the oversight through Contracting Officers and Contracting Officer Representatives on the ground is equivalent to the DoD (interviews 20, 34 and 50).

The major changes that occurred as a consequence of the Nisour Square massacre did not have roots in a wider policy strategy that would address the State´s relationship with PSCs contractors in stability operations; rather, they aimed to

[80] State Department led US delegation in the negotiation process, but delegation included the representatives from the DoD as well.

[81] See annex 3 for an organizational chart of the offices.

[82] The senior State Department´s official stated that those two offices do not contact with each other (interview 50).

[83] On the Department's website there are no directives available, in contrast to DoD where all information about regulation governing security contractors is publicly available and well identified. There were others who struggled with same problem (interviews 2, 8, 10 and 30), and the Sié Chéou-Kang Center´s *Private Security Monitor*, the most comprehensive conglomerate of regulatory information regarding US Government, also have failed to identify such directives.

address the immediate problems. As a result, a standard procedure was established so that every convoy[84] had to have a camera and one State Department officer in it (interviews 20, 34, 38, 39 and 40). Senior officials on the ground found a pitfall in this approach, since the officer tends to be at the front of the convoy, while problems have a tendency to occur at the back (interviews 34 and 38). Information is also not available regarding how effective this measure has been in the prevention of misconduct, and the State Department does not provide information on this.

Criminal accountability over PSCs contractors in the State Department is very debatable, and many argue that MEJA does not extend automatically to them (Brown, 2013; DeWinter-Schmitt, 2016; Leahy, 2014). The agencies not directly connected with DoD mission on the ground, in stability operations, are out of the MEJA scope. Good example were incidents in the Abu Ghraib prison, where personnel from CACI, who had contract with the Interior Department's National Business Center and not with the DoD, was not held accountable for committed crimes because MEJA was no applicable to them (Isenberg, 2008: 132–3). When Blackwater employees were charged under the MEJA for the crimes resulting from the shooting at the Nisour Square, an extension of the MEJA to them was questioned, since they have not been directly connected with DoD mission on the ground (Breuer, 2011; Teichert, 2014).[85] Hence, there is an imminent need for a piece of legislation to directly address the criminal accountability of civilian contractors in departments and agencies other than the DoD.

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[84] In Iraq, PSCs were ensuring security of diplomatic convoys, and previously to this measure transportation counted only with PSC team in convoy and a client they were transporting, with no direct supervision or oversight by State Department.

[85] Blackwater trial had raised questions of the constitutionality of its application to contractors not employed by DoD. Even though Congress used language they considered broadening up the scope to all civilian contractors (“supporting operations of the DoD”), such interpretation has often been contested (Teichert, 2014).

Conclusion

This chapter departed from the historical overview of regulatory attempts and looked at how use of private violence, when outsourced by sovereigns and rulers, has been controlled on the ground. It allowed to see that outsourcing of violence has rather been a rule than an exception in history, and that the regulatory tools were as effective as ruler/sovereign wanted them to be. When sovereign demanded stricter discipline from contracted forces, he would invest more in their oversight on the ground and stricter punishments. The mercenaries which have been studied in the first part of the chapter has been virtually gone from International Relations with the adoption of neutrality law by many countries in 19th century, but their operations were all but gone. Focusing solely, on the US case, it was demonstrated how US used them in their colonization period.

Twentieth century brought the most important advances in prohibition of the use of mercenaries and mercenary activity in general, by advancement of several international conventions. For the first time in history was given importance to respect of the human rights. The end of Cold War and downsizing of national armies around the globe contributed to a rise of available force previously employed in government troops. The US interventions in Iraq and Afghanistan were catalyzers of the growth of new industry that provided security and logistic services for governments in such settings. Their rise, hence caused regulatory challenges since they are not mercenaries, they are not government employees and yet they use force to execute their tasks.

We demonstrated how regulation of private use of force has been addressed, domestically, in the US, and internationally, and which tools are currently available in dealing with private security contractors. Finally, the contribution of this chapter, for the study of US regulation of private security contractors, is in systematization of the existing knowledge, provision of the organizational charts, and identification of the offices involved in regulatory process.

The next chapter will look at the consequences of changes in how the providers of security services have been seen, particularly since the end of the Cold War, and what are the limitations to better understanding of the regulatory process that are imposed by existing research. The new approach is proposed, that will permit observing through practices dynamics hidden by attempts to fit regulatory process in well-established theoretic approaches and settled conventional wisdom.

Chapter 3

Letting go of neoliberal constrains: learning from the regulatory process

With the downsizing of national armies after the end of the Cold War, Private Security Companies (PSCs) gained a new place on the market for force, as a consequence of several factors: the demise of ideological conflict, and the resulting necessity to be prepared to enter in direct combat with another state, the increase of UN peace missions, and ideological demand for outsourcing state´s provision of the services (Avant, 2005: 30–5; Kinsey, 2006: 151; Krahmann, 2010: 4; Stanley, 2015). The limited capacity of national armies to respond rapidly to security threats, an urgency factor highlighted by the 9/11 attacks, led to lifting security outsourcing to unimaginable proportions in order to attain ambitious foreign and domestic policy goals (Avant & De Nevers, 2011). In fact, on several occasions, the number of private contractors surpassed the number of regular troops operating in hostile environments (Dunigan, 2011: 52). Moreover, the lack of preparation for such a rapid increase often led to misconduct on the part of contractors, a fact that alarmed decision-makers and highlighted the inadequacy of the existing regulation of this crucial sector (GAO, 2005, 2006, 2012).

This change in the structural relationship between the state - until then considered as the sole provider of security services, and equipped to use violence outside its borders - and private actors was systemic, and the rapid expansion in the

provision of violence *in the name of the state* out of borders, in volatile environments, unsurprisingly caused an outcry, calling for more regulation. The classical theories used by the discipline of IR have not been very effective in treating the problems resulting from such a power shift,[86] as the complexity of relationships affecting the regulatory process could not be fully understood by them (Avant, 2005; Krahmann, 2010; Percy, 2013). As I argue here, there is a latent need in IR to observe the regulation of PSCs, and its patently limited effectiveness, in the light of three factors: the shift in the relations that occurred, the adequacy of existing structures to accommodate the incorporation of new entities in interventions and finally, observing regulation as something *beyond* the state.

The usual approach to problems related to low levels of accountability and inefficient regulation is to focus on economic and legal explanations, and that is certainly a part of the answer. The above-mentioned power shift was reflected in various aspects, and the use of the International Political Economy and its various theories (Hawkins, Lake, Nielson, & Tierney, 2006) to a certain degree explains the resulting inherent economic benefits in this situation, where the state has lost its monopoly in favour of private agents, which now can influence regulation by the advantages it has from the ground (information gathering, impossibility to stay under continuous surveillance during the execution of a contract, among others).

Arguably the most used approach to explain the regulatory troubles facing the private security industry is Principal-Agent Theory (henceforth PAT). This theory is rooted in the assumption that several relationships between social, political, and

[86] One of the first authors to discuss the importance of the power shift in the relationship between PSCs and government was Deborah Avant (2005), who discusses in detail the asymmetries of information that occurred as a consequence of the outsourcing, resulting in change of the power relationship between government and industry (decreasing on the government side and increasing on industry side).

economic actors can be understood as relationships between Principals and Agents, whereby the principal delegates authority/contracts services, the agent is the one whose services are contracted, and the latter has the ability to make decisions on behalf of, or have impact upon, the decision-making of principal.[87] Considering the specific case of the private security industry, the contracting state is considered to be the Principal, and security contractors are Agents. Agents thus manage to gain comparative advantage because of factors like uncertainty and asymmetry of the possession of information in relation to their employer. In other words, in the unstable/hostile environments across national borders, there is greater comparative advantage of agent hired by the state. The key element bringing difficulties in the relationship between Principal and Agent is distrust, mainly of the principal over the performance of agent as agreed. The suspicion over the possibility of the planned escape of executing contracted services in the mode that was agreed - that Feaver (2003: 60–1) defines as deviant behaviour of agreed relational (critical decision-making) and functional (agent behaviour) goals - is sufficient to demonstrate the comparative advantage that the agent holds over Principal.

If any breach of the undertakings occurs, coercive measures are necessary. Specificity of the post conflict environment is found in unstable and unpredictable circumstances, and that cause difficulties in specification of the contracted services,

[87] Principal-Agent theory raises number of issues resulting from such relationship. As it will be demonstrated further in this chapter, information asymmetry between principal and agent may lead to hidden information and hidden action by agent, when the consequences of those are not beneficial for agent. Moreover, there are issues that can result from such actions and cause agency problems like shirking, slippage, moral hazard and false representation. For more about principal-agent theory and problems that such relationship raise in general, see Grossman and Hart (1983), Laffont and Martimort (2009), McAfee and McMillan (1986) and Miller (2005). For literature that discusses PAT in the context of IR / security studies, see Camacho and Hauser (2007), Gailmard (2012), Kruck (2014), Sowers (2005) and Yukins (2010).

as well as in the oversight. There are two main concerns arising, that can compromise the relationship, namely adverse selection and ethical issues (Dogru, 2010: 58). Distortion of the agent´s image given at the time of hiring occurs in the sense that agent present itself to be more attractive to the principal (adverse selection). The ethical issues concern of the principal that agent will not always do what is ethically correct and principal´s lack of capacity to control the behaviour of agents throughout the contract. Since these problems lead to the possibility of the escape of the modes of behaviour agreed in contract Feaver proposes two types of mechanisms to solve them: monitoring and punishment. Mechanisms for monitoring go through the contractual incentives, screening and selection, alarms, institutional inspections, policing, and the revision of the delegation of decisions; all to encourage the agent to cooperate, reveal and share the information (2003: 86). The mechanisms of the restrictive punishment include monitoring, financial disincentives (current and future), the military justice system and extralegal action, in order to punish unwanted actions and prevent them in the future (Feaver, 2003: 94). Generally, Principal may control the behaviour of agent with such mechanisms if there is the willingness and the power to specify the contractual rules regarding the supervision of the agent, but it seems that in the case of the private security industry this rule is not always feasible (Drutschmann, 2007: 446). The contractual rules are often purposely being left vague in order to give contractors enough freedom to adjust their operations on the ground in the event of changed conditions (increase of hostilities), and as a consequence that limits the ability for controlling the behaviour of contractors on the ground.

Therefore, the only other mode of action PAT sees possible is through the oversight of contractors. Asymmetry of information possession is diminishable by monitoring contractors in the environment where they operate, but in the post conflict environments often these actions are costly and difficult to execute, since the

environment is very volatile, and often, from the point of view of safety, discouraging (Singer, 2003: 152). With all these difficulties, if Principal still manages to identify the breach of contract by any misconduct, his reaction capacity is very limited. On one hand, the contractor is crossed with the dilemma of ending the contract and replacing it with the other, but that option threatens to destabilize ongoing operations throughout the region. On the other hand, if he does not react to misconduct, that will give the contractor power similar to existing in the case of monopoly (Drutschmann 2007: 447). Such difficulties suggest that there is erosion of state sovereignty in a sense of impossibility to prevent these deviant behaviours and ensure state capacity to monitor and supervise the behaviour and actions of contractors, in the harshest environments (Denman, 2011). Avant (2007: 180–5) and Krahmann (2016) discuss the additional difficulty of having multiple principles and benefits agent takes from lack of their coordination. It is recognized that regulation is conditioned by political action and endeavour of public agents of the same approach regarding regulatory effort.

In that sense PAT does grasp the motives of the problems involving regulation of supervision and monitoring of PSCs, by identifying that problems are concentrated in the political and economic aspects of regulation. Beside relying heavily on conventional wisdom to explain difficulties of the regulatory process, and attributing formed identities to stakeholders, this approach does not give opportunity to assess other stakeholders involved in the regulatory process, nor to distinguish between many principals and agents within one stakeholder. Such analysis obscures other potential motivations stakeholders have when they affect regulatory process, that stay uncovered by oversimplification of analysis.

The legal perspective has received far more generous attention by scholars, and they range from the more abstract and macro analysis, to more problem-solving

approaches. Considering the international dimension of regulating private security services, Christopher Kinsey (2002, 2005b, 2008) gave significant contribution in understanding the challenges posed by the inadequacy of existing international regulation, as well as clarifying the options for further regulation. The diversity of approaches to regulation, from public private partnerships (PPP), to more casual forms of governmental regulation, was fairly explored by Krahmann (2005). A supporting view of how to incorporate private public partnerships into constitutional law arrangements was further developed by Kimberly Brown (2013). Recognizing the strong political element in regulation procedures, and seeking to overcome it, Laura Dickinson positioned her work as a quest for finding concrete legal solutions for contracts, focusing on small modifications, out of reach of a political elite that could make significant changes in the supervision, thus keeping private agents accountable (Dickinson, 2011).

Even though the political factor has been recognized as a key variable regarding the regulation of security outsourcing in post conflict operations (Avant, 2005; Isenberg, 2008; Percy, 2013), there is no significant body of research in IR focusing on the political aspects of regulation, or the consequences of this power shift (that occurred in the evolution to a model of regulatory governance) on the relations between public and private agents. Deborah Avant´s work (2005), and work of Abrahamsen & Williams (2010) on change of power in the relationship between public and private agents in context of outsourcing security services represent the most important work developed until this date. Still, to this date, there is no great advance on the study of what impact such a shift has on the regulation of private security services, in the context of post conflict operations.

As our case study is placed at the intersection of regulatory analysis, on the one hand, and foreign policy analysis on the other (as the provision of security services in post conflict operations abroad is clearly related to foreign policy decision-making), further answers with regards to the political/bureaucratic impact on the regulatory process will be sought in the literature addressing foreign policy and organizational theories (Drezner, 2000; Lantis, 2002; Schein, 2010). Departing from a predominant rational choice model, we will also consider the constraints of the organizational structure and bureaucratic policies regarding national security decisions and how they led us to the theoretical lens we propose here. The question of decision-making is often tied to inter-agency process (and politics), rather than result of reason debates or factual power struggles. As Marcella stated

> American power and influence is pervasive and multidimensional. All the instruments of national power are deployed. Yet the challenge of strategic integration, of bringing the instruments into coherent effectiveness, remains. Presidents and their national security staffs strive to achieve coherence, with varying levels of success through use of the "interagency process." (2004: 29).

A rational model of choice is rooted in the assumption that every human behaviour has some rational purpose. When applied to process leading to the establishment of new policy or regulation, that would translate in common model of rational action, where actors are acting purposefully (Allison, 1971; March & Simon, 1958). As Allison and Zellikov (1999: fig. 2) have stressed, a rational choice analysis would assume that the state is a unified actor and has a coherent utility function. Ultimately, this model privileges an analysis on the structural level, and excludes individual as analysis variable. In this particular case of regulation, the state should not (and cannot) be observed as a singular actor, rather it should be seen as a conglomerate of different actors. And, therefore, a coherent utility function is not possible. The cooperation and unity among different actors understood to be under

state umbrella is rather less than optimal to be considered under the rational choice model (Ostrom, 1998: 5).

Another key reason that push away rational model analysis, as we shall see with greater detail below, is an inter-agency competition. Agencies compete, on daily basis, for financial resources, status, power, recognition and influence (Olson & Gregorian, 2007: 14), within limited resources in government. In everyday discussions, budgetary politics affects the outcomes of decision-making process, and what might be considered a rational choice is often not a priority. Different agencies are going after limited funds, It is “the natural condition of a bureaucracy” (Niskanen, 1979: 523), and impact of inter-agency rivalry on crafting foreign policy has been extensively studied by bureaucratic politics (Drezner, 2000; Lowndes & Skelcher, 1998; Marsh, 2014; Wilson, 1989). As Dahl (2007: 5) stated, regarding national security issues, agencies and departments instead of looking at solutions through horizontal, inter-agency cooperation, are forced by government “vertical stove-pipes” structure into “lead agency approach”, which place the competition for a place of leading agency as priority instead of focusing on the most effective solution for problem in hand.

How a particular Government agency would act in the context of the decision-making process is studied, inter alia, by organizational culture literature (Allison & Zelikow, 1999; Barney, 1986; Pettigrew, 1979; Schein, 1990, 2010). This gives primacy to a people-based approach, focusing on human behaviour as an important variable when discussing the way certain agencies act and react in their interactions with others, and why they make the decision they make (Ellison, 2006; O’Reilly, Chatman, & Caldwell, 1991). Sociologist Ann Swidler, for instance, developed complex model of connections between state behaviour and culture. Building her

argument as a critique of Max Weber (1946, 2002) model of how (cultural) ideas influence action, she suggests that *settled* cultures constrain action because they provide "the ritual traditions that regulate ordinary patterns of authority and cooperation" (Swidler, 1986: 284). This argument is important in the context of this research because it focuses on significant organizational constraints that are often ignored when regulatory process is analysed. As we shall see in following chapters, those *settled* cultures have an important influence when considering decision-making process and standing of State Department and Department of Defense in certain contexts.

State agencies do have established modes of operation, under which they have been working for decades and that do fall under the argument "it is how we do things". This might represent serious restraint to improving policy-making, particularly when important political shifts occur, as was the case with ever growing outsourcing of the security services, and the use of contractors in new settings. The organizational process literature, which resulted from the Allison´s (1971) Model II development (focusing on study of impact of organizational process on decision-making process), contributed to better comprehension of the importance and influence of administrative behaviour on policy-making and decision-making processes (Allison, 1971; Fredrickson, 1986; Pentland & Feldman, 2005; Walsh & Ungson, 1991). The mode how one organization will act in decision-making process is closely related to their standard operating procedures (SOPs),[88] which would determine the outcome based on organizational memory and cultural legacy (Allison & Halperin, 1972: 53). As Welch (1992: 124) stated, existing range of organizational routines *can* restrict

[88] Standard operating procedures (SOPs) was defined by Allison as "rules according to which things are done" (Allison and Zellikow, 1999: 169). For more on SOPs see (Cyert & March, 1963; Weick, 1979: 63–72).

available options, particularly in complex operations. Therefore, the decisions in regulatory process should be understood considering organizational background in which they have been made. The trouble with much of the literature that address organizational culture (Alvesson, 2002; Lantis, 2002; Martin, 2001; Swidler, 1986) is that by a using constructivist approach, their narrative stressed that state action is affected by cultural aspects, but does not operationalise it. It fails to demonstrate through examples how specific agent culture does affect their decisions and actions. In other words, it powerfully suggests that culture *does* affect institutional policy-making process, but it often fails to examine exactly *how* this happens.

Proposing a new framework

This thesis arises within such a context, proposing the kind of analysis that seeks to fill the gaps, and to look at both the structural and agential aspects of regulation through a Bourdieusian theoretical framework centred on practices, and how those are operationalised in the specific context of outsourcing security in stability operations. In that same vein, Anna Leander (2007a, 2007b) has made a considerable contribution in considering the relationship between the public and private in outsourcing security services, and by introducing a new theoretical approach to the analysis of the topic, namely Bourdieu´s theory of practice (1977). This approach provides a framework that is more inclusive and comprehensive than the existing ones.

This work takes Anna Leander´s insights as a point of departure, and applies the same broad Bourdieusian logic to regulatory settings, in light of the fact that contemporary security practices have profoundly changed the relationship between corporations and the state.[89] Such a perspective allows for some critical distancing from neoliberal and economic approaches, such as institutionalism or PAT (Avant, 2005; Avant & De Nevers, 2011; Dogru, 2010; Feaver, 2003; Krahmann, 2010, 2016) and facilitates a focus on the real, practical input of all stakeholders to the regulatory process. As a consequence, it is possible to set apart the conventional wisdom of predefined identities and interests,[90] and instead look closely at what routine practices show. In regulating the private use of violence - where transparency is not a high priority, not even from the state, - this regime of contractual authority[91] is a new phenomenon, which has arisen as a consequence of neoliberal governance, there are no previous examples that we could learn from. Thus, the purpose is, through a study of regulatory practices, to learn more about the obstacles to effective regulation, their nature and origin, which would eventually allow for more effective regulations of the practice of outsourcing security services abroad, as well as other areas that deal

[89] This research does not focus specifically on stakeholders' identities involved in regulating private security, but we recognize that there are some very valuable contributions from scholars working on identity with regards to private security industry, such as Anna Leander (Joachim & Schneiker, 2014; Leander, 2002, 2007a; Pelton, 2007).

[90] As it has been demonstrated previously in this chapter, Rational choice theory and realism treat identities as endogenous, interests as aprioristic, and established, without a recognition of its evolution and change. Some other scholars, namely constructivists, advanced from this position and have showed that acquiring identities and interests is a process, an inter-subjective process (Guzzini & Leander, 2005; Munster, 2008; Wendt, 2003), dependent on context. Liberation from the constraints of homogeneous aspects of the agents have been further expanded by Bourdieu (1990), by showing the importance of routine practices upon that process.

[91] While security services have been monopolized, state did not experience contracting process regarding these type of services. Therefore, they have not foreseen and taken precautions concerning difference between military staff and civilian contractors, and consequently, their actions were not always anticipated in timely manner.

with similar transparency difficulties (such as the regulation surrounding drones, for instance (Cavoukian, 2012; Horton, 2015; Leander, 2013).

Even though outsourcing security services is not new, the context in which those services are used and the mode and extent of their use by state have been reinvented with Iraq and Afghanistan interventions (Axelrod, 2014; Dunigan, 2014). However, there are genuinely new aspects that previously have not existed. First, the beginning of the 21st century brought rapid growth of the contexts in which PSCs are used: from mere logistics in previous operations they have expanded to the protection of people, places and objects, the training of local troops and so on (Berndtsson, 2009; Zenko, 2015). Second, governmental agencies that traditionally have not been dependent on PSCs started to use them abundantly (Fainaru, 2008; Franke, 2010). Third, inexperience in managing PSCs on the ground, on the part of agencies that had used them before, as well as new ones, highlighted loopholes in their regulation (GAO, 2004a, 2005, 2006, 2013). I argue here that to study those loopholes further, it is necessary to observe both the structural changes that outsourcing brought (with all the attending organizational and bureaucratic challenges), and the dynamics associated with human behaviour and the interaction between all the stakeholders involved.

To accomplish this goal, the analysis proceeds on two levels. First I address the consequences of structural, contextual changes. Those have been brought by the regulatory approach of neoliberal economies from the late 20th century on, and they played an important part in the reorganization of the security sector, particularly regarding interventions abroad (Baum & McGahan, 2013; Christensen & Laegreid, 2007). The complex regulatory process is affected by the actions of states, of business organizations or oversight bodies, of media and civil society. The new

structure,[92] which brought involvement of private actors within state operations, has altered the relationship among actors[93] and power shift that occurred in outsourcing security can not be left apart when considering its influence on regulation (Avant, 2005: 257). Hence, to understand the obstacles in the regulatory process, it is necessary to admit that it is strongly dependent on political willingness (Feaver, 2003: 166), and that the influence of agents plays a significant part in it (Avant, 2016; Baum & McGahan, 2013).[94] For instance, promulgating adequate legislation is politically dependent of Congress compromise over ideological differences (Price, 2013), and the agents do shape with their input the output of regulation, as it was demonstrated by the example of ICOCA negotiations. Those influences can be best studied through an analysis of the practices of agents (personalized in various governmental offices, trade associations, PSCs, civil society, oversight bodies) with a focus on changes in interests and their assumed identity. The adaptation of structures to fit new demands is dependent on organizational structures, and on a bureaucratic disposition to accommodate them. Good example of availability to accommodate the changes

[92] Previously, when state had monopoly over use of violence abroad, the oversight structure of its use was included in agency structure and have been consolidated by the decades of improvement (including the direct supervision of security providers, as well as holding them accountable for possible misconduct (as a criminal liability). The new structure is different in sense to incorporate oversight and supervision of new set of actors, private ones, and it needed reorganization and adjustment of existing resources to accommodate new reality. For more about the structural changes that outsourcing brought see at (Abrahamsen & Williams, 2006, 2010: 81–2; Avant, 2005: 59–61; Krahmann, 2003, 2005: 8–21).

[93] While in the period of monopolized use of force by state there was no political debate over regulation of use of violence, and all governmental actors involved in process were working toward same goals, with outsourcing the issue of what is/should be inherently governmental function brought divisions, that, (in US case) went beyond legislative branch and affected executive agencies as well. See more about inherently governmental debate (LaPlaca, 2012; Luckey, Grasso, & Manuel, 2009; Tiefer, 2013).

[94] This debate in inserted in wider IR agency-structure debate, which looks at how agency and structure are related. For overview of debate see (Archer, 2003; Gould, 2015: 82–93; Wendt, 1987). Bourdieusian practice theory has an aim to overcome this agency structure dualism, which Bourdieu considered to cause non productive separation between micro and macro analysis (Knorr-Cetina & Cicourel, 1981: 1–48). This theory represents “co-constitutive” solving dilemma approach by considering that agent and structure coexist and co-constitute practices (Bourdieu, 1987).

brought by outsourcing security within existing structures was establishment of the Office of Deputy Assistant Secretary of Defense for Program Support, within US Department of Defense. Therefore, the impact of both agents and structure should not be neglected (as it has been in most of literature on PSCs), rather it should be studied in the context in which occurs and decisions resulting from practices should be placed within a more comprehensive theoretical framework.

Secondly, considering the agent level, PSCs evolution and multifaceted nature was reflected in the new set of political and bureaucratic challenges regarding the protection of public values, since the current regulatory framework used and applied to them was designed in an era when governmental officers executed those tasks (Dickinson, 2011: 3). The behaviour of the agents, both public and private, is not linear, since agents are not trans-historic and static (Kazmi, 2012: 64). Throughout time, both state agents and private actors involved in regulatory processes have suffered transformation (Abrahamsen & Williams, 2009: 6). States are not any more unique provider of security services and their role in providing and regulating security services has changed (Avant, 2005: 66-9). In the same time, private security providers changed and evolved through history, as we observed in previous chapter, and should not be compared to their ancestors. The private-public dichotomy, when labelling the values that agents promote, does not make sense in the globalised world of the 21st century. The importance of the individual, and how personal interests and personality affect agent behaviour, are crucial elements for understanding the challenges of the regulatory process. Individuals belonging to a certain entity, beside the role they execute, have other interests that need to be addressed, in order to understand their motivations and their behaviour (Leander, 2007b: 4). For instance, when political representatives involved in regulatory process are observed, their input

and actions need to be seen both as an individual and as part of partisan group, and consequent ideology.

The structural change and the challenges to regulation of PSCs in post conflict settings

Looking at the governance of global security architecture at the passage of the 20th to the 21st century, Rita Abrahamsen and Michael Williams noted that in addition to states, we now routinely rely on other actors, including companies, non-governmental organizations, and organized civil society, much more than in previous century (2010: 82). Most of the 20th century was haunted by the veil of government secrecy, a result of advent of nuclear technology and the Cold War (Horton, 2015: 19). The end of the 20th century and the beginning of the 21st century were marked by neoliberal policies and the transition to a “regulatory regime” (Osborne & Gaebler, 1992), where liberal democracies influenced through their participation in international organizations, withdrawal of the privacy and confidentiality, and insistence on transparency of policies implying involvement of businesses, for instance, in the process of privatization of goods and services (Goldsmith & Eggers, 2004: 8; Roberts, 2003; Sørensen & Torfing, 2005).

Neoliberal thinking was often introduced in liberal democracies through regulatory policies. This became widespread in the Western world essentially in the last two decades of the 20th century. There are many explanations of the changes brought by the regulatory state (Moran, 2002; Scott, 2000; Sunstein, 1993) but here I use John Braithwaite´s definition (2000). He assumes that the biggest change to the

Keynesian state (which he defines as state-centric, and with a socialist orientation on the use of force, where the state does all the “rowing” and little of the “steering”) to the new regulatory state, was the difference of deregulation, privatization and for implementation of “governing at a distance”, or shift from rowing for more and better steering (Braithwaite, 2000: 225). The dominance of this new paradigm of government, that appeared with the regulatory approach, shifted the focus from the delivery of services to their oversight and regulation, a transformation that some criminologists entitled as a change from *rowing* to *steering* (Osborne & Gaebler, 1992). The metaphor refers to a boat where the function of the state changes from the paddling the boat (executing the rowing component) to the state just being at the helm (steering the boat). Such transformation represents the structural change that is referenced here: the structure where state pass from monopolistic position regarding a provision of security services to a supervisor of provision and open the market for competition. For instance, internally, such change can be noticed in the outsourcing the security provision in the commercial zones or protection of people and properties. The shift where the state has been seen as a unique provider of those services is gone, and has been altered to be one of the providers, opening the space for outsourcing of those tasks, and occupying the primary role of the market regulator and transforming in one of the providers.

The goal of neoliberalism was to privatize, deregulate and diminish public sphere. In the security sector, these goals have been faced with caution, since the use of the violence was in question, considering sensitivity of the topic. The structural change brought by neoliberalism understood certain liberation of the state “claws” and outsourcing security support services that previously have been executed solely by state. As a result, the private security contractors have been introduced in post conflict operations, executing the tasks contracted by state, under regime different from the military. Abrahamsen and Williams (2010) named such change as global

security assemblages, the new set of relationships, where the blurring between public-private and local-global division lost importance it held in the past.

Local security businesses gained global dimension by being contracted to operate in different parts of the world and governments outsourcing security services seek to embed public values, such as human rights, human security, limits in use of force, transparency and public participation in practices of private agents. Therefore, local regulation gained global consequences, as well as the empowerment of public values with regulation of private entities got spread (DeWinter-Schmitt, 2015). The new spaces where PSCs are employed (in post conflict environments) introduced a need to observe the change of relationship between actors in the field, as the superiority of the public power has been diminished and has changed.

The empowerment of the private actors, through their ever growing use in post conflict operations, where state does not have or desire to invest human resources, led to the change of the public-private relationship in such new governance. The growth of symbolic and economic power led to increase of the private influence regarding regulation of their activities (Abrahamsen and Williams, 2010: 218). The importance of coercive power did not disappear, on contrary, it maintains the central position in the understanding of the relationship among different actors. The typical understanding of zero sum game, where are either winners or losers, is not applicable to scenario here analysed, once both actors, private and public, have stakes to win and lose in privatization process. The change of the power in the neoliberal environment is linked to capital and the influence of the private agents has grown in the modes that surely were not imaginable only two decades ago. The old structures, valid in the Cold War context, were disassembled and the new ones are built, more capable to respond to the challenges of new context, where

the governance role is both to control coercive power and to form more responsible actors. New structures supported a power growth of the industry and their influence on the regulatory process visible through phenomena such as *regulatory capture,*[95] where business associations have more capacity to unite - with litigation or influence over the regulator – than the ordinary citizens (Carrigan & Coglianese, 2011: 109). Empowering agents (public, private or civil society) does not have as an aim to represent a state as a weak or strong regarding regulation of private security services, it rather seeks to reconfigure the previous structure and to make their presence and their authority present.

The new structure that regulatory state brought possess new comprehension of the network relationships, where the old hierarchical relationships are gone and are valid new sort of state and non-state hybrid alliances (Crawford, 2006: 450). Some may imply that security regulation in the old system, when outsourcing was marginal, had far less political weight than the current one has. It certainly was more technocratic, with established system of checks and balances. In the new system, the checks and balances applied to military has not been expanded to the private entities providing services, rather the industry started operating and growth in certain legislative and procedural vacuum and have been built upon. That is the space that Kimberly Brown (2013) suggested spreading accountability present in the regular military to the private actors as beneficial for the new structure in order to stabilize the power, limiting the effects that new structure caused.

The multiplication of the agents involved directly or indirectly in regulatory process led to decentralization of regulation, where the state is not any more unique

[95] The regulatory capture takes place when the agency itself aligns its policies with those needed to be regulated (Stigler, 1971: 21).

regulator, emphasizing other regulatory influences. The state´s role in the new context is to maintain regulatory network monitored by the state institutions established with such aim, jointly investing in legal coercion as a method of its enforcement, through the established bureaucratic hierarchy (King, 2007: 63–4). The regulation of standards of behaviour, integrating the consequences for failure of compliance, is an institutionalized process that defines the practices rooted in everyday life (Cetina, Schatzki, & Savigny, 2001). Implies the presence of the law accompanied by control mechanisms, formal and direct, established with the explicit purpose of preventing or reducing the injustice, corruption, negligence or incompetence (Teichert, 2014). Regulation can take many forms, among which state rules and regulations and self-regulation by the private security industry itself are focused here. Under the concept of state regulation are considered forms and direct mechanisms through which the state exercises control over the activities contracted to private security providers. Under the self-regulation of the industry are considered standards established by industry associations, that are volunteer, and do not have legislative or criminal punishment as a means of coercion. Civil society and media, through their different forms have been active, in security industry, particularly via denouncements of misconducts, in performing pressure toward political elite and industry itself, seeking more efficient regulation of sector.

The background of this governance era reflects the new set of relationships that joins different actors into a single network. As Manuel Castells (Castells, 1996: 468) stated “Networks constitute the new social morphology of our societies, and the diffusion of a network’s logic substantially modifies the operation and outcomes in processes of production, experience, power and culture.” Networks are not by any means stable and solid structures; they rather represent an unstable structure that “expands, readjusts, shifts and evaporates; that create new chances but new risks too, of practices that mobilizes some problems, leaving others aside” (Wagenaar &

Cook, 2003: 5). The emergence of networks and the changes they create do not necessarily imply the end of the state authority but its redefinition, and opening of new space for experimentation and diversity (Kickert, Klijn, & Koppenjan, 1997; Rhodes, 2000: 55). Interests and power are not non-issues in the new context; they should rather become central points in researching practices. Hereby is offered a perspective focusing on the effects of these issues regarding governance, particularly regulation of security outsourcing out of borders.

The shift from government to governance acknowledges actors involved as a part of a horizontal network where they influence one another. New networks do challenge previous assumptions of bureaucratic power and its old forms (Dryzek, 1999; Eriksen & Fossum, 2000; Held, 1995). At the same time, they introduce a new way to observe the reconstitution of political action through civil servants, private sector actors and citizens, to act as entrepreneurs or "problem solvers" in their own policy network (Kickert et al., 1997). Their action is inserted in the new spaces, where initially there existed a certain institutional void, where in the beginning of 21st century actors had not seen the clear rules regarding who has authority over whom, without clear hierarchy of organizational structure or line of accountability (Hajer & Wagenaar, 2003: 9). Different actors bring different institutional cultures and values, and a combination of those practices represents the real environment shaping politics.

Regulatory governance reckons complexity of relations and networks, and the regulation is not static, isolated from context where subsists. The private security governance is a clear example of it: there is necessity to address the situations that occurred in the course of post conflict operations that were not foreseen, and that could put in danger the success of the operation itself. It represents a process where political factor has turned to be vital, for stall of regulation or its advancement (soft or strong regulation). While in previous mode of government, where the security

contractors were residual and the state could monitor them closely, the accountability of security contractors was technocratic process, in the current state of governance, the process is highly political. The ineffective regulation is result of the political decisions of various natures, from opting for outsourcing as a result of necessity to reach ambitious foreign policy goals (Avant & De Nevers, 2011; Stanger, 2011), over ideological conviction that state should be the least involved in service provision possible (Tiefer, 2013), to personal interests of those belonging to political elite, who can perceive security industry as a possible career option after the end of the public service, or as a possible investment opportunity.

Political decisions of outsourcing vast majority of governmental functions, as a consequence of the neoliberal approach and regulatory governance widespread in Western hemisphere, led to major power shifts through the first decade of the new century. As we saw, the shift of power that occurred as a consequence of massive outsourcing in post conflict operations had direct consequences in the regulation of the security sector. Achievement of established political goals was not possible without the private security providers, to successfully fulfil the need for fast deployment while maintaining the neoliberal strategy of the minimum of government employees. Conjugating the fact of raising industry of security providers in hostile environments, and their limited offer, gave, theoretically, leverage to companies to limit the regulation of their activities and their accountability on the ground (Avant, 2005; Drutschmann, 2007; Feaver, 2003).

The politicization and depoliticization of issues regarding regulation of supervision and oversight of private agents are motivated by economic[96] and political

[96] As stated in the introduction of this chapter, the economic reasons play an important role in this process, and they have been reasonably well explored by authors such as Ogus (2004), Dogru (2010), Drutschmann (2007) and White (2011) and so they do not represent the object of analysis here.

causes. For instance, political cause might be an ideological stand regarding outsourcing governmental functions in general. What is possible to learn from literature is that power that state held in regulation of the supervision and oversight of contractors changed with an informational asymmetry, and Deborah Avant (2005: 6) resumed the problem of such challenges in expression “who guards the guardians”. When the policies outlined by the state make the ratio between demand and supply disproportionate, the logic of the neoliberal idea of perfect competition is challenged, as well as the philosophy of morality and ethical behaviour grounded on effects brought by cost-benefit analysis that competition creates. In such circumstances, the loss of state power occurs on two levels, political and functional. Decrease of political power by the state led to its increase by companies, and such redistribution opened a path to opportunism and instability between the state and companies (Avant, 2005: 49). Considering functional power, a decrease of power by the state, was demonstrated in the increase of the costs of services and, occasionally, improper behaviour by contractors. When both imbalances occur simultaneously, as it happened in the contracting of security services for the interventions in Iraq, the increasing erosion of capability for supervision and oversight might take place. Such occurrence is a consequence of the regulatory mechanisms' reduction in practice through direct removal of the state authority over the institutions which provide violence (Avant, 2005: 58–9). In the interventions abroad, the state limits its possibility for oversight of these contracts, once necessary structures are limited by the budget and by willingness both of contracting departments and companies to be supervised. The redistribution of political power that occurs benefits contractors, since their influence limits legislative capacity, transparency regarding electorate and opens the way in the impact over objectives and policies implemented by private interests (Avant, 2005: 60).

However, from ground reality there are industry-led regulatory initiatives, both national and international, that contrast these theoretical assumptions. Conventional wisdom would support previous claims, as well as an economic argument that industry´s behaviour is oriented to profit growth, and would therefore reject any regulatory initiative. Thus, even though previously employed theoretical frameworks did include other stakeholders, there is still a path to take to learn and explain their behaviour, instead of limiting itself by acceptance of commonly assumed identities. The influence of the interactions is ignored as well: direct and indirect pressures among stakeholders should be taken into account when addressing regulatory process and power relations.

There is social construction of identities (public entities and industry) that does not facilitate better understanding of the regulatory process or the input of stakeholders. By attributing certain labels to stakeholders, they have been expected to play specific roles and to behave a certain way. Often this has led to decreased interest in studying what has really happened. A good example of this is the public-private dichotomy, where stakeholders can only belong to one or the other – and such generalizations are rather counterproductive. The belief that values such as a transparency, protection of human rights, or accountability, are only public values, may simply be illusion, as big businesses in the 21st century has largely incorporated them in their operations (DeWinter-Schmitt, 2015). On the other side of the coin, so-called private entities are perceived as being driven by reducing their costs, however, this is also very present in the public administration nowadays.[97] Those examples are just to demonstrate labelling such as this should not be permitted, since it does not correspond to reality and usually does not motivate research of the ground reality.

[97] The US Government bidding process generally acts on what is, technically, the lowest acceptable price and not on quality based evaluation.

There are two sides to all of the stakeholders, which makes the importance of studying practices even greater in order to understand better the regulatory process.

Going beyond the state: the importance of the agent

With the premise of the inadequacy of neoliberal analysis to explain the behaviour of the agents, and its exclusion of multifaceted identity, structural transformations led to division between what are considered public and private agents, defending public/private values. What is suggested here, using a metaphor of a wood and the trees, it is necessary to focus on the individual trees to understand their motivations and consequent behaviour. Not all governmental institutions are the same, and not all businesses are the same. Some are more transparent and accountable than others, some are propelling the regulatory process along and others are trying to drag it back. What is a fact, is that until their behaviour is studied, those assumptions, when repeated enough times, turn into conventional wisdom.

Besides recognizing that agents are plural within the same stakeholder, and even within the same institution, it is important to acknowledge transformation of the agents in general. On one side, those once considered to be mercenaries evolved from disorganized and wild rogues into highly structured, multinational enterprises, with a strong business orientation, as we have seen in the previous chapter. On the other, public entities have changed as well, or at least the manner in which they perceive themselves has changed. They are not single-minded, faceless machinery without interests, instead they represent large groups of disparate thinkers, complex multidimensional organisms, with multiple interests.

The relations between players (called private and public) have been constantly changing, and the line between private and public values has never been more blurred than nowadays. Issues of representation of public good are not new, but in the last couple of decades they have gained a new dimension, with the changing nature of the state and its relationship with other institutions and agents, both public and private (Abrahamsen & Williams, 2014). The new dimension, which is more complex than just an approximation of public and private, represents a space where public and private are mixed, and where agents do change sides, and are absorbed from public to private sector and vice versa. As Leander (Leander, 2010) stressed, the formal division that says business is private and state is public can dangerously distort the understanding of security governance. The limitations of formalism and procedures are limiting the better understanding of the motivations behind the inefficiency of regulation. The public values are not always easily absorbed by the logic of the enterprises, particularly when state itself seeks to avoid public scrutiny in order to achieve its own, often ambitious, foreign goals. The regulation of the private security contractors has suffered from stronger political push as the government has sought to avoid public debate and legislative control over highly controversial issues (together with budget constraints and political sensitivities), in order to implement more assertive foreign policy (Singer, 2003). Defence of public values and acting in the name of the public good is not reserved to state as an actor, particularly if the analysis is focused on the agent representing state. Political representatives are not isolated from the context where they are placed, both professionally and personally, and their action does not always represent the best interests of the state. Regulation does not necessarily represent the best possible action, rather, the decisions are made in a certain context and need to be observed in light of the agents and their interests.

There is recognition of the importance of the political factor regarding the regulatory process of private security providers (Avant, 2005; Avant & DeNevers, 2011; Tiefer, 2013), both considering the influence of state as an actor, and as an industry itself. Political influence is often mentioned in the context of economic gains, mainly from the industry´s side, and political benefits that it usually brings to the state apparatus, as a cover for the real costs and risks of international interventions. Still, how politics influences the regulatory process through actual practices, has not been specifically addressed.

In the context of the 21st century, some formal and classical theories applied by IR are simply not enough, and it is necessary to observe the context in which the regulation occurs, in order to understand better its pitfalls. Following the work of Anna Leander on rationalization of practices (Leander, 2010), and rooted in the Bourdieu (1977) practice theory, here is explained the political and economic motivation of the agents, and the impact of the context where they operate. The important point she made regarding the irrational focus on rational action[98] can be transported to the logic of the regulation of private security provision in hostile environments, by emphasizing the importance of the political factor in the process. Incidents should be understood in the light of defence of public values, as an incentive for protection of those values. However, the multidimensional character of private and public actors in a social context often leads to limited action, the response dictated by personal interests rather than by defence of public values.

[98] Anna Leander points out that we should not focus on isolated bad examples when dealing with governance of security provision, rather than dealing with issues related to construction of new, collective institutions in the context where these incidents appear. See more at Leander (2010a).

The analysis of security in the beginning of 21st century, as Williams (2006: 8) has recognized, lacked in the distinction of what is understood by state. Usual understanding of public agent was lacking identity and cultural dimension, as it was understood to be non relevant. State was perceived as a homogeneous, rational actor, deploying instrumental rationality as a main form of decision-making process. With the shift from *rowing* to *steering* (Osborne and Gaebler, 1992) that occurred on the structural level, the need to broaden analysis of the agents contemplating the new reality grew and served as a support for an expanding traditional analysis of security agents relevant to regulatory process. In such setting, these dimensions are considered more central for comprehension of decisions and the personal influence of public agents in regulatory process.

The Bourdieu´s theory of practice would provide a framework to look for challenges to regulatory practices regarding the security outsourcing, where agents are concerned. The observation of the *modus operandi* instead of *opus operatum* as he put it (Bourdieu, 1977: 72), allows quest under the surface of the structure pressures and influences on the regulatory elite. The structures under which regulatory process occurs determine *habitus,*[99] resumed by John Thompson (1991: 12) as "a set of dispositions which incline agents to act and react in certain ways. The dispositions generate practices, perceptions and attitudes which are ''regular'' without being consciously coordinated or governed by any ''rule'''. Structures of *habitus* are not universal, they are acquired through the occupation of certain social positions.

[99] Bourdieu defined habitus as "systems of durable, transposable dispositions/ structured structures predisposed to function as structuring structures, that is, as principles of the generation and structuring of practices and representations which can be objectively "regulated" and "regular" without in any way being the product of obedience to rules, objectively adapted to their goals without presupposing a conscious aiming at ends or an express mastery of the operations necessary to attain them and, being all this, collectively orchestrated without being the product of the orchestrating action of a conductor" (Bourdieu 1977: 72).

Both individual and collective, *habitus* applies to those who share similar occupation or social position in certain field.

Habitus, in this particular analysis of the regulatory process of private use of violence abroad, would include vocabulary used between participants that is unfamiliar to others. For instance, participants in this particular case would use certain acronyms, such as: NDAA (National Defense Authorization Act); MEJA (Military Extraterritorial Jurisdiction Act); CEJA (Civilian Extraterritorial Jurisdiction Act); and PSC.1 (industry initiative to improve quality standards), or certain terminology such as: Member (referring to a Congressman/woman); or contingency contracting (contracting in contingency operations, namely Iraq and Afghanistan). People closely involved in the regulatory process would know the meaning of these; unfamiliarity would indicate less involvement in process.

The regulation represents the bureaucracy process leading to formation of the regulatory mechanisms and their application. Using the Bourdieu´s game analogy (1987: 64), bureaucracy process represents those rules in the game that give them a structure, without which would be impossible to follow the process of regulation. The action consists in relationship between the *habitus* and field where it operates. Both *habitus* and field influence one another and in that mode represent the relationship of power, where the relationship is reciprocal and tends to reproduce regularities of behaviour (Williams 2006: 27). However, agents do share more than one field simultaneously, varying in generality and scope, and include both professional and private spheres of life. The idiosyncratic rules, product of practices, in the field are usually unwritten and operate as a certain understanding among actors that share the same field. As Anna Leander (2010: 63) put it, most of those in the field would find hard to spell the rules, but still are working under them. There is necessity to identify the place of the agents in the field, and understand the power and influence they are

able to employ between them. The influence is exercised by use of the capital, and it does not count solely with economic capital, which is usually associated. Beside monetary capital, there are other forms of capital, as cultural (capital based on knowledge and educational or technical skills), political (rooted in political connections), social (founded on social networks), symbolic (refers to accumulated prestige or honor) among many others. In regulation of the private security in post conflict operations, the *habitus* is regulatory environment where the relations between actors go on, social space where agents interact.

The regulatory *habitus* represents the interactions between different agents (public, private and civil society) that influence their actions. The field is the regulatory process itself where the agents do and say things that constitute practices. They form different types of pressures on political representatives that create and approve regulation itself, and so their decisions are reflection of the influences they receive. In regulation of the outsourcing of security services abroad, the power can be observed from both agents, public and private, rooted in different types of capital: while the private agents found their influence and power on the monetary capital, the public agents´s power lies on symbolic, political, social or cultural capital.[100]

Bourdieu´s theory of practice has been further enriched with other academics whose aim was to understand more profoundly what constitutes practice and how to better understand the policies, in our case certain regulation. The practice is not a mechanical process; it is the universe of interchangeable possibilities, depending on the subjective action of the agent. Practice represents the way in which human beings negotiate in their world. It is an interactive and a context embedded process where the agents conduct their lives as members of society, in opposition of mere automatized action. Practice cannot be summarized as an organizational routine or

[100] For more about cultural and symbolic capital see Williams (2006) and Bourdieu (1987).

standard operating procedures since it demands a considerable amount of spot-on judgement (Allison & Zelikow, 1999; Turner, 1994). Practice is seen as a separate dimension of politics “with its own logic (pragmatic, purposeful), its own standards of knowing (interpretative, holistic, more know-how than know-that), its own orientation toward the world (interactive, moral, emotional), and its own image of society (as a constellation of interdependent communities)” (Wagenaar & Cook, 2003: 141). MacIntyre (1984) used several examples to better explain the scope of practice and highlights that practices are only partially defined. An issue of context, as Lave (Chaiklin & Lave, 1996: 4) put it, mostly has been considered as granted, and the context of socially constituted action has been underestimated in the analysis of practice. By the problem of understanding the context is considered conceptualizing relations between actors and the social world where they operate. It should be openly recognized that actors are not usually dropped in unaccompanied or problematic spaces. The people participating in these activities are skilful at aiding each other in participating in changing the world, learning together to relate in new contexts.

Decision of the political representatives should not be perceived as a result on the action guided by the best information available, rather as a result of the various factors, among them the interests (personal, foreign policy or others) taking the top of the hierarchical ladder. The context in which they are formed are making an important contribution as well, as for example, neoliberal regulators have more predispositions to understand outsourcing desirable and welcome, and fewer involvement of the state better.

The mode in which agents would act depends on their *doxa*. *Doxa* are beliefs and opinions, derived from the world around us, and integrated into every human being, or social group (Deer, 2008; Eagleton & Bourdieu, 1992). It represents personal ideology, something that we simply accept without questioning. Bourdieu

wanted to distance himself from ideology (being it marxist or neoliberal) and instead recognize what are truths and facts for various social groups – their own belief systems.

In this regulatory process, *doxa* didn't vary only between stakeholders, it differed even within the same stakeholder. It would provide both a reason for their involvement in the process, and their opinion on which direction to take to resolve regulatory obstacles. Part of the industry may have seen regulation as an issue of quality control and considered that raising quality standards would be the ultimate solution, because it was their *doxa*. Ideological beliefs can be seen as a *doxa* of the political elite. Ideological premises were something they internalized as their standpoint and it led their actions in Congress (Tiefer, 2009, 2013). For example, while Republicans considered that outsourcing is desirable and regulation should be minimal, Democrats found the outsourcing of private violence abroad undesirable and in need of tight regulation. All these different *doxas* contributed to the mismatch of regulatory goals.

Political representatives are not representing necessarily the best interests of the state, as humans, they are multidimensional and execute daily other roles that are not of state Representative, such as a parent, part of community, businessman, and often the economic interests that surge from personal life can heavily determine political decisions. Therefore, there can not be linear thinking of public representatives as a diffuser of public values. These contexts are turning the background in which practices occur important to understand the result of the regulation itself.

The same mode the state agents should not be perceived as homogeneous and static, private security contractors operating in post conflict operations in 21st century should not be observed in the light of their ancestors that operated through and before 20th century. Their evolution and change of the image, from evil mercenaries to corporate style enterprises, is notable. Here are not discussed mercenaries that fought the battles in the Roman Empire (Backman, 2003: 10–1), or Condottieri (Garin, 1997: 25–35), or the ones that were following merchandise ships through the Middle Ages (Thompson, 1994). Neither are referred the 'soldiers of fortune' or 'dogs of war' that were fighting the wars in the Africa in the decolonization period, or even the ones that participated in the direct combat in Sierra Leon in the 1990s (Avant, 2000; Gaul, 1998; Mallett, 1999; Thompson, 1994; Wittels, 2010). Here are referenced the business enterprises that flourished in the beginning of the 21st century, constituted by retired military personnel, that marketed themselves as a good option for wide spreading democratic values while providing the security services with the quality and standards of the army where they previously served.

The companies passed to be rather well organized and structured and work with all the internal structure present in other industries. Their evolution is notable also in the intention to present the companies as responsible and accountable for their actions and the auto-regulation came as a banner for their orientation toward accountability. Their influence on the regulatory process is most visible through the lobbying activities, as well as through political influence, market power or social connections (Leys, 2003: 83–4). Private agents operate in the complex social space where their relationships with other agents are influenced by family ties, religion, political friendships or business, and such reality is usually used as an escalator for the business opportunities, not only in provision of security services in stability operations, but more generally (idem: 82). In the same mode regulation is influenced by complex social network of each agent, both agent being influenced by regulatory

process with state initiative (as for example the result of the public pressure) in the mode to turn its business more open and accepting of public values defended by the state, as it can influence the regulatory process by itself, seeking less control and oversight by state in execution of their contracts.

Therefore, the public-private understanding of values, where the state is understood as a homogeneous rational actor that defends the best interests of the tax payers on one side and private agent which defends solely its economic wealth is gone, and new regulatory practices are demonstrating the multidimensional nature of either actor. The context in which they operate demonstrate certain promiscuity of actors and a change of identity (the public agents are considering the regulated industry often as a job market or investment opportunity) and influence their regulatory practices. Regulation of the private security industry is limited by agents and should be observed in the context of the relationship in which these practices occur.

Conclusion

The aim of this chapter was to seek alternative approach to study regulatory process and it departed from consideration that regulation of outsourcing violence abroad, in 21st century, cannot be restricted to state action. First was demonstrated why the most used approach, Principal-Agent Theory, is inadequate and pointed the shortcomings that usually led to formation of commonly accepted wisdom regarding actors involved in the regulatory process. Then we explained why considering solely state, as the one impacting regulation, impoverish regulatory analysis and how inclusion of other actors, and not solely their recognition, makes it more

comprehensive. The actors involved are very different one from another, even within same stakeholder, and often attempts to homogenize them lead to formation of common wisdom which does not benefit study of regulatory process. Finally, we demonstrated why studying practices is beneficial. Beside leading to more empirical research and therefore uncovering data which are mostly inaccessible when studying subjects related to national security, this approach allows immersing in process from different angles, and as a result, may uncover dynamics hidden under assumed motivations of actors involved, and ultimately, lead to analysis of possible obstacles that may be overcome.

In the following chapters, I proceed in deconstructing conventional wisdom that halted more comprehensive analysis of regulatory process in last decade. Then, I summarize obstacles identified in the process of studying practices of regulatory process of outsourcing security services abroad by the US Government.

Chapter 4

Deconstructing Conventional Wisdom

Regulation of private security contractors in post conflict operations by the US Government is reasonably new. Even though the process can be observed as far back as early 2000, the majority of regulatory initiatives occurred after the major incidents involving contractors (GAO, 2004b).[101] The difference here, when compared to contractors from other industries employed by the US Government, was their sudden and massive use, as well as the government' dependence on their services for accomplishing their interventions, namely in Iraq and Afghanistan. This conjuncture - including a domestic divide between the Republican and Democratic parties in Congress regarding the outsourcing security, high dependence on contractors, their use for the first time in such a fashion (previously they had been mostly used for logistics), and the sudden, massive outsourcing (representing up to three contractors *per* soldier at its highest point (Zenko, 2015)) - caused new dynamic that previously could not been observed in the relationship between public and private authorities regarding the provision of security in hostile environments. Therefore, there is no prior example that can be comparatively analysed to better understand the obstacles that may hinder the development of more efficient regulatory tools.

[101] Most notably the Abu Ghraib prison abuses and Nisour Square massacre.

By undertaking a thorough analysis of the practices surrounding regulatory process (meetings, discussions, reports, hearings among others) employed by different stakeholders, this chapter aims to rectify this state of affairs, by revealing those obstacles in context, and by highlighting possible alternatives that may lead to an improved regulatory process. To do this, I introduce the stakeholders and their structure. The chapter then deconstructs a certain amount of conventional wisdom about the regulation of private security provision in the US, in order to reveal how such conventional wisdom might prejudice a better understanding of the regulatory process and its outcomes.

The range of players involved in the US government's regulation of PSCs in post conflict operations is wide, and includes a variety of stakeholders including the legislative branch - covering Congress, with its several Committees (both on the House of Representatives and on the Senate side) having an active role, a range of executive agencies dealing more closely with their own contractors (here I focus mainly on the DoD and State Department, as the most involved in the regulatory process), as well as a wide variety of oversight and government supervisory bodies (like SIGIR, SIGAR, GAO, CWC). Non-governmental stakeholders furthermore include industry representatives from companies, trade associations, and various civil society organizations and academics.

All of these have been important for the regulatory process, and their input has helped shape the regulation of PSCs in stability operations into what it is today. However, academic research has regularly failed to delve anywhere nearly deep enough into this networked structure, or to study closely the stakeholders´ impact on the regulatory process. Such a knowledge gap is significant, particularly because outsourcing security services in low-intensity conflict environments is a new approach

to governance in recent history.[102] As I argue here, in the present context, the private security regulatory process cannot be observed through a simplistic institutional lens as it was before, since we have witnessed the emergence of other stakeholders that have weighed in on deciding the path of regulation. This is particularly relevant in the case of industry representatives, an increasingly powerful civil society and the media.

Moreover, it is inadequate to observe either the institutional players or their initiatives as homogeneous. Not negating the importance of the institutional stance toward some initiatives, which I will address in due course, the importance of the people involved is much greater. There have been less than 50 high-level people who closely followed this issue since 2007, and most of them have circulated through different institutional stakeholders.[103] These individuals had both formal and informal interactions between them, and the information exchanged in both contexts shaped the course of the regulatory process. Public opinion triggers, such as the highly reported incidents, alone would not have been enough to push regulation forward. In other words, ingrained organizational behaviour and people leading certain institutions (public or private) invested in the subject, whatever the motivation, are responsible for the state of regulation as it stands now.

Congress, as the main legislative body in the US Government, led some of the key institutional interactions. There were different Congressional bodies involved and the increased interest in the regulatory practices may be observed, particularly from 2008, when individual members from different Congressional Committees

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[102] Naturally, states did outsource military and security services, particularly before the 18th century, as discussed in the previous chapters. However, the context in which such outsourcing occurs today is very different, from the standpoint of both international law and domestic legislation. For more see (Avant, 2000; McFate, 2015).

[103] Information obtained from several senior officials and company representatives (interviews 6, 13, 14, 17, 28, 31, 34 and 48).

became more closely involved. The forums of interaction included various Committees' hearings and reports, such as the House Committee on Oversight and Government Reform.[104] The chairman of the Committee, Henry Waxman, was known among the community involved in the regulatory process as a "showman in the one man show". His hearings and investigations were controversial and considered to be unproductive, motivated only by the need for public attention.[105] However, these forums were generally seen as an opportunity to seek solutions regarding quality separation of the PSCs operating in Iraq and Afghanistan. Therefore, even though Congressman Waxman had not constructively contributed to resolving the problem, he gave the impetus to others involved in the process to seek plausible solutions.

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[104] This Committee is the main investigative body in the US Congress, and has addressed on several occasions the misconduct of security contractors, particularly through the period when Congressman Henry Waxman was a chairman. The testimonies about Blackwater misconduct on Nisour Square were prime time events and led to more thorough requirements for investigation of the procedures that PSCs, as well as their employers (primarily state Department), had regarding control and management of their personnel. For more see hearings Serial No. 110–120 (October 25, 2007), available at http://www.gpo.gov/fdsys/pkg/CHRG-110hhrg47427/pdf/CHRG-110hhrg47427.pdf; Hearing Serial No. 110–89, October 2, 2007, available at http://house.resource.org/110/org.c-span.201290-1.1.pfd; Hearing Serial No. 110–11, February 7, 2007, available at http://fas.org/irp/congress/2007_hr/iraq020707.pdf; Hearing Serial No. 111–13, June 10 2009, available at http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg51899/html/CHRG-111hhrg51899.htm; hearing Serial No. 111–142, June 29 2010, available at http://www.gpo.gov/fdsys/pkg/CHRG-111hhrg65554/pdf/CHRG-111hhrg65554.pdf.

[105] "He was all about the wrangling. He wanted to be in the lead position, to be a big issue. In one point, after the Erik Prince hearing, he tells every company who has life security guard in Iraq, he wants basically every single document that has ever been produced, every contract, every report of every casualty, every firing weapon discharge, he wants all these stuff. And that is a lot of material, we were in 2007/8. And so the companies were literally spending the millions of dollars on compiling this stuff, packing it and shipping it over to his office. In some cases, the company had in their contract, government contract, said that if something like that happened, just charge government for it. It was all this additional work, but whatever. So, all these boxes and boxes and boxes were sent up and Waxmen was so focused on this issue and another issue pops up (drug abuse by baseball players) and he was gone. It was it. On that Committee, I knew one of his staffers very well, so I asked him what happened to all these boxes of information, and the guy didn't know, they were probably mopped" (interview 6).

The debate on the accountability of contractors was held by the House and Senate Judiciary Committee as well, where the issue of the accountability of the civilian contractors continues to be present. Even though there were no major interactions between the different stakeholders on those Committees, the strong differences of opinion between political representatives involved, contributed to expanding the debate outside of Congress walls.[106]

Hearings held by the Commission on Wartime Contracting (CWC) were possibly the forums that brought together the most personalities from all the different sectors. Beside these Congressional sponsored hearings, industry associations have been very active over time in organizing public events where company representatives have the opportunity to talk to people from the State Department and Department of Defense.[107] There were occasional events that joined different players involved in regulation, such as the one organized to clarify the PSC.1 Standard certification process that united industry and NGO representatives, as well as people involved in the regulatory process of the State Department and Department of Defense.[108] The academic conferences at universities and think-tanks dedicated to the regulatory issue, are other type of forums where diverse players present their opinions and developments. The informal settings are propitious for more relaxed contact between stakeholders, enabling easier communication of experiences and opinions.

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[106] Particularities of this Committee will be addressed more in this and the following chapter.

[107] For example, IPOA /ISOA organize an annual summit open to public.

[108] The event in question (Managing Human Rights Risks in Complex Environments) was organized by the ISOA with the help of the Fund for Peace and Human Analytics in Washington DC on April 9 2015. The certification body representatives demonstrated the structural changes that companies usually need to make in order to become certified.

In the transition from government of security services to governance, there is a “lost in translation” in understanding the actions of stakeholders, due to the assumption of homogeneous and continuous identities. In this and the next chapter the changing identities of stakeholders will be addressed, along with the demystification of theoretical misconceptions of differentiation between the identities of public institutions (as usually existing to protect public good and democratic values) and that of private entities (as profit-driven with no interest in spreading democratic values or investing in human rights protection). Such an approach will permit us to learn from practice where the theory fails, and from stakeholders’ habits how their identities were shaped up to that moment, and the consequences of this on the regulatory process.

The quest to identify supervision and oversight mechanisms for private security contractors operating in contexts other than war, was not an easy task. There is no one approach used by the US Government; rather each department deals with regulatory mechanisms on its own. This absence of a uniform approach to dealing with security contractors in post conflict operations means there are neither guidelines nor consistency regarding how concerns might be addressed. For that reason, it is crucial to outline the path of the regulatory process of each institution involved and its correlation/influence with the others. The list covers six institutions: U.S. Government Accountability Office (GAO), Special Inspector General for Iraq Reconstruction (SIGIR), Special Inspector General for Afghanistan Reconstruction (SIGAR), Commission on Wartime Contracting in Iraq and Afghanistan (CWC), State Department and Department of Defense. In the attachment to this dissertation may be found three tables demonstrating the organizational charts of the regulatory bodies (DoD and State Departments) and influence of these institutions on each other (US regulatory network).

The broadest independent Government Agency, non-specific to the issue of supervision of the PSCs in the volatile context, is GAO, which is responsible for performing audits of state agencies to confirm their efficiency and best practices, and to investigate misconduct. Principally in the last decade, this agency has developed annual reports focusing on these areas in response to the growing interest by Congress into the use and supervision of PSCs in the context of Iraq and Afghanistan (GAO, 2004b, 2006, 2012, 2013, 2014). Their reports are consulted by the different sectors of the government and serve as guidelines for the problems that occur on the ground, occasionally offering concrete proposals to solve them.

In 2004, with the amendment of Public Law 108-10614 by Congress, an independent body was constituted to implement the oversight of spending and performance in Iraq – the Special Inspector General for Iraq Reconstruction (SIGIR). The equivalent in Afghanistan, SIGAR, was established in 2008 by the NDAA (House of Representatives, 2007). These bodies were established with the aim of performing audits of all contracts established with companies operating in these interventions. Such audits may or may not be coordinated with other bodies and it was left to these offices to decide.[109] Among the goals set by the 2008 NDAA, are those focused on the process of monitoring and oversight of the PSCs. This includes provision of audits on the following areas: the effectiveness of the DoD to oversee and manage the PSCs; the ability of the DoD to provide specific training for those responsible for performing these tasks; and the lines of communication between the PSCs and the officials responsible for their supervision and management.[110] The purpose of these audits is to determine the true extent that responsible federal agencies maintain control in the

[109] Considering security services, with the Inspector General of the Department of Defense and his counterpart at the State Department.

[110] See section 842 g (5) e (6).

management of PSCs on the ground, meaning supervision of the contracting agency rather than the contractors.[111]

The NDAA of 2008 also established the Commission on Wartime Contracting in Iraq and Afghanistan (CWC) for the purpose of examining all documents prepared by the Special Inspector General Offices for Iraq and Afghanistan and to elaborate informed opinion, jointly with recommendations, regarding contingency contracting. The CWC had two years to complete the task. Its involvement was supposed to be completing a review of the recruitment and performance of government agencies that dealt with the hiring of the services, focusing on the security services whose provision implied the use of weapons.[112] The Commission issued its final report (Commission on Wartime Contracting in Iraq and Afghanistan, 2011) in 2011 with series of recommendations, most of which have not been even discussed since.

The State Department has multiple offices dealing with the regulation of private security contractors. The two main offices work under separate pillars of the State Department. One is the Bureau of Diplomatic Security, operating for the Under Secretary for Management, that has its contracting agents and their representatives on the ground, and works closely with the contracting process, and supervision and oversight of contracts. The second is the Bureau of Democracy, Human Rights and Labor, working for the Under Secretary for Civilian Security, Democracy and Human Rights. This office operates at an international level and manages US global efforts in regulating private security contractors. The curious disconnection and lack of communication between these two offices will be explained later on.

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[111] See more at 842 h.

[112] See for more detail section 841 c.

Their counterparts in the Department of Defense are the Office of Deputy Assistant Secretary of Defense for Program Support, and more specifically the Office of Contingency Contractors' Standards and Compliance, working under the Assistant Secretary of Defense for Logistics and Materiel Readiness. The office was created in 2007 as a consequence of the internal reorganization demanded by 2007 NDAA (House of Representatives, 2006), in order to establish a viable structure to deal with private security contractors. This office is responsible for establishing policies and following the regulatory process and its application on the ground, and addressing new challenges in a timely manner. It is responsible for the educational aspect as well, and when out of crises, deals with writing manuals and seeking out possible loopholes that need addressing (interviews 27 and 41). It communicates with contracting officers to look for possible problems, as well as informing and educating them about introduced changes and the implications on the ground.

The last stakeholder, far from homogeneous, is industry, and is considered further on. It is composed of representatives from different companies (those holding the position of Director of Governmental Relations), lobbyists and trade associations; namely the ISOA, previously known as the International Peacekeeping Operations Association (IPOA), and the Private Services Council. Some of them have been more open to introducing higher standards than others, and their involvement cannot, by any measure, be observed to be continuous nor unanimous over time. However, the people that have been working in these positions have usually dealt with more than one entity belonging to the same stakeholder and have followed regulatory process through most of the time.

The complex network of opinions, interests and motivations has made the regulation of security contractors what it is today. Since the early 2000´s numerous

obstacles have left a mark on it, some of which have been uncovered by previous research, such as economic gains (Kinsey, 2010; Loader, Goold, & Thumala, 2014) or philosophical division over contracting out security (Avant & De Nevers, 2011; Stanger, 2011). Then there were other issues that have not been perceived as obstacles, but rather taken as given, such as looking at regulation of PSCs as either a legal (Elsea, Schwartz, & Nakamura, 2008; Lanigan, 2008; Tiefer, 2009) or contractual issue(Dickinson, 2011, 2013; Krahmann, 2015); assuming regulation should be/is imposed by Government (Krahmann, 2005, 2010; S. Percy, 2013); assuming strict division in public and private values (Andreopoulos & Brandle, 2012; Avant, 2005; Axelrod, 2014); or even assuming that the regulatory issue is resolved.[113]

The aim here is to rupture some misconceptions and deconstruct some common wisdom, rather than accept it as given fact. In this chapter four such misconceptions will be addressed. Firstly, the idea that the US regulatory approach is relying on political institutions will be deconstructed. Secondly, it will look at the overreaction to either the importance of industry or to its total exclusion, amid claims that regulation is a matter of government. Thirdly will be addressed the misconception that regulatory issues are solely, or at least primarily, legal issues. Fourthly, it will consider the idea of a clean cut between what is considered to be private and public values, and lastly, the half truths about the transparency and secrecy of both the regulatory process and outsourcing security will be examined.

[113] At 2015 ISA Convention in New Orleans, when Christopher Kinsey was asked after his presentation about necessity to study more regulatory issues, he claimed that to be overcome issue, “so 2008”.

US regulation is a matter for US political institutions

This is one of the most common pieces of common wisdom encountered and it assumes the job of regulation belongs to the state doing the hiring of security services. Such an understanding has been refuted by the approach focusing on the importance of the territorial state, in the case of Afghanistan, attesting the significance of the country receiving those services and claiming it not to be so much a task of the American government, as of the receiving government (Armendariz, 2013). However, such a myth needs to be thoroughly deconstructed. To do it, it is necessary to state the level on which the analysis is conducted, ranging from International to individual level. On an international level, in this case, would be considered issues such as international regimes and institutions, transnational organizations and networks, economic patterns, global norms and international law or distribution of power/capabilities between states. On a national, state and societal level are included governmental issues (policy-making process or political system structure) and societal questions, such as public opinion, political culture or ideology. Then there is a group level covering interest groups, governmental bureaucracies, policy-making groups and various non-governmental organizations. Lastly, influences on the regulatory process might be observed from an individual level, considering public and private leaders; their personalities, belief systems, perceptions and understanding or not of the situation. Therefore, to obtain the full impression of the regulatory process, the interaction of all these levels and their influence on one another should be observed.

Starting with the international level of analysis, the regulatory process in the US Government has both influenced and been influenced by global interactions

((Avant, 2016; DeWinter-Schmitt, 2015). The involvement of the US Government in both the Montreal process and the International Code of Conduct for Private Security Services Providers (ICOC) initiative and outcomes, were key motivators to make the domestic regulatory process more dynamic. The US Government has been an active participant in the negotiations between several states for the Montreal document (the ICRC initiative) in 2008, and later of the ICOC multi-stakeholder initiative signed in 2010, by sending a team that was led by State Department representatives and included selected people from the Department of Defense, who could address the more technical side of negotiations. Such involvement was the main channel in addressing concerns held by the US regarding accountability issues internationally (interviews 27 and 50). Those initiatives aimed to advance discussion by: evaluating what, in practice, was the real minimum acceptable standard; determining what direction monitoring of accountability should be taking; and consulting different stakeholders about their own experience of contracting private security, particularly in Iraq and Afghanistan. The consequence of US involvement in international process for domestic settings, was the inclusion of the requirement by the State Department that their contractors need to be members of the International Code of Conduct Association (ICOCA) in order to be eligible to tender contracts (Government and Contract Bid, 2015). In the Department of Defense it had a stimulative effect, leading to support for the US setting its own standard, that would be more advanced and demanding than that established by ICOCA. Such stimulus resulted in the PSC.1

An interaction between different levels of analysis was very important in the US domestic regulatory process, as Congress had serious difficulties making regulation more efficient from a legislative standpoint. Those difficulties were the result of the political system structure, blocked over debate early on when the issue of private security contractors turned into a broader ideological battle and legislative

advancement depended on a significant attitude shift in motivation, personality and perception of the leaders in Congress to require improved accountability of the contractors, which was essential for regulatory process (Brown, 2013; Dickinson, 2005; Tiefer, 2013). From the industry side, a small group of companies led the process of US domestic standard certification, led by the conviction that the lack of it was hurting their businesses, and therefore some investment in the costs (resulting from certification process) would be compensated by being able to distance themselves from scandals that might close the door on further business (interview 32). Industry´s close interaction with the DoD in such a process, and the involvement of NGOs, was understood to be an extension of the cooperative effort that began with the ICOC and was assimilated on a domestic level, involving different stakeholders (interviews 27 and 41).

On the national level, and considering the policy-making process, the structure of the political system in US government is such that with Congressional elections being held every two years, influencing representatives' priorities to match those of their constituents is vital in order to achieve re-election. When the sense of emergency is taken away (and in the years following the major PSCs incidents there was no such sense) those issues were usually less important for constituents than something that was affecting them directly (interviews 39 and 40). Thus, lack of investment from the majority of representatives can be partially explained by a fact that public opinion defines their agenda (interviews 21, 28 and 31). The media had the same effect in the crisis (when major incidents did occur) and pushed Congress to prioritize discussion on accountability issues.[114] Numerous hearings by various committees after Abu Ghraib and Nisour Square confirm this, and the establishment

[114] Over 70% of interviewees agreed on the media impact on Congress.

of the Commission on Wartime Contracting was the ultimate example, even though its merits were contested.[115]

The group level analysis demonstrates the influence of interest groups, NGOs and oversight bodies on the regulatory process, of which there are numerous examples. As mentioned above, the negotiation of quality standards has joined both industry representatives and several human rights organizations, with the final results representing the compromise they reached. The trade associations, particularly using the example of the IPOA/ISOA, contributed by establishing their own Code of Conduct, a voluntary initiative that profoundly affected the regulatory process, perhaps not so much on a national level as it did internationally. When compared, the original text of the IPOA Code of Conduct (IPOA, 2008) is very similar to that of the ICOC (Swiss government, 2010) and it could well be considered that the IPOA´s document served as the basis on which the ICOC was developed. As demonstrated above, the ICOC had a significant effect on the domestic regulatory process in the US.

However, the contribution of trade associations and their cooperation with NGOs should not be idealized, as Neil Gordon, investigator for Project on Government Accountability, stated

> Industry usually tends to be in the opposite direction from groups like POGO, we try to push reforms, they try to stop those reforms, it´s kind of push pull all the time there. Sometimes people would agree, would have the same view of the reforms, but usually we have crossed purposes, I think. So, that´s a problem, the industry groups have money, have influence, they have been

[115] There was no acting upon the final report recommendations of the CWC by Congress, and even the Commissioners involved consider their existence was to alleviate political pressure on Congress rather than to bring palpable changes (interviews 17, 39 and 40). The spirit of it is well captured in a joke told by former Counsel Lloyd Cutler to Presidents Carter and Clinton: “A retiring president leaves his successor three envelopes to be opened, in sequence, to learn what to do each time he faces a serious crisis. The first envelope says `blame your predecessor´. The second says `appoint a Commission´. The third says `prepare three envelopes´.” (Tama, 2011: 4).

> making campaign contributions, they lobby. We lobby too, but we just do not have the resources that some of these major contractors and corporations have.[116]

Oversight bodies contributed to the regulatory process according to their missions. GAO produced several reports leading to more action by Congress (GAO, 2004b, 2005, 2006) already following the first years of massive contracting. SIGIR has been recognized to have had more impact on the regulatory process than SIGAR, and to display a more proactive attitude.[117] The testimony of Stewart Bowen, former Inspector General of SIGIR, before the CWC demonstrates the effects of such a proactive approach (Bowen, 2011).

On an individual level, the importance of personality and personal connections impacted negotiations concerning regulatory measures, as well contributing to interactions among stakeholders.[118] The influence of the perceptions and personality of individual leaders on obstacles and contributions will be addressed in detail in the following chapter.

Deconstructing the levels of analysis and their interactions with each other demonstrates the complexity of players and networks influencing the US regulatory process. The obstacles can be found at each and every level, and simplifying the analysis, in this particular case, by focusing on just one would not reflect the genuine picture. Therefore, to have a notion of the obstacles at state level, it is necessary to observe and understand the influences that each level of analysis bring to the table.

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[116] Interview 5.

[117] See (Warren, Bianco, Pelletier, & Shamari, 2009). Such attitude was confirmed in interviews 4, 21 and 37.

[118] Interviews 3,4, 6, 7, 8, 9, 20, 13, 14, 17, 21, 25, 27, 28, 31, 34, 40, 45, 46, 47 and 50.

US regulation concerns the government and its agencies

The conventional wisdom stated above needs to be disentangled. It is true that the US is responsible for the contracting and implementation (supervision) of PSCs on the ground, but in the age of governance, there are other stakeholders strongly influencing the outcome of the regulatory process. US regulation of security contractors employed by the US Government is a matter for US public institutions, but not solely, and what has happened in practice has demonstrated that industry's initiative had a significant role in where the regulatory process stands nowadays. As established previously, it is not possible to divide national from international in the posture and actions of stakeholders. In the global market where this industry exists, national and international efforts to regulate industry are tightly connected and impact on one another. Moreover, as will be discussed further on, there is no clear division between public and private values. Considering the stakeholders involved, it is not possible to say the regulatory process in the US regarding outsourcing security has been solely private or public, rather it represents a complex mix of initiatives. Furthermore, what have traditionally been considered values defended by public institutions (such as transparency, accountability, respect of human rights) have nowadays been commonly incorporated into private entities. The same applies to private interests; what once used to be considered private interests (cost reduction, minimizing resources to obtain greater profit, or ignoring accountability) cannot be solely used to describe the behavior of the private actors.

In the US case, industry associations have been rather proactive and their efforts can be traced internationally as well. Two trade associations, the Professional Services Council and ISOA, played an important role in raising issues related to the

poor quality of service provision. The first concern raised by the Professional Service Council, the association that supported major providers of services (mainly logistics) for Iraq and Afghanistan, concerned security provision for those companies executing logistic contracts. Since from early on the DoD recognized that logistics contractors needed to contract their own security, the association demanded from DoD a list of recommended security providers they might consider. Such a list had never existed and their intention was mainly to form a clearer picture of what could and could not be done, to enable the contractors to calculate their costs beforehand and ensure not to put in question their profits, as a result of poor security provision (interview 37). The ISOA was more proactive in the area of how security providers were regulated, or rather unregulated, particularly in the early days of the Iraq interventions. They claimed that the lack of contracts and clear rules of engagement caused a loophole, used by some security providers to commit serious misconduct without any consequences (interviews 6 and 32). The solution, they asserted, lay with raising the quality of provided services, which alone would mitigate the majority of accountability problems.

This example does not serve to claim that industry was a promoter of firmer regulation, rather that they were seeking the introduction of some common rules that would promote higher standards in the delivery of security services.[119] The proactive attitude from industry in defending both the transparency of rules and the responsibility of companies was pure necessity

> People recognized that Blackwater would drag us down, if we let it. Making us all look bad. If the industry gets painted with one paintbrush we all go with evil PSCs. No, not all PSCs are the same and we need to do better. So we

[119] In the course of interviews, a number of senior government officials, practitioners and even some industry representatives considered that associations were active in the process of delaying and "watering down" the proposed regulations, by arguing that they defended "what is possible" and they wanted "regulation but not to be micromanaged" (interviews 8, 9, 17, 21, 24, 27, 31, 38, 39, 40, 41 and 46).

> tried, and now we have PSC.1 Standard and it was direct industry effort (…).It was like we got to fix this up ourselves or we are all going to go down (interview 43).

Their main motivation was separating the whole industry from incidents such as Blackwater, and demonstrating that contractors can be controllable; however, this was not industry being the good Samaritan since, as was further claimed, their alternative was to shut down the whole industry completely, or be given some "draconian" regulation by Congress (interviews 6 and 24). While defending what were considered as traditional public values (more transparency and accountability in the contracting process), the development of PSC.1 was ultimately run by economic interests, that would both make competition more fair (all bidders would have the same expenses) and keep the industry more acceptable since it would be less prone to incidents.[120]

The mix of the public and private initiative was the most visible in the process of establishing the PSC.1 quality standard and ultimately turning it into an internationally recognized standard. Since quality certification processes are industry led initiatives, not established by governments, the PSC.1 Standard needed to be

[120] The drive to turn PSC.1 into a national standard can be understood from the example in the gap between the companies providing lower quality services and the ones certified by an industry representative to comply with PSC.1 (interview 32). After complaints from a UN contracting agent of a lack of representatives from his association in the bidding processes, he answered: "Well no, they don't bid because they never win. And then the UN person say: well they never win because they are always expensive. And I say, well, they are expensive because they have all the regulations they need to comply (against human trafficking, export trade control agreement). He said, these are all good laws, complying mechanisms, but if I have a US company that is bidding on contract that's gonna take place in Mali, and the UN also has Pakistani or Afghan or Indian company that´s bidding for the same service, of course they are going to be cheaper. Because none of these other countries and companies have to comply with the US regulations for anti trafficking, or export trade. So I have to go and say look, if you are always going to go for the lowest offer provider, then American businesses are not going to bid because they will not get it. But at the same time, if you go with any of these companies, and there is an issue on the ground later on, it is your problem not ours. If by going by ICOCA type mechanisms, where we can increase the level of standards for all the participants, whether they be US, British, Afghan, Pakistani or Indian, then everyone wins quite frankly. Is it gonna be more expensive? Yeah, it will be more expensive but at least you have now the levelled players."

introduced by industry endeavour. There was no US national standard requiring minimum quality certification in the contracting process that would have made the bidding process more quality oriented and less lowest-price oriented. The bidding process in executive agencies is cost-based, favouring the lowest bids rather than quality. Hence, to change bidding outcomes, it was necessary to elevate the minimal requirements in the bidding process.[121] The DoD was mandated by the 2007 NDAA (section 854) to put in place significant requirements when managing its contractors in contingency operations, since they had previously demonstrated poor results (interview 41). With the Nisour Square incident the US government recognized that the current governance of PSCs was not efficient, rather there were multiple unsynchronized governance approaches, including those of each agency and NGO. The State Department and DoD, being the main security contracting agencies, were asked by Congress in 2007 to standardize the process and vocabulary regarding how PSCs were used and their limitations, resulting in the Memorandum of Agreement between the State Department and DoD (DOD & DoS, 2007).

After indications by DoD that imposing quality demands in the bidding process would contribute to a certain level of quality control, Congress asked DoD to work on it.[122] The most efficient road to achieving a national standard was to first find the industrial quality standard most applicable to government contracting. Since there

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[121] "There is what I call my spectrum of PSCs. Swiss guard security Vs Letal response Unlimited. So we want everybody to be toward Swiss end, but the reality is that whole bunch of companies is down on this end (Lethal Response). The companies on this end will not to go with any regulation (they will go with whatever is cheaper, and they are going to underbid everybody and just hire mercenaries (…). And we need to deal with these people. How we do it? Well for one, I don't listen those people, I only listen to these people (shows Swiss guard). These people want to do good job, they want to be able to say yeah it cost more money to us but there is a good reason for it. And yes, it is cheaper to hire these guys but there is a good reason for that too. And you don't want to go there. So, how do you meet those people up? Well, partially we need to look up at ourselves and be sure that we are not accepting the lowest price technically acceptable, one thing we have done was that we had these standards so we raised the bars" (interview 27).

[122] See section 833 of the NDAA for FY2011.

was no national or industry standard at that moment, DoD worked with industry and civil society representatives to develop the best result possible, where all participants were able to intervene and present their suggestions and doubts.[123] The result was the PSC.1 standard, which represents a quality certification, where companies had to exercise rigorous control over and restructure of their risk management mechanisms in order to prevent serious incidents, as much against the civilians as for the contracted workers.[124] This was not the first time that industry and DoD worked together on regulatory issues, but it was the first resulting in advancement of regulation. In 2008 there was an attempt to work on these issues by the key leadership of the US PSCs but, as senior DoD official said,

> We were not able to pull it off at that time. It was too much, quite frankly, business fratricide between big players and so, you know, we thought we had agreement to start with because as with any piece of industry you're better off if industry developed a sense of standards, a sense of continuity, and they want to be good stewards of their area of responsibility (interview 41).

What was once understood to be typical private player behaviour – lack of investment in the oversight and management of contractors – began to be quite often found in the public sector as well. Both DoD and the State Department recognized that there was insufficient oversight of contractors, particularly after the major incidents occurred (interviews 20, 27, 41, 49 and 50). In the case of the DoD, there was a lack of training of DoD personnel involved on the ground, which was manifested in poor understanding of in what circumstances they needed to be vigilant. Additionally, before incorporation of the PSC.1 Standard in the contracting

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[123] "We (DoD) are the client and we put our parameters out. But we had contractors who were calling the meeting together and I mean there was huge business representation, we as a client has red lines that we could not cross: these were the minimal acceptable things they will include x,y and z. Includes weapons qualification ok? Again, human rights trainings, all that kind of stuff. We were the ones who were requiring it but it´s really a business led process which is one of the reasons why it works and make sense" (interview 41).

[124] For more about the PSC.1 standard see www.acq.osd.mil/log/PS/p-vault/item_1997-PSCs_1_STD.PDF

process, the DoD supervised only the activities and contracts of the prime contractor (both by choice and without the legal capability to do otherwise), leaving aside all subcontractors involved.[125] Although not addressing all of the gaps, DoD did have a proactive attitude in resolving oversight issues, as extensive analysis of the Congressional Research Center demonstrated (Schwartz, 2011).

The lack of investment in the oversight and supervision of the contracts continues to be a problem. As the Comptroller General of the United States stated

> While this (inadequacy of the acquisition workforce, including oversight) is a DoD-wide problem, having too few contract oversight personnel presents unique difficulties at deployed locations, given the more demanding contracting environment as compared to the United States (Walker, 2008: 8).

Thomas Bruneau (2013: 138–42) made a detailed analysis, with different sources, supporting the opinion that CORs are scarce, unprepared and overloaded, and therefore incapable of carrying out meaningful oversight of contractors. There are recent changes at DoD that at least deal with the educational part of the problem. As senior DoD officials recognized, 2015 was finally an educational year, in the sense that manuals could be produced and training carried out to update the knowledge of the officers involved in the supervision process, not solely CO and COR, but some of the military representatives as well, in order to clarify common misconceptions about the limitations of PSCs activities (interviews 27 and 41).[126]

[125] "And again, there are things that we (DoD) should have caught and we would have caught if they were prime contractors, as opposed second tier contractors. For example the limits of the weapon size, we have limits for it. Clearly their tactics and procedures were much more aggressive than what we accepted. And so that was one area where I can say that we are collectively making it easier for ourselves but just say ok, prime contractor you can hire these guys just do it right. But we didn't go back to check. And we paid the price for that in a long run." (interview 41).

[126] "The idea that you have to stay engaged active is a big deal, we constantly need to go back and reeducate about the limitations in arming, limitations of what a contractor can do, because people and the very best of the intentions sometimes a quake a PSCs equivalent to soldiers, they are not. They

A cultural change, associated with the massive growth of contracting in stability operations, has taken place in DoD over the last two decades in order to integrate the contractors. As a senior DoD official explained

> We are changing a culture in a way...I worked in the military and I was told If it wasn't in the contract, then don't worry about it, at command. Don't worry it's not your problem. That´s we grew up with it. That´s it´s not right answer. Particularly in contingencies, they are 50% of your force in the range. At least historically you can't ignore it. You have got force protection issues you have care and feeding them you got base ops, you got whole bunch of things that are affiliated with these folks that are part of your force, they just don't wear your uniform. And they are under different command control and restrictions but they are still part of your force you need to deal with them. That´s a cultural change, that´s a massive cultural change that we had to go through (interview 41).

Part of such cultural change must also be recognition of the necessity of a career path and progress for the people executing oversight functions. In the interviews held, there was a common opinion held that those officers, both in DoD and State Department, are not motivated either to go beyond what would be considered the minimum required for the execution of their functions, or to put themselves in any risky situation since their compensation, monetary and in terms of their career, is not going to follow.[127] This leads to the conclusion that the US government structure is not putting a value on those services and therefore may only expect results according to what has been invested.

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can never be, they never should be. But it happens, particularly at the lower levels because they haven't educated them this process. The senior guys get it now, the senior senior people. (…) How they could simply say I´ll admit my soldiers on the game. No! That's not what is their job. And so they came down away some poor captain or major who thinks he is doing a right thing because he is trying to allocate resources but he hasn't properly thought of cans and cannot´s. That still happens on occasion." (interview 41).

[127] Interviews 21, 33, 38, 46 and 50.

Regulation is either or

The fact is that either limiting regulation on legislative initiatives, or on contracting issues, leaves regulatory analysis poor. To fully understand the regulatory issue, besides the legislative aspect and the complexity of contracting, there are very important political and bureaucratic aspects to consider. From an academic standpoint, the accountability of PSCs has been viewed largely as a legal issue: from looking at the criminal liability gap (Brickell, 2010; Chapman, 2010); to considerations of whether security functions might/should be outsourced (Brown, 2013; Tiefer, 2009); to proposals to do it smarter through contracts (Dickinson, 2011). In practice, it is curious to observe how the notion of responsibility for "accountability" differs among stakeholders. The legislative branch tends to see it as an executive agency's duty and responsibility, something that should be integrated into departmental procedures. Executive agencies have tended to see it as a legislative responsibility and something out of their hands. The industry focuses its narrative on its efforts to internally address accountability issues, and claims that if contractors are not being held criminally accountable, it's due to the poor job being done by the State, DoD and the Justice Department. Oversight agents consider both the legislative and executive branch responsible, and their failure to hold contractors accountable means they are running away from their job.[128]

To continue the chapter, the different elements that could make regulatory analysis complete will be discussed. It will start with analysis of legislative constraints, continue with executive obstacles and it will briefly touch on political aspects, since in depth analysis of these follows in the next chapter. They each have their own merits

[128] Analysis of interviews was permitted to make a generalization of certain opinions, but the opinions expressed by stakeholders were not in agreement in every case considered. There were some examples where stakeholders held a different opinion than stated here.

and if any of them are not operational and synchronized there is no efficient regulation. Without legislation being properly carried out, there is no legal framework to enable criminal misconduct to be accountable before US courts. If there are no procedures and no willingness to apply firm oversight and continuous improvement on an agency level, even the most adequate legislation may be futile. This applies to the contracting process, the education of personnel, and the understanding and acceptance of risks associated with oversight in a post conflict operation (vs peacetime).[129] Finally, if there is no political agreement and willingness to support the application of necessary legislative reform, or strong financial support that would assist and enable efficient oversight and prosecution, even the best looking regulations won't achieve much.

The legislative attempts to improve regulation of the private security companies in stability operations are in fact very important since they deal with accountability issues, enabling prosecution of criminal misconduct by contractors, and serving as a dissuasive measure. As addressed in the historical chapter of this dissertation, there are several legislative elements addressing accountability of security contractors, but a very limited number of prosecutions (and even fewer resulting in effective punishments), demonstrating its inefficiency.[130] The Patriot Act, the Military Extraterritorial Jurisdiction Act (MEJA) and the possibility of prosecuting defense contractors under the UCMJ are all valuable when dealing with the accountability of contractors. The fact that major incidents happened under the State

[129] As former Inspector General of DODIG stated "One principle that I often repeat -and you might hear about it from some of my experts in this organization because we implement this principle on a day-to-day basis - is one of the foundational principles of transparent government, namely that the rules need to be prescribed in advance. William Blackstone, in describing this principle, wrote that it is important the government not only prescribe, but promulgate the laws in the most perspicuous manner available, "not like [Emperor] Caligula, who . . . wrote his laws in very small character, and hung them up upon high pillars, the more effectually to ensnare the people." (Schmitz, 2005).

[130] In the next chapter will be detailed the issue of lack of prosecutions, representing the number and opinions of stakeholders.

Department's watch, and not under DoD's, might prove that existing legislation, up to a point, did actually serve as a discouragement to misconduct. As a senior DoD official confirmed, the possibility of being prosecuted under UCMJ had that effect on defense contractors:

> From our standpoint, the military side, we have it under control now because we always had MEJA and then 2008 we reapplied UCMJ against our contractors and it is very interesting UCMJ against contractors, it is not the number you charge under UCMJ that matter, that it is there and everyone understands that is there and we have so many ex-patriots working inside the contracting organizations, anyone who is unfamiliar, it becomes. I don't want to say it is chilling effect, but it is a conduct effect thing (interview 41).

There are numerous flaws within the MEJA and its application. They begin with the fact that it does not include all criminal misconduct, rather limiting its scope to "an offense punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States" (Doyle, 2012: 2–3). Senior military officials consider that such behaviour might result in the silent understanding that smaller crimes are acceptable (interviews 34 and 38). However, various stakeholders admit that funding for a proper investigation and prosecution (that would include preservation of the chain of evidence, detailed investigation and preparation of the witnesses and their participation in the trial in the US) is not sufficient even for the incidents of major misconduct and the final results are often questionable.[131] There is also the argument that charging under MEJA is constitutionally challenging, and in the case of Green,[132] his defence was rooted in the

[131] Interviews 13, 28, 38 and 45.

[132] Green´s defense was that the expansion of the circumstances by the executive branch under which one can be prosecuted under MEJA was a violation of the separation of powers, and that trying him under MEJA while his conspirators were held accountable under UCMJ was going against the principle of equality of law protection. In the Williams case the court declared that before application of MEJA there was the need to ensure respect of international laws. For more about these cases see United States v. Green, 654 F.3d 637 (6th Cir. 2011).

claim that Congress exceeded its enumerated powers with the application of MEJA (Doyle, 2012: 2–3).

However, the fact that major incidents involved contractors of the State Department, just strengthen argument that existing legislation is not sufficient. The extension of the MEJA to be applicable to contractors belonging to other departments (not solely DoD) was not a good solution, as will be seen further on. Besides MEJAs applicability to the State Department´s contractors being contested by defense in prosecutions (Wilber, 2009; Williams, 2010: 48), and recognized by academics to have unclear applicability (Kemp, 2010: 510), it is the main tool used for the criminal liability of contractors working for other Departments (not DoD). There were other attempts to make the contractors of other Departments and agencies criminally accountable, the most recent one being the CEJA (Civilian Extraterritorial Jurisdiction Act). Unfortunately, there is still no political consensus over that bill.

However, the necessity for such legislation does not appear to cause discordance among stakeholders. In the interviews carried out for this research, only three interviewees from fifty considered there was no necessity for more legislation (interviews 33, 16 and 17). Their arguments rested on two premises: firstly, that there should not be more legislation but smarter of legislation and secondly, a more efficient way to prevent misconduct would be an application of monetary fines and negative evaluations when contracts are broken, since the companies' bottom lines are then in question. The other 47 suggested that CEJA would be a good start but is not sufficient. As a senior DoD official emphasized: "Our biggest weakness that we still have today in the US is that we don't extend CEJA or MEJA, or something similar, to apply to everyone that we have in the contingency area. Pretty much across the board." (interview 41). Therefore, there is still a certain legislative void regarding

security contractors' criminal liability, the filling of which would clear any doubts about the consequences of potential misconduct.

As former DODIG, Joseph Schmitz (2005), stressed, having the laws promulgated does not mean they are applied in practice. Their application is dependent on the efforts of executive departments. Beside the assertive contracting process, where there is no doubt about responsibilities and the permitted means to achieve them, nurturing a departmental culture that would support and invest in strong oversight and supervision of contracts, and cooperation with contractors, is crucial. Laura Dickinson had warned that challenges rooted in institutional culture and organizational structure might endanger the core rule of law values (2013: 358–9). This was the stage where, partially, the regulatory process stalled. As the organizational theorists already recognized, internal organizational structure, group norms and compliance agents can advance or stall organization´s goals, or goals of the individuals, within an organization.[133] Organizational theory suggests that agents tend to be most efficient under certain circumstances. Laura Dickinson (Dickinson, 2013: 360) summarized those conditions as: 1) an integration of the accountability agent with other operational employees; 2) the strong understanding and commitment to rules and values by agents; 3) operating within an independent hierarchy; and 4) the ability to employ benefits or impose penalties based on compliance.[134]

[133] There is a wide range of organizational theorists that have been working on these issues for decades. Consult for example (March, 1989; Meyer, Scott, Rowan, & Deal, 1985; Moe, 1990; Powell & DiMaggio, 2012; Rubin, 2005; Simon, 1965).

[134] Dickinson applied her analysis to uniform military lawyers, and the rationale used followed the same logic that is applied here. The organizational structure and institutional culture do define how the regulatory process is applied and are dependent on the nurturing or not of a certain culture within the department.

When discussing challenges in the regulatory process of PSCs in post conflict operations caused by institutional culture, interviewees were unanimous to appoint their finger at the State Department (even their own officials). There were a number of obstacles mentioned – what follows is a discussion of the five most common.

The first was absence of motivation to invest more in the regulatory process concerning their Worldwide Protective Services contracts, even though, ironically, State Department led negotiation of the international efforts, in the name of the US Government, on the topic.[135] The State Department attitude to internal oversight problems is that they are resolved with the installation of cameras in every vehicle and the presence of a State Department officer in every convoy (interviews 20 and 50). Reaction to the major incidents was restricted to security contractors in the State Department and there was no thought that the regulatory issue, internally, should be addressed and policy developed that would prevent problems from arising in the future (interview 50). The oversight of contractors in stability operations was approached as an exception to common practice, not as a new mode of operation, as it was formulated by DoD (interview 20).

Secondly, the consequence of such a "problem-solved" approach and the narrow attitude of the Department about their internal business, was the identification of the State Department, by senior congressional officials, as an obstacle to improving the regulation of private security contractors. They stressed the disinterest of the State Department with both making more profound changes to how they carried out oversight and supervision of contracts, and with cooperating and becoming more

[135] The interviewees from State Department that dealt with security contractors were not sure of the measures that are undertaken, besides placing an officer in every convoy.

involved with other DoD departments in regulatory practices as a consequence of their Congressional exemption from having to present their business/ accounts to anyone, Congress included, and therefore there was no way to obligate them to change their *modus operandi* (interviews 40 and 46). Their work on the Memorandum of Agreement (MOA) between the Department of Defense and the State Department on usage of Private Security Contractors (DOD & DoS, 2007), as mandated by Congress, imposed cooperation with DoD on the Iraq operation specifically, but there was no motivation to continue joint work on regulatory issues for other situations (interview 41). The shut-in attitude toward suggestions that would improve regulatory policy toward contracting in stability operations in the long run was publicly visible in the hearing of CWC, where Patrick Kennedy (2011), Under Secretary for Management, refused suggestions for improvement given by the CWC.[136] The suggestions made by the CWC were the result of the State Department´s inexperience with contracting in stability operations, which often defended its lack of initiative as being caused by insufficient staff and budget.

Thirdly, the zero casualty policy was highly contested as a serious problem that might even act as an incentive for contractors to use excessive force. In conflict prone zones, inevitably, the security situation is unstable and therefore some casualties are expected. The State Department policy was/is no casualties allowed,

[136] The defensive attitude of State Departments officials is not uncommon. Senator McCaskill, on occasion, made public her letter to Patrick Kennedy. She wrote “I have written to you nearly a dozen times over the past five years raising concerns about contract management. When I have raised these concerns, you have repeatedly responded that the state Department’s contract acquisition and management are adequate and that the Department is making improvements" (Hudson, 2014). This was supported by the opinion of senior oversight officials. When asked about the attitude shown when some improvements are suggested they stated that State Department would generally answer “We are fine!” (interview 14), following by “Thanks for asking!” (interview 15). As one of them further justified, “Lot of these is business as usual. And so when Congress make rules government wide, I think that was some enforcing tactic from State Department. They actually had to work with other Federal agencies, and when new regulations were coming out at federal level, they wanted to make sure that those regulations don't adversely impact State Department” (interview 14).

no matter the price (including eventual civilian casualties). One former State Department official explained that such a policy and practice was understandable in the institutional framework, particularly due to the nature of the business State Department had in Iraq (interview 20). In opposition to such view, and coming from a culture where casualties are accepted as a reality, DoD had a different attitude toward their contractors, where they were expected to follow stricter rules. The common suggestion was that State Department's zero tolerance encouraged a cowboy approach to security by their contractors, as opposed to the more disciplined DoD (DeYoung, 2007; Elsea & Schwartz, 2008; Kovach, 2010). An industry representative who was involved with companies working for both departments stated that the differences were unmistakable, ranging from what was expected from contractors, to how they dressed and behaved. He said

> Something that I think just Blackwater did, I think they did not want to embarrass their client [State Department], so they did things. You see pictures of Blackwater guys and they look like cowboys. And some of them act as well. That was something that in a corporate firm, as Armour Group, you would not see. They can hire the same guy, but in Armour Group he would wear a shirt and suit uniform, follow strict protocols and so on, developed through the years, where the newer companies needed to pick up on that before starting to do it. And of course they need to follow the protocols of the client (interview 6).

The protection from criminal suits that State Department's contractors got from their client, unmistakably supported the attitude of zero tolerance policy for casualties (Fisher, 2014).

Fourthly, the cultural identity attributed to State Department is one of poor management capabilities (McCaskill, 2014), and internal struggles have turned public when State Department's Inspector General issued a report, warning on the department's´ inability to successfully manage and oversee its security contractors

(DeYoung, 2009). Claire McCaskill and others stated on various occasions (Hudson, 2014; Keyes, 2011; McCaskill, 2014) that its insufficient monitoring of oversight was publicly known. Even though State Department's problems in the contracting process did not appear on the front page, they have been recognized by people who were involved. For instance, in 2010/11, after repeated complaints by other competing companies of the lack of fulfilment of the minimum requirements by the company to whom a contract was awarded, three out of four of the most senior contracting officers were removed from their positions.[137] Still, the policy behind their decisions continue to be the same; contracts are awarded to the lowest bid and oversight of performance is usually done by their competitors in the bidding process (interviews 6 and 32).

Lastly, even when regulation is promulgated and then applied correctly and with conviction by the respective departments, there is the issue of the application of penalties in the event of criminal misconduct. That is the point where can be observed the political commitment to apply coercive measures and to deter future misconduct by applying criminal penalties to individuals who commit such misconduct. It is a political issue because Government needs to allocate adequate budget/funds and personnel, and to monitor closely the tools available to the Department of Justice to deal with perpetrators and bring them to justice. Starting with the premise that MEJA application requires tight cooperation between DoD and DoJ, the procedures that must be followed to make it possible to prosecute cases under MEJA are more

[137] This information never became public and was facilitated by a former senior DoD and State official who was working for State Department in that period. He stated "the State department had a bunch of contractors that were to replace DoD in Iraq and Afghanistan, they issue four contracts, all of which were protested by the contractors that did bid in, all 4 of which were returned by GAO, because the contractor to whom it was given award actually did not meet minimal requirements, but they said they did and then the State Department went right on. And so what happen there is (...) 3 of 4 or all 4 of the State Department senior contracting people were transferred or let go or whatever. (...) (what happened is that) the State Department awarded them to the lowest cost bidder whether they really met criteria. State Department says that they use the best value contracting but they really don't. They usually go with the one that meets the minimal requirements, but if they don't meet the minimal requirements the contract is protested (by other bidders) and award goes to a next" (interview 34).

complex and bureaucratic than under UCMJ. The necessity to run procedures past a high level DoD official makes some military officials reluctant to pursue investigations and those are not later valid for the prosecution.[138] The practicality of it, even when the DoD contractors are considered, has been questioned by a retired colonel, an expert in counterinsurgency warfare:

> With all the times we have had people shoot at the villages in Iraq and Afghanistan, there were only couple who has been tried and convicted, for a good reason. You don't want to second guessing squad leaders in hostile environment, has to be outrages massacre in the village where they killed 16 people, even than it was extraordinary difficult to conduct the trial. How do you get witnesses from Iraq? Forensics don't exist. If it was a fighting area you probably moved out of area quickly. Even if you go back the locals aren't expecting anything so they buried the dead. You are really going in the village that is already stir up and say hey we want to dig up all your dead and take them away and autopsy them? So you get religious believes too. All of those things make the practical extraordinary difficult (interview 38).

But even when it is possible to conduct all necessary procedures, the ultimate decision regarding whether DoJ will prosecute belongs to US attorneys:

> Upon receipt of information from command authorities that a person subject to the Act's jurisdiction has committed an offense in violation of Section 3261(a) of the Act, the US Attorney for the District in which there would be a venue for a prosecution may, if satisfied that probable cause exists to believe that a crime has been committed and the person identified has committed the crime ... file a [criminal] complaint (Code of Federal Regulations, 2015, sec. 3261 (a)).

In deciding if a case will be prosecuted, US attorneys need to take into account the resources available to conduct the prosecution, since MEJA prosecutions draw from the US Attorney's budget and personnel. When viewed in combination with the other

[138] "Illustrative of this point, military criminal investigators investigating cases with the potential for prosecution under the MEJA are required to forward their reports to the legal office of the responsible combatant command. Such a requirement necessitates that these reports be packaged and submitted to the staffs of these various levels of command on their way to reaching the combatant command? presumably a time- and resource-consuming process. This differs considerably from a case prosecuted under the UCMJ, as the UCMJ requires that the investigative report be delivered to the commander and legal adviser with general court-martial convening authority, typically two or three levels of command below the combatant commander." (Cullen, 2009: 533–4).

considerations they have related to seriousness of crime: the difficulty of gathering evidence; the difficulty in securing testimonies of witnesses in the hostile area; and competing caseloads and priorities in the US Attorney's´ own district, it is no surprise that MEJA cases are rarely prosecuted (Cullen, 2009: 535). A senior government official, who used to work as a prosecutor in Brooklyn, confirms such troubles:

> It is not an easy to win a case in Brooklyn. It is doable, you need witnesses, you need a chain of custody for evidence, you need to secure crime scene, you need all of these other things, you need to prove intent. How you are going to do that in Afghanistan? I'm not saying it's not ever doable, but it is a lot harder. So, if I´m a prosecutor, for nº 1 I cannot talk to these people in their native language (…), I already have limitation. Securing the scene? Well, how likely is that? Proving intent in a war zone? How do I prove that he was absolutely negligent, unless I have that on cameras? I mean, it is a really hard case to prove. And a really hard case to get conviction because a lot of people can say " I don't know. I can see him being afraid for his life." It is hard to persecute, it is really hard to prosecute. And then of course you have political sensitivities. Particularly in Afghanistan, a lot of PSCs were either local or third country nationals. You have all other level of difficulty of prosecution of international politics involved. That put aside, the jurisdictional issues of if a Peruvian private security contractor working for a British company shoots an Afghan national in Afghanistan, now I have all kind of host problems and that might not be, for pure political reasons on the top of my list as a prosecutor, as a US attorney, then you will have a military charge it, they have a whole different system. It´s hard. How do you do it? (interview 28).

However, in conversation with one senior representative of an industry association, the impression he shared was that such obstacles were possible to overcome, if there was a political will for it:

> So, we (one industry association) pushed hard for MEJA and the pushback came from FBI and Justice Department “well we don't have resources to do the investigations”. So there was a guy here,(…) his name was Patrick Fitzgerald, who was US attorney for northern district (Illinois) who had fraud teams and stuff, not just for Iraqi. We had meeting with him and talked what they do for fraud detection. And I asked him this question (of application of MEJA) and he said “we do it all the time. We go overseas all the time”. He thought that was a bogus answer. The Justice department could deal with them. What you do is set up a set of standards because if you have a military police and NCIS doing initial investigations, they know how to do crime scene control, they know how to collect evidence and protect evidence and chain of

> custody and all that, so even if you are not right here that day, you were here when police car shoots up, you can come up behind and follow through. So, it frustrated us because on some level the resistance to expend MEJA was partially by people who didn't understand why it was important. Partially because of the people who knew exactly why it was important and didn't want to do it because then it would actually sanction this kind of contracting (interview 37).

That political willingness needs to be found not only in the attribution of sufficient funds to make it possible to effectively prosecute, but to improve accountability legislation applicable to any security contractor operating under a US Government contract. The political will, and investment by Price and Leahy in Congress on the CEJA bill – that would cover some loopholes of MEJA (including federal violence, corruption and trafficking offenses) – is a long time coming.[139]

Regulation is done and over

Variations of this sentence are often heard in academia, and particularly on international academic conventions.[140] It is not uncommon to hear it among practitioners as well, particularly between Congressional and State Department officials (interviews 3, 20, 25, 26 and 35). Hence, the regulatory process is ongoing, and numerous seemingly small changes do continue to occur. Just recently[141] was

[139] The first version of the bill was submitted by Price in 2007. In meanwhile there were all together 6 proposals between two of them, the last one in May 2015.

[140] As a matter of fact, at the International Studies Association meeting in New Orleans (2015), in discussions on and off panels, I often got the opinion that regulation of private security companies was ‘‘so 2008’’, it was done and over, it was, to sum it up, a non subject.

[141] On November 20 2015, at American University, Washington, DC, an event was organized, "ISO 18788: The New Standard for Responsible Security Operations", promoting the new ISO 18788 standard, where Christopher Mayer, director of Contingency contractor standards and compliance (DoD), explained how adoption of this standard will help combat the flaws that his department has no capability to address otherwise. He was referring to it as an opportunity to use a standard requirement as a part of contracting law, and so being able to hold a client criminally liable under the False Claims

confirmed the initiation and promotion of the certification process for ISO 18788. Focusing on the word “process”, it is important to understand that regulation is a living thing, and it does have different phases of life. To understand it fully, we should observe the behavioural changes of the players and depart from the premise that there is no straightforward analysis of the behaviour of stakeholders in the regulatory process. Along with the shift from Government being a provider of security services to being a supervisor of its outsourcing, occurred a multiplication of stakeholders. The resulting distribution of regulatory power, once held solely by the state, caused a change in the dynamics of the relationships between the stakeholders. The consequence is both an advance and a delay of the regulatory process. The stakeholders are not homogeneous, static or unanimous, and that in turn makes the process dynamic and continuous.

When we consider the expansion of the number of stakeholders (from government to governance) and the consequent shift in power, voice is given to elements previously not impacting the private security regulatory process, namely; human rights organizations, non-governmental watchdog groups, and government oversight and watchdog bodies, such as CWC, GAO, SIGIR and SIGAR. Those last mentioned actively shape and influence the mode by which government agents and industry respond and behave about regulatory policies. Even though these newly empowered stakeholders cannot directly affect certain regulatory practices, as the other stakeholders can, their input is very important. Never does it cause an immediate reaction to all the concerns that are been raised, but it does serve as an

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Act as well, in a case of non-compliance with it. The benefit of ISO 18788 for DoD are extended, in a sense, as it relieves some of the pressure on the hiring department for oversight, as ISO 18788 certified companies need to have strong internal mechanisms, audited internally and externally, that ensure the company has all risk management tools developed and functioning, even before being contracted. Lastly, the lack of knowledge and inexperience of the contracting agents will be partially overcome, as there will be more certainty surrounding what can be expected from the contractor.

element that can shed new light and give rise to new considerations that otherwise would not be addressed. The work on the standards was very good example of how different stakeholders, no matter their effective power, did influence the outcome of a very important regulatory tool.[142]

What is important to learn from past practices are the actions and reactions that have shaped the regulatory process through the time. There was no one stakeholder that could be considered the main regulator; they all stated their opinions and hoped to influence the lawmakers and regulators in a fashion that would benefit their interests.[143] For instance, the government officials I interviewed in Congress noted that the lobbying was exercised by industry, NGOs and governmental oversight bodies. And even though they employed similar means, their ends were very different. Generally, the industry representatives have been considered to often complain of costs and to claim it would be impossible to execute their contracts if certain new rules were put into practice (interviews 7, 39 and 46). This has been seen as both a positive and a negative. As a former US Congressman explained, industry should influence and express their concerns since they are the ones who know "what are the stakes in performing their job. Sometimes, PSCs are trying to do their best and

[142] As a senior DoD official stated "one of the most important things about PSCs is that they operate in intersection of war law and human rights law. And if they were only operating in war law issue it would be so much easier. But we are not. Sometimes we are saying: does War law apply? Does Human Rights Law apply? and how that works. In that way we need to listen to all those people and they don't have answers either. But they might have insight that we don't have. So, for example, standard for PSCs is the first standard anywhere that has incorporated a perspective from civil society. So, we really set down and made sure that, Rebecca DeWinter Schmitt in that time represented Amnesty international, so we were careful to make sure that we understood her view. We didn't always agree with it, but we understood it. I mean there were times that she was not able to be on the working, drafting session. And I would actually argue her position for her. If she was here she would say this. I don't agree with that but that's what she would say. I think that we came with some very good solutions" (interview 27).

[143] As an example, senior DoD explained their input into legislative proposals: "we send report up, they generally they (Congress) give us (DoD) an advance copy of what is proposed legislation so we get the chance to review and comment on it and then send back and sometimes they pay attention on what we say, sometimes they don't."(interview 27).

others, they influence regulation in order to reduce their costs" (interview 33). That discourse was recognized by industry representatives as well

> There was a lot of that "listen we are going be providing these people security so you need to understand what we can and what we can't do". And I think they (government representatives) listened to a point, but I also feel that some of the requirements are very heavy handed and very difficult to pin in contracts, from the economic point of view (interview 9).

However, there is no guarantee that their lobbying efforts will produce any results. Rather, the negotiation between all of those different interests will hopefully produce an outcome that will push all involved in the process to do more than they were comfortable with.[144] Congressional hearings, the CWC hearings, individual meetings with Congressmen and their staff, the meetings promoted by departments – such the ones for the discussion of the PSC.1 Standard by DoD – even different conferences and summits (industrial and academic), represent venues where different stakeholders can interact and hear the troubles and proposals of other stakeholders. All of those interactions strongly influence regulatory policies and practices. If observing the law-making process, as one former industry representative formulated,

> Government is really big slow working machine, difficult to move without a lot of support behind. In my own role, in trying to influence regulation, and craft policy, that maybe an ability to generate ideas, but ultimately government "sausage factory" we call it, takes all these inputs in and kicks the solution off on the other end, but it is beyond the influence of any individual or group of individuals (interview 24).

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[144] Two examples are given, one by a senior DoD official and other by an industry representative. "My background for example was 30 years in military, I understand how to deal with soldiers, I know how to train soldiers, these PSCs personnel are not soldiers, they are protecting civilians who are not used to be shot at, and so they have to take those considerations too, so we have to listen to them, because whatever we come up with again it can be ideal, it must be realistic" (interview 27).The senior industry association representative stated that requiring implementation of higher standards is desirable because "if you create a standard higher than everyone is going to agree, you are going to leave aside small companies that don't want and can't comply. It becomes barrier and cost to do business, but it is a necessary barrier and costs (to protect from, for example, human trafficking)" (interview 32).

The NGO's input on the Hill has been generally seen as desirable,[145] however, the opinions about the weight and importance of their stands vary. While some Congressmen consider they bring important insight of what should be taken into account while legislating PSCs in post conflict operations,[146] others consider their input very limited since "they are not having their life put in the bag every day. They usually don't know what they are talking about" (interview 33, with former US Congressman). Senior Congressional officials considered them to be very useful since "they were usually very sharp and very helpful" (interviews 3 and 40).

The input of the watchdog groups, POGO for example, was considered important in drawing public attention to the problems of contracting in post conflict operations.[147] Making the public aware of the existing problems was important and the watchdog groups, together with the media, created a certain pressure on the legislative branch (Amey, 2010; Brian, 2009; Gordon, 2012, 2016; POGO, 2014), who consequently demanded and sought out more reaction by the executive branch(Chesterman, 2009; Isenberg, 2012; Risen & Rosenberg, 2015; Shachtman, 2007; Thompson, 2009). Therefore, watchdog groups made an important contribution to the debate about those particular issues.

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[145] Based on interviews conducted with senior Congressional staff and Congressmen.

[146] For instance Congressman Price highly valued their input (interview 31).

[147] For example, a senior industry association representative stated "Then you get groups like POGO and others who were criticizing the fact that we were using PSCs and the fact that there was no jurisdiction to prosecute misbehavior and so forth. And at some elements they were correct. I disagree with their premises you shouldn't use it, but I agree that, actually they did expand MEJA somewhere, but didn't go all the way, that was part of the problem" (interview 37).

The input by oversight bodies, namely SIGAR, SIGIR, GAO and including with them the Commission on Wartime Contracting (CWC), has been received well by all stakeholders. The general feeling from interviews was that their main contribution was in raising issues and pointing to the problems that should be addressed. However, since they do not have direct power to change regulatory policies and practices, they unfairly tended to be left aside.[148] The importance and personality of the individual who has led each oversight body appears to have had a great impact on the influence that body has had on the regulatory process. As Neil Gordon stated "ever since it (SIGAR) has been taken by a guy John Sopko, he has been very aggressive and effective watchdog over what is going on in Afghanistan. I think they have some influence. I think they have some positive effects on reforms".[149] Together watchdog groups, oversight bodies and the CWC contributed mainly by raising public awareness of the existence of the problems and perpetuating its presence in the public debate, enabling a demand for solutions.

If the impact of oversight bodies was considered reduced in comparison with, for example, executive branch impact, contribution of the Congressional representatives has been considered polemic. While there is recognition for the legislative initiatives they took, there is also the other side of the coin, meaning the political theatre Congressional hearings often were. As one of the interviewees noted, not many facts came from hearings (interview 7), and information demanded from other stakeholders could have been provided in written form and without the presence

[148] As former US Congressman pointed out "I have great respect for SIGAR and SIGIR and GAO, and their reports are very well done and usually do appoint to very serious problems that should be addressed. The legislative branch should act upon those reports in a better way, and they usually don't" (interview 33).

[149] Neil Gordon is a senior POGO investigator, who has been closely following the regulatory process of PSCs from 2007 (interview 5).

of the media.[150] However, the media coverage did have some positive effect, as Neil Gordon from POGO recognized:

> To some extent you can see it as a "dog and pony show", but over the long term, it does have some effects. It educates the public, it makes them see what the problem is and how it can be fixed, so I think it helps in some way. Not in a short term but on the long term it has cumulative effect (interview 5).

The stakeholders do not continue to hold the same motivations for advancement of the regulatory process as time passes. Their activity is influenced by current events; for example, the Congressional input was the most intense in the period when major incidents occurred in Iraq and Afghanistan (Commission on Wartime Contracting in Iraq and Afghanistan, 2011; Leahy, 2010; Price, 2007, 2010, Sanders, 2007, 2010, Schakowsky, 2007, 2010; Waxman, 2007). As many of the interviewees recognized, being a "hot topic" certainly influenced the regulatory process, particularly between 2007 and 2012. The motivations were found in the need to justify the continued use of security contractors, and therefore the political approach was to clarify the contracting process and to improve accountability. The executive agencies only approached regulation of contractors from 2007 onward, and more intensely after the Nisour Square.[151] The State Department approach has been very different to that of the DoD, and it certainly has to do with the culture of the

[150] Particularly were famous hearings held by Henry Waxman. Industry claims he just wanted a media show, that he was not really interested in solving the problem or studying it more closely. This opinion was explained by one industry association representative: "he was all about the wangling. He wanted to be in the lead position, to be a big issue. In one point, after the Erik Prince hearing, he tells every company who has life security guard in Iraq, he wants basically every single document that has ever been produced, every contract, every report of every casualty, every firing weapon discharge, he wants all these stuff. And that is a lot of material, we were in 2007/8. And so the companies were literally spending the millions of dollars on compiling this stuff, packing it and shipping it over to his office. In some cases, the company had in their contract, government contract, said that if something like that happened, just charge government for it. It was all this additional work, but whatever. So, all these boxes and boxes and boxes were sent up and Waxmen was so focused on this issue and another issue pops up (drug abuse by baseball players) and he was gone. It was it. On that Committee, I knew one of his staffers very well, so I asked him what happened to all these boxes of information, and the guy didn't know, they were probably mopped" (interview 6).

Department, as well as with understanding the importance of the policies on this subject. From early on the State Department assumed that the use of security contractors in such a fashion (as it was used in Iraq) was a one time event, not something that would be repeated. Their interest was to find oversight mechanisms that would satisfy public opinion as well as Congress. Since there were no major incidents later on, and after the drastic drop in the number of contracts in Iraq and Afghanistan, the issue has been put on the back burner. In the hearing in 2013, before Senate Homeland Security and Governmental Affairs Subcommittee on Financial and Contracting Oversight, Patrick Kennedy (2013) announced that State Department had been working on improving oversight by both increasing the number of CORs and improving their training, and expressed the intention of the State Department to continue to work on those issues in the future, but without firmly establishing any goals or framework.

Initially, industry approached the issue from the standpoint that more regulation meant more costs for companies (through additional trainings, supervision requirements, mandatory reports, etc).[152] After the Nisour Square incident, however, part of the industry recognized that without some regulatory mechanisms setting higher standard requirements, industry may be completely cut out, particularly after the strong negative wave of public opinion.[153] As a consequence, a number of companies incorporated higher standards for oversight and vetoed their contractors,

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[151] A senior DoD official claimed the issue of contractors was raised for the first time by the DoD in 2006, when NDAA 2007 was discussed. The first serious steps regarding regulation were taken only after 2007, when Congress mandated both DoD and state Department to work on harmonization of the procedures (interview 41).

[152] As a former industry representative recognized "in every initiative, it is delay, delay, delay is definitely the tactic. If some of them where maybe self preservation? Yes. Some of them may be genuine disagreement with policy. It is toolkit of advocacy if you don't like regulatory or statutory or legislative reform, not only industry, the Congress does this all the time. The Congress mandates topic be studied, that is essentially delay. Sometimes the people who are looking for legislative action, sometimes it is the only way the process can be made" (interview 24).

leaving them with higher costs than those that did not (interviews 6 and 32). Investment in quality standards allowed certain clean-up of industry's image and highlighted their availability to invest in prevention of future (serious) incidents, such as Nisour Square.

Regulatory efforts by the part of industry that provides high-end services was stressing the division of industry on the ones who were there for the long haul and others that seek short term profits (interviews 6, 27 and 32). Without levelling up the field regarding cost versus quality, they would be outbid in the contracting process by the companies offering a low quality, low budget alternative, not solely domestically, but rather globally. In that sense, introduction of regulation of the quality of service provided, and the rise in quality standards, has been seen as a positive, and has been welcomed by bigger companies who plan to stay in the industry for the long haul (interviews with senior DoD officials (27 and 41) and industry representatives (6, 24, 32, 47 and 48).

With a perspective of reducing of US government contracts, expansion on the global level has been a strong motivator to level up competition. The global private security market in unstable environments includes much more than support of governmental activities, such as of Department of Defense and State Department. There are lot of NGOs, both working in development and humanitarian assistance, that employ security services. There are other logistic companies who need security support for their contracts. There are numerous International Organizations (NATO and UN just some examples of it) who count on the private security contractors.

[153] This was seen both by former and present senior DoD officials and by industry representatives (interviews 27, 38, 41 and 43). As former vice-president of one of the biggest private security company stated "the people recognized that Blackwater would drag us down, if we let it. Making us all look bad. If the industry gets paint with one paintbrush and all go with evil PSCs. No, not all PSCs are the same and we need to do better" (interview 43).

These services are usually provided by low-cost alternatives since there is no awareness of the differences between the services provided by low-cost or high-end and they would opt for lower budget in that case (Donald, 2006; østensen, 2013; Perks, 2012; Spearin, 2008, 2011; Stoddard, Harmer, & DiDomenico, 2008). The global acceptance of higher standards would give opportunity to high-end companies to take a share of it, since up to now, they consider market is unequal (interview 32).[154]

Where we are heading with this exposition is to demonstrate that there was no unique dynamic or trend in the behaviour of any of the stakeholders. It cannot be stated that any stakeholder held the same interests the whole time, nor that some stakeholders were active and others passive. All of them adapted their behaviour according to the development of the process, the influence of the others, or incidents that would call back attention to the problems (such as the Benghazi issue or incidents in the Kabul Embassy).[155] In the process, every small step had a cumulative effect. The improvement in the quality of security services provided, and the recognition of the new standard internationally, as occurred with the acceptance of

[154] President of trade association stated "The UN always complain to me that when they are bidding for peacekeeping operations for any type of security contracts, logistical support to peacekeeping operations, they don't have very many US companies bidding. And I said "Well, no, because they never win". And then the UN person says, "they never win because they are always expensive." And I say "Well, they are expensive because they have all the regulations they need to comply with. What if some of them [regulations] are more important than other? Against human trafficking, export trade control agreements, those are all good laws, complying mechanisms, but if I have a US company that is bidding on a contract that´s gonna take place in Mali, and the UN also has a Pakistani or Afghan or Indian company that's bidding for the same service, of course they are going to be cheaper. Because none of those other countries and companies have to comply with the US regulations for anti-trafficking or export trade" (interview 32).

[155] Even though those incidents were not directly related to regulation, they demonstrated the existing loopholes in the approach to regulation of the security contractors. There were issues of quality control of services, and acceptable ethics and morals of the contractors in question. In the case of the Benghazi issue, there were inadequate numbers of security contractors for the task (US HR The Permanent Select Committee on Intelligence 2014), and in the Kabul case the behavior of the security contractors was inappropriate (Thompson 2009). Both contracts in embassies were under the control of State Department.

the PSC.1 Standard as a national standard, and ISO18788 as an international standard, are two of the steps taken on that path. As Christopher Mayer, director of Contingency Contractor Standards and Compliance said,

> This international initiative raises the bar for quality and ethical private security company services. We recommend that clients, both governmental and non-governmental, around the world adopt this standard for their contract with private security providers (Globe News Wire, 2015).

Lack of transparency is a private sector problem

Summing-up opinions about transparency/secrecy would result in something like “lack of transparency is mostly industry related, because industry is secretive, non unapproachable and Machiavellian”. This is the last piece of conventional wisdom to be discussed here. Since it has been repeated so many times (Chesterman & Fisher, 2009: 224; Kinsey, 2004; Scheimer, 2008; Sié Chéou-Kang Center for International Security and Diplomacy & DCAF, 2012; Stanger, 2012), it is commonly assumed to be true. It is not the intention to claim that industry lacks transparency, but it should be understood why industry acts as it does, and to stress the lack of transparency and accountability in the public sector as well. There are (at least) two sides to the story where transparency is concerned, and there are (at least) two sides who should be involved in the analysis.[156] The unapproachability of industry should not be a reason to step back from the quest for explanations for a lack of transparency. Without insight from industry, informed opinion and analysis could not be made.

[156] We are referring to “at least two sides” considering that within division of public agent and private agent there is great variety of opinions involved. Beside that, there are other stakeholders with opinions about the lack of transparency and its causes.

Lack of transparency is under no circumstances solely a private sector problem, and contracting departments have demonstrated more than once that secrecy is very present in the public service as well (Isenberg, 2009; Sié Chéou-Kang Center for International Security and Diplomacy & DCAF, 2012). The limited access to information available to either Congress or citizens (regarding both private security contractors and the involved in regulatory process), and the very high percentage of documents that require Freedom Of Information Act (FOIA) application, demonstrate this very clearly (Sié Chéou-Kang Center for International Security and Diplomacy & DCAF, 2012).

Why is there not more transparency regarding the provision of security services in post conflict operations? Before that question can be answered there is another one that must be asked first; why are the companies not more transparent about their business in general? The starting point was that there must be more to it than just military culture and industry competition. That opinion has been verified in the interviews with industry representatives, particularly by their explanation of how contractual relationships between companies and contracting agencies influence information flow, and what the expectations are of the contracting agencies regarding transparency of the companies. The second point is that the focus should be on the contracting agencies and their lack of transparency. There is no benefit in mystifying one stakeholder when, as past practices have demonstrated, the public service can be very mysterious as well. In the case of the US Government agencies, as absurd as it might seem, the DoD has been more transparent in their actions than State Department, as it has been demonstrated in earlier chapters. That also applies to their openness to explain to the public and academics their point of view and their processes.[157] Certainly, it wasn't only the goodwill of the agency that led to it. The

[157] DoD has, through numerous public events, participated in discussion about regulatory issues. In interviews, academics and practitioners confirmed their openness and availability to share their work.

history and culture of the DoD regarding their relationship with Congress accounts for much of it (interview 40). In contrast, State Department does not have such a dependent relationship with Congress and therefore their willingness to be more transparent is very limited. As a former CWC commissioner stated, “State Department also sees itself as it does not believe that Constitutionally it needs legislative oversight. So, if legislators let them get away with that, than Congress let them get away for years and years” (interview 39).

Starting with industry's lack of transparency, one factor is that companies are hiding their operations to protect their businesses. They do not openly share information, the websites of PSCs, by unwritten rule, contain very scarce information, and there is certainly no institutional structure or email contacts of their senior officers or leaders available.[158] As various industry representatives stated, industry has a tendency not to volunteer much information, for various reasons. One of the more obvious reasons is that most of the founders and very senior directors are former military officers, so they have inherited a culture of secrecy from their previous experience (interview 10). One industry representative indicated that the reason for being so cautious about public exposure, whether by interviews with media or academics, is that more often than not the industry is painted as a “bad guy” and blamed for everything that goes wrong, even when they are only doing as instructed (interview 6). Industry does take its privacy seriously and there are companies that

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Industry association representatives confirmed their continuous participation in the industry organized summits and their receptiveness to present their intentions and hear others’ opinions.

[158] For example, visit the sites of PAE at www.pae.com, Academi at www.academi.com, Dyncorp at www.dyn-intl.com. There are usually very few senior names presented on the site and there is no information on how to contact them directly. Media inquiries involve filling out a specific form, and generally there is little information related to their operations.

have gone as far as threatening their employees over media exposure, particularly after the larger incidents.[159]

However, it is far from true that academics or other stakeholders have not been able to approach industry representatives. On the contrary, such dialogue has been encouraged at conferences organized by industry associations.[160] Then, if they could be approached but could not/would not share more information, the question raised is 'Why?". Several interviewees claimed that industry could not volunteer its side of the story to the public or media, because the client (contracting department) would not allow it (interviews 6, 9 and 23). The State Department was particularly identified with this practice by several company representatives interviewed. One senior industry representative explained how a particular company managed to talk to the press and give their side of the story, ignoring the Department´s instruction to remain silent:

> So one of the major security companies, there was some bad news about them in the press and was inaccurate. When the journalist, I think he was from the New York Times, wanted to do an interview with one of the people involved they went to the State department and asked "can we talk to this person" and they said no. So the company did, and they usually don't because of the relationship with client. They went to the chief counsel and asked "can we find a way to talk to these journalists?". The chief counsel sent a letter over to State Departments saying, you know, we would like to talk to this particular journalist, if you have an objection to it please give us an objection in writing. And State cannot do that. So, never got fired but they got criticized so they don't want to do that. So, they were able to talk to journalist and give their side of the story. But as a company your concern with the client will not allow you to do that. And coming back to contracting process, it may

[159] A former industry representative confirmed that his company threatened employees with lawsuits that would leave them bankrupt and without work in the industry if they disclosed any information regarding the company. He personally was told that contact with journalists would ruin any chance of him getting a promotion, and could get him fired (interview 10).

[160] As an industry representative stated "we were on our way to be open as possible on everything, so every time we had a conference we invited everybody we could. You can call it revolving door, but in every conference we did, journalist had a free ride, academics have academic fee which would be waived if they would bother to ask us, and often they wouldn't even bother to ask. And so you know, lot of academics are very welcome on all our conferences, and there is belief that we are this very secretive industry, but we are really not" (interview 6).

> have been main impact on contracting process and they do not want to lose billions dollar worth contract" (interview 6).[161]

The necessity to keep the client happy, and not cause avoidable tensions, is confirmed by one former senior official from Academi:

> State Department is the biggest customer of the PSCs within US government and pretty much everybody wanted to be on the State Department contract and if you wanted to be there you had to follow their rules" (interview 9). Of course, blaming the client for all secrecy would be as wrong as blaming it solely on the industry. Besides the fact that the client would not allow it, senior industry representatives recognized that journalists were not coming to talk to them unless it was related to an incident.[162] Therefore, when industry recognized someone as a serious journalist, who would do a fair analysis and deep investigation, they would occasionally be open to discuss parts of the business (interview 6).

However, the industry does protect itself from the general public, claiming this is due to the nature of the industry and possible damage it would cause to ongoing operations. Still, the events organized by industry associations are open to the public and during those events it is possible to interact, not only with high level industry representatives, but with NGO representatives, senior governmental officials and academics. As one of the senior industry representatives noted, this industry is no more secretive than any other (interview 32). From personal experience, where I did not know anybody from the industry before my fieldwork, I can confirm such an

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[161] On the question if that happened just in State or as well in DoD, senior industry representative answered: "Both of them had policy that without permission you can't talk with the press. I think that State made bigger deal of that then DoD did" (interview 6).

[162] Senior industry representative stated: "Nobody calls them. I mean you will never see headlines says Triple Canopy did great job doing security for government in the New York Times. (…) If you look at New York Times over the years they just didn't try to understand industry, there are several journalists, but they never left their offices in New York. They never went on field, and they never bothered to understand how contracting works, how bidding works, how rules and regulations. At one point in New York Times they wrote article/editorial on industry probably 2004-5, and he was so wrong, ok I didn't like what he was saying but what he was arguing was totally, in contracting was impossible to do. (…)It doesn't make any sense. If they did base their argument of facts and we didn't like it in industry, fine, we could deal with it. But if they are basically saying nonsense, it just doesn't make any sense" (interview 6).

attitude. Generally, they were very open and available to answer my questions, after promising them anonymity.

And so, after observing the industry's lack of transparency, the focus is now shifted to the situation detected in the public sector. The information publicly available is often very limited, and in many cases possibly available only after filing a request under the FOIA. When consulting the websites, particularly of State Department, one can easily give up after hours of research, without understanding even which office deals with the regulation of security contractors. The methods by which the agency conducts the contracting process, as well as oversight, are often dubious, which turns public opinion even more hostile regarding private security. The lack of transparency may give the impression of a lack of regulation, or that information is being hidden, even when that is not, in fact, the case. If the experience of the contacts proved the Department of Defense to be very transparent, and open to share their advancements and challenges in the regulatory process, the State Department confirmed the opinion of its inaccessibility.[163]

The other area where transparency is expected is in the contracting process. The lack of competition in the early years of the Afghanistan and Iraqi operations was unavoidable, due to a tremendous increase in the number of contracts in a very short time. However, such circumstances would be expected to have improved a decade later,[164] particularly when considered that such behaviour is in breach of legislation

[163] The few attempts to talk to people from Diplomatic Security, closely involved with regulations, did not give results. Even though I had been recommended by their colleagues/friends, after months of attempts to get clearance to talk to me, their superiors refused it.

[164] The GAO annual fiscal report for year 2003 (2004) shows that from 25 contracts that have been examined, 14 of them (56%) have been awarded without competition. Vindication of the Department of Defense in the case of awarding $1.2 billion contract to KBR in 2003 without competition, was that they considered all companies available on the market and chose the one they considered uniquely capable to provide the services within the required time frame given classified pre-war planning requirements.

from 1984 (Competition in Contracting Act) that promotes “full and open competition”. The lack of transparency in contracting can result in huge and unnecessary costs, with excessive spending on outsourcing of these functions and the adjacent waste and fraud (Arnoldy, 2011). The problems with the contracting process are related to the regulatory process, since the bidding process sets the minimum required conditions companies need to fulfil, to be eligible to bid for the contract. Irregularities in the process occasionally happen and an extreme example was the State Department in 2010/11, where all senior contracting officers had been fired or transferred, as a consequence of repeatedly favouring the companies who did not fulfil the minimum required conditions, and so should not have been considered for the contract in the first place, much less contracted.[165] That the situation was far from resolved was supported in the GAO report in 2013, calling attention to the corruption and problems in the contracting process (GAO, 2013).

In the relationship of contracting departments with industry, there are also gaps regarding transparency. Senior industry representatives stated that major misconduct occurred because there was no clear contract explaining what was permitted and what was prohibited (interview 6). At this point, the industry considers the best regulatory tool to be the contract itself, and everything that the government/department wants to be done, and the way to do it, should be specified there.[166] However, that lack of transparency in the contractual relationship means that, at times, favouritism can damage regulatory efforts on the ground. As pointed out in the interviews, cosy relationships, particularly like those the State Department had

The 2013 GAO report finds that competition in the last 6 years has declined and that there is a number of cases considered problematic (GAO 2013).

[165] The case was treated internally and there are no publicly available records of it. It has been previously mentioned in this chapter.

[166] “And as I always say, if you want everybody to wear pink pyjamas while they do their business, put it in the contract. If they don't like it, they won't bid on it. But if they want contract they are going to wear pink pyjamas. It's the way it works” (interview 6).

with certain contractors, did have the effect of complaints about misconduct or problems with audits and future contracting being overlooked, reinforcing their sense of impunity.

Non-transparency of the agencies toward the general public, particularly regarding why departments have dealt with contractors in a certain fashion after incidents, raised red flags among public opinion. The investigation process after the Nisour Square incident was followed by media very closely and the issues usually not so visible became widely known. The State Department providing internal protection for the contractors after the incident, removing them from the country and not allowing interrogation after the incident by the agents responsible for the investigation, put a dark cloud over the whole industry, giving the public the impression that contractors are protected from justice (POGO, 2014). Danielle Brian (2010), Director of POGO, stated that when the State Department was called to their attention for the misconduct of their contractors and inadequate supervision, the issue was concealed and the government officials who tried to change the situation urgently dismissed.

Moreover, the inaccessibility, even by Government officials, to documents relevant to understanding the contracting process better is not a secret. The Commission on Wartime Contracting, in its final report, called attention to “significant limitations” in the access to contracts and other documents considered relevant for the control of supervision of contractors in contingency operations (Commission on Wartime Contracting in Iraq and Afghanistan, 2011: 11). Senator McCaskill more than once called for access to contracts and other relevant documents, as well as asking for greater transparency of departments and more accurate reports, including assessment of policy, planning, management, and oversight of contract support by

the departments.[167] The academic community recognized the lack of transparency and public availability of documents as well, and stressed that their unavailability represented a regulatory challenge, since it would not allow assessment of the impact of the regulation on the ground (Sié Chéou-Kang Center for International Security and Diplomacy & DCAF, 2012).

The general public also sought the outcomes of the processes resulting from misconduct on the ground, and often they have not been available. Most of the cases finished without convictions, and the companies usually settled out of Court. Just to give a personal example, when searching publicly available documents, I was not able to find a number of cases prosecuted under MEJA for operations in Iraq and Afghanistan nor how many of them have resulted in convictions. In interviews, nobody knew the exact number, but in the DoD it was assumed that the low number or non existence of cases from DoD contractors, has to do with application of the UCMJ to contractors since 2008.[168] I asked for help from a senior GAO official in this quest, and after weeks of research through numerous databases, his office came up with a list where only three cases matched all criteria (MEJA + Iraq/Afghanistan). Even though this number should not be taken as accurate, it demonstrates the trend of legislation application, as well as the difficulties in obtaining information.

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[167] Senator Claire McCaskill introduced bill proposal S. 2139 in 2012, together with Senator Webb, calling for stronger supervision. The email discussing this proposal and its foundation may be found on claircmc.tumblr.com. Other examples from McCaskill were from hearings of the Subcommittee of Contracting Oversight, where she called for access to documents and argued that since Congress was providing funding for the operations they should have access to documents they request (interviews 7 and 26, with her former senior staff).

[168] "It is not the number you charge under UCMJ that matter, that it is there and everyone understands that is there and we have so many ex-patriots working inside the contracting organizations, anyone who is unfamiliar, it becomes. I don't want to say it is chilling effect, but it is a conduct effect thing" (interview 41).

Understanding that transparency is one of the weakest links in the regulatory process when it comes to security contracting in post conflict operations, it is necessary to recognize that the problem is as much public as it is private. Both departments and industry lack transparency in their activities, in the general information made available regarding the outcomes of misconduct disputes and the resulting consequences. Having said that, there is a huge advancement in the information available regarding private security contracts, resulting from measures approved by US Congress. However, there is still a long way to go before it can be claimed that transparency is adequate, and that it does not represent an obstacle to the regulatory process, particularly in the results of its application on the ground.

Conclusion

The goal of this chapter was to deconstruct conventional wisdom that often restricted understanding of the regulatory problems, forcing them to fit into a certain theoretical framework. Often enough, the assumption of clearly defined identities of the stakeholders involved and their interests did not help in developing a more comprehensive approach to regulation of private security contractors in post conflict operations. The divisions of private and public, and any categorization where actors the players are put into either black or white boxes, does not contribute to better understanding of their involvement. What this chapter has demonstrated is that there are no good or bad actors, and no public or private modes of action. There is, instead, a grey zone, where actors operate in a way to maximize their benefits, and in that process interests and *modus operandi* get changed. More specifically, the chapter has dealt with how governance has changed the dynamics in the regulatory process, and how the process is dependent on the participation of multiple stakeholders, rather

than being solely served as the product of political institutions. International and national spheres tend to intersect and influence one another, and it is difficult to separate the national regulatory process from international efforts. The regulatory process should not be reduced in any way: it has different stakeholders that are involved; and should consider both Congressional legislative dimension and policies and rules established by contracting departments, from the contracting process to oversight on the ground. The regulation process is fluid process: it is never ending, it has its ups and downs, and impulse stimulus is never provided solely by one stakeholder. Textbook´s definitions of idealized public institutions' values make them appear as "the good guys", when compared to the profit-seeking, uncaring image of private institutions reducing the industry's identity on profit driven. Such segregation is not beneficial for to the comprehension of the regulatory process, and thus observation of past practices is crucial to understanding the reality. Transparency is an ideal that all stakeholders should strive for, and the lack of it should be recognized by all stakeholders involved. Identifying all of those issues gives a more complete framework within which to observe the regulatory process, understand better its flaws and make suggestions of the ways how it could be improved.

Chapter 5

Political and bureaucratic obstacles in regulation of the PSCs

The previous chapter deconstructed common misconceptions about the regulatory process and refuted them by practices. Those considerations will assist in better comprehending two major obstacles in the regulatory process analysed here: on one side, the political stall of regulations, and on the other, the obstacles caused by what are commonly understood as bureaucracies. First, what is understood about political obstacles will be deconstructed, since they have often been invoked, but never clearly explained (Avant, 2005; Avant & De Nevers, 2011; Dickinson, 2011). A comprehensive analysis of the political impediments in the regulatory process implies addressing these political impediments on two different levels of analysis: ideological (partisan) and institutional. Ideologically, we will discuss how different postures towards inherently governmental functions[169] might stall the progress of regulation, as

[169] Inherently governmental function was for a decade a crucial stepping stone in ideological debate. Circular A-76, as revised in 2003, states that using contractors to provide certain types of protective services—guard services, convoy protection services, plant protection services, pass and identification services, and the operation of prison or detention facilities, all whether performed by unarmed or armed personnel—is not prohibited. Nevertheless, Circular A-76 also stipulates that executive agencies should take into account whether circumstances exist where the provider's authority to take action ... will significantly and directly affect the life, liberty, or property of individual members of the public, including the likelihood of the provider's need to resort to force in support of a police or judicial activity; whether the provider is more likely to use force, especially deadly force, and the degree to which force may have to be exercised in public or relatively uncontrolled areas. DOD implementation of the FAR,

well as other bipartisan issues that restrain the process, such as the understanding of the need for further regulation and the roles of ethics and morality. Then, to address the institutional level, the way in which agency culture affects the posture is presented, and eventually, the progress of regulation. In the second part of the chapter the conglomerate of issues that are commonly called bureaucracies will be addressed, which can help in explaining the stalling of the regulatory process. Those include “revolving doors,” institutional memory loss, urgency caused by media pressure, organizational obstacles (consisting of the effect of inertia, the lack of a specialized office that would deal with contingency contracting, inadequate oversight on the ground, a consequence of a lack of career path for the contracting staff, the effects of staff rotation, inadequate education of staff, and budgetary problems) and effects of personality and personal connections on the regulatory process.

Partisan ideological division

How does bipartisan division influence the regulatory process? There is a wide body of scholarship studying effects of partisan division on regulatory process (Finocchiaro & Rohde, 2008; Lee, 2009; Scully & Patterson, 2001; Zuckerman, 1975). More recently, Azzimonti (2014) explored the impact of partisan conflict on policy making process, discussing relationships between legislative and executive branch. Elka Krahmann (2010: 27–36) debated about functions of state, confronting Republicanism and Liberalism. Focusing on democratic control of and accountability

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known as the Defense Federal Acquisition Regulation Supplement (DFARS), does not prohibit the use of contract personnel for security, but it limits the extent to which contract personnel may be hired to guard military installations and provides mandatory contractual provisions for contractors who are accompanying U.S. Armed Forces deployed overseas.(48 C.F.R. Part 252.225-7040.)” (Luckey et al., 2009).

for use of private forces, she shed a light on how ideological differences might affect decision making.

Departing from such rich theoretical findings, we identify several effects of ideological division on this particular regulatory process. First, it causes a huge delay in addressing the concrete problems that were identified on the ground - addressing real problems turned into an ideological debate, thereby delaying action. The politicization of technical issues enveloped detected problems in the political bubble, where technical solutions were not even considered. That was particularly obvious during the first decade of this century, when debate was dedicated to the question of inherently governmental functions.[170] There was a division between the Democratic and Republican political elite[171] over questions of whether outsourcing security services should even occur, when in practice, contractors were already present on the ground in large numbers, at times even outnumbering US troops. The democratic debates in Congress would finish with the same blanket political statement: security services should not be privatized at all, they are inherently governmental function, and they aren't even cost efficient.

This occurred even after the GAO and the Office for Management and Budget (OMB) issued a number of reports (CBO, 2008; CRS, 2005; GAO, 2010) dealing with these issues, confirming that the outsourcing of security services, while not in combat and offensive operations, is not considered an inherently governmental function, and,

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[170] Why such debate was unproductive might be seen in the framework of a definition change of inherently governmental functions. For instance, the former Commissioner of the CWC stated, "the guys who wrote the definition of inherently governmental, they can change on a dime, the next administration can amend what is or not inherently governmental function." (interview 40).

[171] The Republican Party considered outsourcing of security services as desirable, and a non-inherently governmental function. In contrast, the Democratic Party was opposed to the use of security contractors, and often invoked inherently governmental function as a reason to quit using those services.

in fact, generally speaking, should be more cost-efficient than hiring troops to do the same job. Examples of this could be found in hearings held by Carl Levin while a chairman of Senate Committee on Armed Services, or in the proposals of bills such as those sponsored by senator Sanders and representative Schakowsky (Sanders, 2007, 2010; Schakowsky, 2007, 2010).[172] As one industry representative stated,

> When you saw partisan proposals going so far as demanding the stop of use these folks, it was not politically viable and so partisan, in the early days Republican Congress, Republicans both in House and Senate, White house as well, they provoked rival, they were just political statements, they were not to be taken seriously.(…) I don't think there was ever a deep understanding on the navigating political aspect of this. The needed to decide if they wanted pure oversight democratic approach? They were destined to failure. Political pieces would never aligned so to be successful. Even when you had something bad happening, screaming that something needed to be done for accountability here, partisan politics would not let that happen (interview 24).

The other example was given by a senior industry association official:

> Congress was over here yelling and talking and doing nothing. Literally, part of the political overlay in this and this was, Blackwater was only a sheep, but part of the political overlay was that private security, the Blackwater issue were just the biggest of them all. There were other issues, if you look statistically, there were no more issues with PSCs than with US military in terms of assaults and inappropriate behavior, it´s just that they are recorded differently. But it was a part of the political argument against the war. So, for the members of the Congress, anything to do with Iraq contracting, and PSCs are part of that, when it went bad or was perceived to go bad, was

[172] Former senior DoD official stated "senator Carl Levin, who was at time Chairman of Senate Armed Services Committee had a point of view, and he may still for all I know, that completely ignored the findings of the GAO and CBO. He argues that the functions that are inherently governmental and therefore should be performed only by government. The regulations are pretty clear that armed contractors in defense is not an inherently governmental function and the offense it is. And the defense is not. I testified in front of him half dozen of times when I was in DoD. Occasionally I would point out that whatever the law and regulation requires the DoD would comply with. However, I would read to him what the regulation stated and he would ignored them and moved right on. And I was actually stating the official DoD position that if it was not inherently governmental function, and regulation said it wasn't, GAO and CBO said it was cost effective to use contractors then it was to use government employees and they signed all the reasons. (…) So, that´s been essentially political debate because you have some members of Congress, and Senator Levin was certainly one of them, who, whether he believed or not, probably advocated that this was an inherently governmental function."(interview 34).

> used to go against Bush administration. Much on way down (Republican Darrell) Issa in previous Congress was using everything that went wrong to go after Obama. It became a political weapon in ways we never used to see acquisition and contracting before. It wasn't really about the contract went really bad, it was about you Mr President are bad. That's really, what the message was, so Congress was playing the game like that (interview 37).

Ideological divisions marked CWC work as well, and the final report fully represents the bipartisan division among Commissioners (interview 39 and 40). During hearings, whether outsourcing security services was considered an inherently governmental function or not was raised. Even after the unanimous answer from the panel of specialists – representatives from different stakeholders – that outsourcing security services while not involved in offensive operations was not an inherently governmental function,[173] the final CWC report did not fully support such an opinion (CWC, 2011).[174] The Final Report expressed the true compromising nature of the bipartisan division of Congress and its presence through Commissioners from both ideological backgrounds. The former Commissioner stated, "we were in very political environment, we were created by as the McCaskill-Webb Commission, you know, two democrats created a Commission, they made it bipartisan (…) in membership, and in execution." (interview 40).

There was a wide range of proposals though, from stopping outsourcing, as in Sanders and Schakowsky's argument (Sanders 2007, 2010; Schakowsky 2007, 2010, 2011), to a more constructive approach seeking reinforcement of oversight and

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[173] Hearing held on June 18 2010, available at http://cybercemetery.unt.edu/archive/cwc/20110929231705/http://www.wartimecontracting.gov/index.php/hearings/commission/hearing2010-06-18.

[174] The CWC final report (2011) concluded: "Commission endorses the context sensitive, risk-sensitive and mission sensitive approach taken by the Office of Federal Procurement Policy's March 2010 draft policy letter on this topic, and recommends vigorously applying this guidance to the unique contingency-contracting environment".

criminal responsibility (Bluemenauer, 2010; Bond, 2008; Clinton, 2008; McCaskill, 2010; Obama, 2007). There were proposals like that of Senator Obama in 2007, or Senator Clinton in 2008, seeking accountability for security contractors, or the proposals of Representative Price and Senator Leahy (Leahy, 2010, 2015, Price, 2007, 2008, 2010) working on the Civilian Extraterritorial Jurisdiction Act (CEJA). The stalling of the CEJA, an equivalent of the MEJA (but designed for civilian contractors employed by other US Departments that are not DoD), is a good example of Congressional partisan division. The insight on political issues suggested by some of my interviewees was not available in the hearings or other publicly available documents of the Judiciary Committee. This insight was offered first-hand by a former senior Congressional staff member working for the Congressmen sponsoring the bill (interview 31).

The bipartisan division on this particular bill (CEJA) had several fronts. Firstly, this was the bill introduced by Senator Obama before he won the presidential election in 2008. In 2007, while a member of the Senate Judiciary Committee, Obama (2007) introduced the Security Contractor Accountability Act of 2007 to the floor (S. 2147), which was an initial attempt by the Judiciary Committee to deal with the accountability issues of civilian contractors. On the same day, Representative Price introduced a bill dealing with the expansion of MEJA to include civilian contractors in the House of Representatives (MEJA Expansion and Enforcement Act of 2007, H.R. 2740). Obama ´s bill did not pass, and Price´s bill passed the House, but not the Senate. Representative Price understood that the bill as proposed would not pass, so he decided to split his proposal in two. The expansion of MEJA was separated for inclusion in the following years' NDAA, while the legal accountability of civilian contractors was separated into a new bill, later known as the CEJA proposal. While the MEJA expansion and the issues related to contracting and oversight of the DoD

were passed fairly easily in parts in the following years in the NDAA, the civilian accountability issue faced more resistance.

Arguably, the problem was a technical issue of the intelligence community, and the positions of both sides, Republican and Democratic, held strong attitudes about it. There were various reasons to oppose. First, Republicans were opposed to the approach that was suggested for dealing with accountability, and second, they did not want the now president, Barack Obama, who first introduced this issue, to succeed in his long-term goals (interview 31). In 2007, when Representative Price´s bill was presented, Republicans had the majority in Congress and they led the White House. As congressional staff working on the bill stated, on a voting day, Republicans were advised at the last minute, by the Bush administration, to oppose such a bill, citing concerns about the intelligence community (their ability to work would be affected by such a bill). From the first introduction of this legislative item, concerns were raised as to how a contract is defined (e.g., when you bribe someone to get information, is that a contract?) and concerning the responsibility of intelligence contractors to hold their sources accountable as well.

However, since those arguments were not elaborated, the bill passed the House vote. When the bill was considered on the Senate side, Republican senators Chambliss and Grassley again raised concerns regarding the inclusion of the intelligence community in the bill and, at that time, negotiated the language and scope of the bill. The Democratic side supported the inclusion of intelligence contractors, particularly after the Abu Ghraib scandal, while Republicans defended their exclusion, or at least a limitation of the offences that they should be charged for. Democrats thought that progress was being made, until the Republicans agreed to pass a bill with a restraint on an exclusion of charging contractors for offences that occurred in

prison settings. That was a deal-breaker for Democrats and the bill was not addressed again.

The next opportunity to pursue the bill was after President Obama suspended interrogation and detention procedures by the CIA, but opposition to the bill, particularly by Senators Chambliss and Grassley (and their lawyers), continued to be very strong. As a senior Congressional staff member noted, “in large part (they) misunderstood the issue at stake, and in some part, just were significantly opposed to the approach offered” (interview 31). The other issue causing bipartisan division was, as mentioned above, the original introduction of the legislation by Obama during his tenure as Senator; therefore, there was strong opposition to giving him credit during his time in the White House. The prospect of downgrading the accountability issue from a political to a technical one would be expected to occur only after he left the presidency.[175] A new wave of attention to the issue occurred in 2015 with certain problems that the US had with Canada, which refused to allow the US to place law enforcement personnel on Canadian soil (airports, borders, ports) until they had a solid means of holding them accountable. In that context, passage of CEJA would help to achieve diplomatic goals and be seen as a technical issue, as opposed to a political one.[176]

[175] “This has been an issue associated to Senator Obama, not totally from beginning, but soon before we got something passed in House. Obama as a Senator decided to introduce legislation, he was interested in it, it is his bill and then he got into the presidency and has requested that from Congress. So it has been associated to him throughout. Once he is out of office, I can see scenario in which new president comes in (democratic or republican) and they (Republicans) start to see it as “maybe you are right, maybe this is necessary, maybe this was not just Obama tells what to do" and it gets downgraded in terms of its political importance, and people start to see it as a technical fix for hole in the wall.” (interview 31).

[176] Agencies “are supportive because the implications of the legal accountability regime would gain them, help them achieve diplomatic objectives. For example, right now like even with our close allies and neighbours, Canada, Canadians won't let us put our law enforcement personnel on Canadian soil unless we have a means of holding them accountable legally if any misconduct. So we have means of holding them accountable for misconduct as long as that misconduct is performed in called duty. If it is not part of their official responsibilities though we don't have current legal regime to hold them

Moreover, the ideological division between Democrats and Republicans could be observed in the way that ethics and morals were discussed in the regulation of security contractors in post conflict operations. For instance, looking at how contractors´ criminal misconduct should be prosecuted, there was a lot of tension between those who thought that permission to hold them accountable under UCMJ was right and those who considered MEJA as being enough (Fidler, 2007). Traditionally, there is an ideological difference between the Democratic and Republican view of the moral and ethical use of security contractors, so the issue has been observed through that lens as well.[177] The governmental context into which the issue was inserted also played an important role. The interplay between ideological differences and the majority/minority in Congress and the administration in the White House is an important factor in understanding the push and stall in the regulatory process.[178] Even though the issue was politicized from the beginning, given US

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accountable (CEJA would fix that). And we are willing to allow them to be subject to the Canadian judicial system. So we are trying to do a lot of collaboration on border security with Canadians, that would allow us putting law enforcement personnel in Canadian airports or ports of entry and we cannot do it right now, so this is State Department would see possibility for the diplomatic gains if this sort of pass, whereas they don't take any additional responsibility if that was passed" (interview 31).

[177] "That debate is a larger one that has to deal with consequences between public sector unions and private sector contractors generally, so there is always a discussion and difference between what should be done by Government and what should be done by contractors even outside of conflict zone. Generally conservative folks tend to push more toward more work out Government, more to the private sector. Then there is a natural reaction to bring that back to government because government should be doing that job. It is bipartisan issue" (interview 7, with senior Congressional staff); "Some people may look at contractors from human rights perspective,"Hey, these guys are really bad and they are not regulated, they are kind of breaking headache here" but other people maybe "Oh, they are helping the military, it´s business, they generate jobs and revenue".Unfortunately lot of things nowadays are partisan politics. Even the human trafficking, there is a bill this week on human trafficking, it seems like fairly obvious, but then republicans put inside something about abortion and stalls. Nothing happens. Like homeland security bill, they put all that immigration stuff and they undermine the president and it goes nowhere. And then they end up passing a Clean bill which most of them advocated from the beginning with. We wasted weeks, weeks, weeks and so, there is a lot of partisan stuff that get influence or, slow down the progress." (interview 26, with a senior Congressional staff).

[178] As a senior industry representative explained "(Republican) Congressman (Thomas) Davis I believe at the time was, kind of, defender of utility and service contracts and big government contracts person,

participation with the Montreal document and the Nisour Square incident, there was a necessity to put aside some of the ideological debates and downgrade the issue to a technical level, as occurred with issues of setting quality standards, as well as a better selection and training process, in order not to endanger operations on the ground.[179] Ideology was left to Congress, as CEJA proved, and more pragmatic solutions in dealing with security contractors were undertaken by contracting departments.

Agency politics

Bureaucratic politics have extensively explored the effects of inter-agency competition on policy, demonstrating that rational choice is not the way agencies decide their operation mode (Freeman & Rossi, 2012; Niskanen, 1979: 523; Ostrom, 1998: 5). When inter-agency rivalry is crossed with issues surrounding foreign policy crafting, the dynamics of competition gain new dimensions (Drezner, 2000; Lowndes & Skelcher, 1998; Marsh, 2014; Wilson, 1989). Focusing on national security policy and inter-agency relations, Marcella (2004) questioned adequacy of inter-agency relationships to respond to new challenges of 21st century. With a reason so, as by

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so I would not say defender of the industry but supported the need to perform this type of services. At the time this was the partisan Congress, Bush administration, Republican White House, later with Democratic Senate, so some of these broke on partisan lines, as far as pushing oversight regulation harder.'' (interview 24). Thomas Davis was chairman of the House Government Oversight and Reform Committee from 2003 to 2007, replaced by Congressman Henry Waxman.

[179] "I think with Montreal document that was not any more issue, we were more interested in deciding how the people are getting trained and how they are selected, the equipment they use, and we gave them some language that was later used in NDAA bill and helped in dealing with those issues'' (interview 23, with industry representative).

studying their coordination competitiveness better explains relationship between agencies than cooperation (Freeman & Rossi, 2012). In this section is addressed the relationship between State Department and Department of Defense and their impact on regulatory process.

The role of executive agencies in the regulatory process is very important, since they are contracting security services. The regulatory process in contracting departments is exercised through contracts with a provider, and by establishment of policies that ensure effective oversight and supervision of the contracts, as well as consequences for those in breach of the agreement. Congress is responsible for the legislative part, which ensures the establishment of adequate laws to deal with criminal liability in cases of misconduct. Moreover, agencies should incentive further legislative development when it is considered necessary and alert Congress to eventual gaps they identify. Therefore, the way departments are led and how their leaders establish priorities significantly affects how the process is developed. Even though departments were not ideologically divided, as Congress was, politicization did have effects on the regulatory process. Politicization affected departments in different ways, and along with the culture of the agency, it affected the efficiency of the regulatory process.

The State Department was usually accused as being non-responsive to the regulatory propositions by industries, other departments and Congress itself. The major problem, identified by several Commissioners of the CWC, was a lack of responsibility of the State Department towards Congress, in comparison to the DoD. While the DoD answers to the US Senate Armed Forces Committee, which approves their annual budget, supervises their activity, and asks them to justify actions when they are deemed problematic, the State Department does not have the same

relationship with the Foreign Relations Committee.[180] The State Department does not see itself as being constitutionally obligated being subject to legislative oversight.[181] Patrick Kennedy (2011), in his testimony before the CWC, made a political Statement, saying that the State Department does not need (or want) any interference from Congress concerning how to conduct its business. The rejection of even the consideration of establishing a special wartime contracting office was a clear example of the State Department's non-responsiveness to Congress. Frustration with such attitudes was evident from the Commissioners interviewed for this study (interviews 17, 33, 39, 40).

Generally, the interviews demonstrated that their dealings with the State Department regarding the regulation of private security contractors have been very difficult (70% of interviewees dealing with the State Department claimed the attitude to be negative about suggestions coming from outside the department). Therefore, agency culture did influence the regulatory process. When an agency tends to keep itself away from other stakeholders, is not transparent regarding its progress, and refuses other suggestions and influences, the regulatory process is obviously poorer and weaker than when a dynamic is cultivated that nurtures transparency, the sharing of experiences, and interaction and openness to consider and evaluate other suggestions. Such an impediment is considered to be political, because it represents

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[180] Besides Foreign Relations Committee focus is on diplomatic and foreign policy issues, and not defence and security, so it never really got involved in regulatory issues concerning security contractors.

[181] "Committees on the Hill are more interested in diplomacy and political issues and that's where you really see the politics is in the Foreign Affairs Committee not at defense area.(…)The State Department also sees itself as it does not believe that Constitutionally it needs legislative oversight. So, if legislators let them get away with that, than Congress let them get away for years and years. (…) Unlike any other agency State Department calls on Constitutional prerogative that does not require legislative oversight" (interview 39).

a political game, where one department does not want to be subordinated to another or be told what it should do.

There is a huge difference between the way that the DoD and State Department offer answers and strategies regarding the advancements that have been made, the method of recognizing the challenges that lie ahead,[182] and the manner of dealing with such issues.[183] The former Commissioner from the CWC stated, “at least the DoD realized there were risks involved in hiring contractors and I think they learned some lessons from Abu Ghraib and some other really outrageous incidents. State Department seem not to even ever admit there were risks in working with PSCs.” (interview 39). While the State Department refused suggestions to open an interdepartmental office for contingency contracting over the long term (Kennedy, 2011), the DoD embraced the idea as a long-term necessity and established an office to deal with the wartime contracting of security and other services (Office for Armed Contingency Contracting Policy and Programs). The major difference in the way that the provision of security services was seen in the State Department and in the DoD, as a senior DoD official stressed, was the cultural acceptance by the DoD that in conflict zones, there will be some casualties (interview 27). By the nature of DoD missions, their CORs have been working in conflict zones, so their experience has been much more comprehensive. However, DoD senior officials do recognize the necessity of investing more in COR career path and education, and confirm that such trouble is even more prominent in the State Department (interviews 27, 38 and 41).[184]

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[182] Interviews 16, 27, 34 and 41 with senior DoD officials.

[183] Interviews with academics (8 and 10) and with former CWC Commissioner (39).

[184] There were interviewees from other stakeholders that called attention to a necessity to establish career paths for CORs in both departments, from former US Congressman involved in this thematic (interview 33) and senior congressional staff (interviews 26, 35 and 46) to senior oversight body representatives (interview 17).

The segregation of the State Department is not only outward-facing (other political institutions), but internal as well. A senior State Department official confirmed, the lack of communication and internal cooperation between different offices dealing with the same issue, namely the Bureau of Democracy, Human Rights and Labor, which is working on the establishment of international policies, and the Diplomatic Security Bureau, which implements those policies in the contracts (interview 50).[185] The disconnection between different pillars supports the argument of the isolation of the State Department in addressing regulatory issues. Such isolation contributed to the close relationship of Diplomatic Security Bureau officers with contractors and what one senior industry representative called their "cosy relationship" (interview 6). The consequences of such a relationship, he stated, were late responses to the issues that emerged.[186]

This researcher's personal experience confirmed the difficulty in talking to State Department officials, in general. The majority of interviewees confirmed that this is a rule, rather than an exception. Their communication with other stakeholders is very limited. One academic researching regulatory issues stated:

> I don't have a sense of what State Department did in terms of changing procurement policies, in contrast to DoD, which is transparent, quite frankly, nobody would expect, but it is true. So, I don't know what they also did to address issues of diplomatic security.(…) I don't know what they have done in terms of allowing previous performance to influence future contracting decisions" (interview 8).

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[185] The interviewee stated that the exception to that rule was one-time cooperation regarding the incorporation of the ICOC standards in the contracting process for the latest WPS contract.

[186] "The guys who are in it, in the Diplomatic Security Section, were the same guys who have been doing security, they are all former special forces, navy seals, military certainly and they just had this really cosy relationship with lot of security companies. And I think it was good in some ways, but harmful in others, in a sense that they didn't push the changes as hard as they could have. Until too late. Until some issues just popped up" (interview 6).

Even in interdepartmental interaction, there is a retreat by the State Department after mandatory cooperation with the DoD that Congress demanded.[187] The DoD has supported the development of the industry management standard known as PSC.1 and invited the State Department to join this effort. However, there was no interest in participation by the State Department, and to many, this was not surprising and was even considered "business as usual" (interviews 13 and 14).

Cultural differences among the departments and the refusal of the State Department to seek support or advice from the DoD with regard to contingency contracting and contract management in contingency operations have been recognized as originating in the political perspective that the State Department is not subordinate to anyone.[188] A former senior State Department officer confirmed the huge gap in capabilities to manage security contractors between the State Department and the DoD. He noted,

> You have to keep in mind that State Department, whereas a military is rather robust in contracting and procurement at large, that was not a case in State Department. Nor it was in USAID. They did not have an institutional framework or the institutional depth to take on these responsibilities (interview 20).

However, that did not result in a motivation to learn how to deal with them from others. The difference in dealing with contractors and the culture influence responsiveness of the agency was recognized by a senior DoD official:

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[187] With a Memorandum of Agreement signed in 2007 between the DoD and the state Department, there was a period of adjustment in vocabulary and procedures between the two departments.

[188] Former Commissioner (CWC) stated ‘‘State Department's culture is just not one of the management. And the State was mainly defensive, much more trying to explain what happened rather than to say "Hey we understand that something is wrong and we need to do something about it". Department of Defense was more forthcoming in terms of trying to fix of what might be broken.’’ (interview 17).

> We (DoD) know how to manage all of these contracts. And other agencies, namely State and USAID, may not be so good at it. And also DoD is very responsive to Congress. They (contractors) are here, so we are not just going to sit and say “we are not going to worry about that!”. We are very responsive (interview 27).

This opinion was shared by a number of other interviewees from different stakeholders, including a Congressman (interview 32) and two CWC Commissioners (interviews 39 and 40). When asked about the difference between agencies in promoting regulatory initiatives, one CWC Commissioner said,

> I think that DoD does, but I don't think that State Department even dealt with it. I mean they just don't see an issue, they don't see anything that they need to deal with, they think they have all policies in place, everything works fine, no problem. And you bring up the problem and they say we fixed that. They just...They live in a separate world, really (interview 39).

Another political statement that influenced the regulation of PSCs contracted by the State Department was a policy of zero tolerance for State employee casualties, meaning that their employees’ lives should be protected by any and all means, essentially granting *carte blanche* for contractors in their means of achieving such an objective. Again, cultural differences between the State Department and the DoD were stressed, concerning the meaning and understanding of security and risks in stability operations. The State Department culture guaranteeing its officers protection by all means originated in the evaluation that their loss would jeopardize all missions. The DoD takes a very different approach, expecting and accepting some casualties as an inherent part of the mission. Such cultural differences are due to the fact that the two departments have traditionally worked in different settings: while the DoD “normal” is war or at least contingency operations, the State´s usual area is peacetime operations, implying a much lower level of risk. Those differences were

initially present in the security procedures that both departments used in their daily operations, particularly in Iraq. The discrepancy of reactions while providing services drew the attention of Congress and stimulated a request to harmonize their methods of operation in the MOA (DOD&DoS, 2007).

State Department officials did not necessarily consider the zero casualties policy a problem,[189] but for the sake of others who did, Patrick Kennedy (2011) stated that it should be adjusted.[190] On the other hand, one former senior DoD official, who also worked in the State Department for a year, considered it a crucial problem.[191] The

[189] A former senior State Department official considered that (DoS) employees, as civilians, had no ability to protect themselves and so their lives were in the hands of PSCs, and for them to accept the risk to work in such conditions, it was satisfactory to know that PSCs were working under a zero casualties policy, since there were a lot of armed civilians that could hurt them (interview 20).

[190] In the hearing before the CWC, Patrick Kennedy stated that the State Department's "revised mission firearms policies further strengthen post's rules on the use of force, and less-than-lethal equipment has been fielded as a means to minimize the need to employ deadly force".

[191] "The biggest problem that State Department has, was they had a zero tolerance casualties. They told to Blackwater, before a Nisour square incidents that they had a zero tolerance for casualties. And they made a point of saying "Do you understand what a zero tolerance means? It means we take no risk". And so Blackwater regardless of aggression was operating under mandate "never take any risk" and therefore any kind of perceived threat was something for them to use overwhelming force. The regional security officer for State Department I interviewed after Nisour square, he basically confirmed that was the mandate under which they were operating". In a continuation of the interview he explained the difference in the approach that DoD and State contractors/staff had in the same context and area, using as an example the Nisour Square location: "Ok Nisour Square is very high jammed area. It´s always a traffic jam. Anytime day or night. The commander, the general who was in charge of that area, not just the provision commander, but overall commander, said he often got caught in traffic jam and when he would get, he would go out of his Humvee and he would go to talk to local people through his interpreter. He never perceived that there was a threat. The problem therefore was an attitude of the Blackwater people, which was super aggressive, not that I can condone but strongly encouraged with regional security, so that´s the background of the difference. The Blackwater people, the policy said that they can through water bottles at cars to keep them getting to close, well, they were throwing frozen water bottles, which would crack windshields of the car. Well, nobody said anything frozen or not frozen, but that´s what they were doing which obviously alienated the local population significantly. I have done work with the PSCs, in particular with one PSCs, the key of successful work in PSCs is not running around with gun intimidating people. The key is to know the area where you are operating and know who the key people are that you need to influence. The particular company I´m talking about, and they operated largely in Iraq at the time, and now they are operating in Afghanistan, were masters of it. For example, in Baghdad you would run in the numerous checkpoints, many which were run by Iraqi. Their point was always to know who the guards were, who the guards reported to and who the senior

zero casualties policy was reinforced by a regional security officer, particularly in his risk assessment. The former Senior DoD member and State Department executive stated that if regional security officers determined that there was a high risk outside of the embassy compound, they would not perform their duties if they were not certain they could guarantee zero casualties while executing the tasks (interview 34).[192] Later on, the policy was assimilated by some companies as *modus operandi* and turned into their trademark. A senior former DoD official and various academics noted that companies used examples of State Department contracts to separate themselves from competition in the market, making that behaviour not only acceptable, but rather desirable.[193] The existence of such a policy would not be a problem in itself if the State Department nurtured a culture of accountability and responsibility. However, this is not the case, as several interviewees called attention to the lack of accountability and

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military official was and whether he was army or police or whatever. And they would always stop by and give them cigarettes and provide space fingers for them in the winter, and all of the sort of the stuff so they were always known when they would approach checkpoint, because each contractor had to have identifying bar on the front of the vehicle. They would always know who these guys were and they were always fairly accepted and if there was a problem, it was not a shooting war, it was something they would take directly to the senior officer. There were several groups that did this and did it well.'' (interview 34).

[192] One US colonel noted: ''the State Department's zero casualties rule was the security officer´s as well: I'm not going out there, I can't guarantee a zero casualty'' (Interview 38).

[193] One US colonel explained how the zero casualties policy was seen by Blackwater, one of the biggest State Department security services providers: ''Blackwater was making a lot of money globally because they were the guys who protected the Bremer in the toughest place in the world. Not only in the conflict zone but they are selling a lot of personal security to executives around the world, in case of kidnapping etc. That all goes away if Bremer gets killed or even hurt badly in tragic accident. So your entire brand is based on zero casualties. Why are we surprised that they overreact? The penalty for having a casualty is enormous. Probably crashes down the company. Killing couple of Iraqi´s is pretty much free.'' (Interview 38). He continued ''(even if now) State Department says it´s ok, you can lose 10% of people. It doesn't matter, I´m selling you a corporate HQ and they say to corporate security officer, ok, Blackwater lost two last month in Iraq, DynCorp lost zero, do I want to go back to my CEO and say hey, I get this great team for you, they are really, really, good. They protected people in Iraq. How many the loosed? Well, they loosed 5-10%. Well that is an issue, maybe you should also search for another job too. So all of the incentives in private security are geared in conflict zones.'' (interview 38).

consequences for misconduct in the State Department in general, not solely related to private security contractors.

Another political issue is how the budget of the department is spent, particularly in terms of the DoJ. The actions of prosecutors make a political statement about priorities of the department, which has consequences on the internal political scene. The prosecutors are career politicians and the impact that their cases have on the local community is very important for their future. Therefore, considering PSCs criminal misconduct, they tend to prosecute only high-profile cases, and only when they have some certainty that a conviction will occur.[194] Such a decision is the consequence of numerous attempts to prosecute even high-profile cases that end up being dropped by the Justice Department, since there is not enough proof to convict alleged misconduct (McCoy, 2010). The technical problems related to the collection of evidence, the chain of custody, building a case where it is possible to prove an intention to commit misconduct, and the involvement of third-country nationals are tightly connected with such political decisions.[195] One industry representative said that

[194] As Peter Singer stated, “The reality is that no US Attorney likes to waste limited budgets on such messy complex cases 9,000 miles outside their district, even if they were fortunate enough to have the evidence at hand.” (Melson, 2005: 317).

[195] “I was a prosecutor in Brooklyn. It is not an easy to win a case in Brooklyn. It is doable, you need witnesses, you need a chain of custody for evidence, you need to secure crime scene, you need all of these other things, you need to prove intent. How you are going to do that in Afghanistan? I'm not saying it's not ever doable, but it is a lot harder. So, if I´m a prosecutor, JAG attorney, for military, nº 1 I cannot talk to these people in their native language. (…) I can't do it well, I already have limitation. Securing the scene? Well, how likely is that? Proving intent in a war zone? How do I prove that he was absolutely negligent, unless I have that on cameras? I mean, it is a really hard case to prove. And a really hard case to get conviction because a lot of people can say" I don't know. I can see him being afraid for his life, or whatever." It is hard to persecute, it is really hard to prosecute. And then of course you have political sensitivities. Particularly in Afghanistan, lot of PSCs were either local or third country nationals. You have all other level of difficulty of prosecution of international politics involved. That put aside, the jurisdictional issues of if a Peruvian private security contractor working for a British company shoots an Afghan national in Afghanistan, now I have all kind of host problems and that might not be, for pure political reasons on the top of my list as a prosecutor, as a US attorney, then you will have a military charge it, they have a whole different system. It´s hard. How do you do it?“ (interview 28).

in his conversation with then US Attorney Patrick Fitzgerald, it was admitted that the Justice Department had tools to conduct investigations and that his office was doing it frequently, with a great deal of travel to Iraq and Afghanistan (interview 37). However, as Carney (Carney, 2005: 332) noted, “the US Justice Department has not said publicly whether or how it will employ the law”.

That leads back to the political dimension of the issue, and academics recognized that the Justice Department “lacks desire and resources necessary to pursue such cases” (Giardino, 2007: 733). Industry representatives that were interviewed supported the opinion of a former industry representative, who stated that,

> It´s up to DoJ to prosecute. I think it comes back to the political question, is there a will politically to use the tools that Congress is putting in place? That is different question than if the tools exist. It has to be a will from the agency to enforce their own regulations (interview 24).

There were no official claims that the method used up to this point does not work and that it probably needs to be revised in order to provide a more efficient way to prosecute alleged misconduct. That could be interpreted as a lack of political willingness to get involved in such debate, as well as a lack of political pressure to deal with problems. Besides, as a former senior State Department official discussed, there is no political willingness at the moment to deal with the issue of contractors at all, because there is no intention to deploy them. He explained,

> You know you always plan for the worst case scenarios, well ok, let's start doing planning process. We got agencies who did this before, I think it is up to the leadership to give the orders to start doing this, its is due to politics. Because, as soon as you give an order you are convening that you might do it. So in order not to do it, the last thing you want to do is prepare for it, because (their discourse is) if you do not prepare to do it, then you don't do it. And politically, with this administration right now, that is preferable. Because if you would have a capabilities then there would be more pressure for you to

use these capabilities. But as long as you do not have these capabilities, you can always respond to pressure with something "We don't have capability, we don't have military any more, we have other things at home" so you can see how the interplay of politics in resourcing influence (interview 20).

Bureaucracy rules all

This seems to be the answer to everything. When asked about efficiency in public administration, faces fall and heads shake, claiming that it is all the fault of bureaucracy. However, what does that mean? When considering bureaucracy, there are two main dimensions that need to be addressed, structures and people. On one side, there are established structures that make bureaucracy big, heavy machine. On other there are people who might work to overcome some inefficiencies of structures or to contribute to inefficiency of the machine. As Marcella (2004) stated, existing governmental structures are supported by bureaucracies that are not always capable to address the most recent challenges. Governmental bureaucracy is difficult to fight against because it has deep roots in the ways it operates, and deals with issues. It is inefficient (Courpasson & Clegg, 2006). Organizational culture literature grasped some reasons of its inefficiency and shed a light on influences of organizational culture on bureaucratic structures and its` effects on the agency´s behaviour (Brewer & Selden, 2000; Rainey & Steinbauer, 1999; Trice & Beyer, 1993). Organizational theory also recognized that people play important role in it, particularly organizational leaders (O'Reilly et al., 1991; Schein, 2010). Administrative science has addressed the influence of personality and organizational culture on the mode stakeholders may act, and their predispositions to be cooperative (Chatman & Barsade, 1995).

In this section, those little elements that might pass unnoticed under the larger term “bureaucracy” are going to be approached. Moreover, processes that can be traced and identified as ones that can benefit or hurt the regulatory process will be separated into individual components. Given their impact on the regulatory process, those are factors that influence the regulatory process, positively and negatively, and they include revolving doors, institutional memory loss, importance of media involvement, importance to local voters, organizational obstacles, the influence of personality and personal connections.

The regulatory process, as the name suggests, is not an event, but rather a process that extends in time and through space. Given that agents involved in that process tend to change, their passage through different stakeholders is inevitable. People move, and when they do, the knowledge they developed in one institution is taken elsewhere. The impact of such knowledge flow is two-fold. On the one hand, there are certain revolving doors that have an influence on the regulatory process. On the other, institutional memory loss as a consequence of people leaving their positions is inevitable, particularly in public administration. Therefore, those two obstacles will be tackled first.

Revolving doors and institutional memory loss

Revolving door occurs in the US more frequently than in any other country in the world, since there are elections at least every other year. As a senior industry representative explained,

> Revolving doors is very unique in American system of politics. It´s quite frankly the only form of Government that I'm aware of where when you have a new administration 3000 of your upper management structure switches. It switches the people who are knowledgeable of the industry. When you switch it comes somebody that knows nothing about the industry, it could be good or bad. It´s good if that person studies the industry and tries to understand and brings fresh new perspective to the industry. It´s bad if someone who says "I don't understand any of these we are just going to do business as usual. That's when bad things happen. But that is very unique to American society and it´s not going to change (interview 32).

The goal here is to demonstrate that the revolving door in the US system is more massive than anywhere else, not to negate its occurrence elsewhere. It is typical to have people flow between stakeholders. They might be forced to find alternatives, as happens when the Congressional or presidential mandate is over, or they might want to return to industry in a professional capacity.[196] People movement does influence the regulatory process. As one academic stated, “There are very blurring lines, and to choose what is public and what is private, who civilians are in contingency operations is challenging and there are lot of crossovers” (interview 8).

There is a perception that in the regulatory process, there are two sides: governmental and industry, where one is completely good, while the other is entirely bad. To sum up the mainstream academic perspective, this is a win-lose situation, meaning that one industry's gains necessarily represent governmental loss. Those notions are rooted in the economic perspective that is usually applied in regulatory analysis between public and private actors. When people leave the public sector (be it in this case, the legislative branch, executive branch, or even governmental oversight body) and go to industry, there is always apprehension concerning whether they are

[196] Of the 50 people interviewed, 21 had changed one or more stakeholders in the last 15 years. There were 10 academic interviews and 6 of them have observed or participated in the regulatory process from other stakeholder perspectives. There were movements within the executive branch (DoS and DoD) and then to industry, and there were movements from oversight to the legislative branch, from the legislative branch to industry, from the executive branch to industry and back to executive, and from industry to academia.

going to use their previous relationships and knowledge to benefit the new position they hold. Even though there are rules about such transitions, there is a general impression (from the interviews I held) that people transitioning to industry influence their former colleagues in some sense to benefit their new employer.

As one CWC Commissioner stated,

> I personally, and this is just my view, wasn't in the report, I think that we should not allow anybody who retires to work for industry for 3 years. For 3 moratorium. Because one of the reasons is that you hire somebody that have and then you put them back in the government to do the same job or they work in the industry with the same people that they worked with in the government and so it is just so easy to make these kinds of arrangements, but if they are not able to do any kind of work, have any kind of discussion at any level and basically need to go to different career for 3 years, two things are going to happen. One is they are going to be in different career, they may decide not to come back. Secondly, they will simply not be able, even if they come back after 3 years, they won't have same atmosphere, a lot of people would be gone, they won't have the same kind of influence (interview 17).

Practice demonstrates the positive and negative consequences of the revolving door. Non-debatable is that the flow is inevitable. The private security industry, in dealing with contingency contracting, is quite small and limited in comparison to other industries; therefore, the percentage of people moving is greater than in other industries.[197] There are not a lot of knowledgeable people, and at some point, they move on. On the positive side, those movements contribute to a better understanding of regulatory challenges and ultimately result in better policies (premise defended in interviews 6, 23, 24, 27, 28, 39, 40 and 45). A person who observes regulatory challenges from different angles has the opportunity to offer more informed solutions and better understand what might or might not result in practice.

[197] The senior industry representative evaluated the industry at its highest point in 2007 (just concerning private security services), claiming that it was worth 2 billion dollars. He stated, "I cannot see how they can evaluate it on 100 billion dollars industry. So anyway, compared to other industries, I was in Australia for conference and one of the big mining companies advances profits for it, and one company had profits of 40 billion dollars, which is not even if we see by whole industry, so we are the tinniest industry there is." (interview 6).

There is an example of a DoD senior executive who worked as a military official involved with security contractors on the ground in Iraq, later worked briefly for industry, and finally returned to the Pentagon to work on regulatory issues for the executive branch, defining policies and regulations for security contractors. His perspective is recognized by industry representatives, academics, and the executive branch as a highly informed one. As one senior Congressional official stated, “not all revolving door is evil and bad, but it is the same people in different roles. I think they have more informed view, because they are not coming to something cold, they won't need to do two years of thinking on it and already understand punch line and the answer” (interview 40).

The other positive effect of revolving doors, particularly from the executive branch to industry, is the extension of democratic values, such as transparency and accountability. One former senior DoD official stated,

> From having been in charge of holding contractors accountable as the DoDIG in the public sector from me then becoming the Chief operating officer in the general council of defense group It was very easy to understand what I needed to do within the private company, and I was able to take my experience from the public sector apply it in the private sector in a way that allowed our people to serve better as contractors (interview 16).

Another possible benefit for the regulatory process is the opportunity to present challenges that were previously poorly understood from the ground-level perspective. As one former senior industry representative noted, when there is openness, as in the DoD, to listen to other points of view, such revolving doors can lead to more efficient decisions regarding regulation. He pointed out that such logic was not applicable in the State Department’s case.[198]

[198] After being asked about the effect of revolving doors in the DoD and State Department on regulation, he answered: “State Department is very difficult agency to interact with. DoD is much open.

On the negative side, personal influence from those who left on those who stayed is present. Sometimes, it can be very subtle and not easily detectable. As a CWC Commissioner stated, “If somebody is working in your office and you like that person, you know that they passed on the contractor side, they will do something to help that person. And that person does not even ask you to. He does not have to say a word, he does not need to pick up the telephone”(interview 17). Besides that, revolving doors tend to affect regulation (and its application) on the executive level, but not as much on the legislative level. As one industry representative stated,

> I can't say that I saw it on high level in government, but Blackwater did hire a lot of those folks, so they were pretty well for some time with connections. They would shift to the senior leadership roles in companies and I think they can influence how the regulation moves forward. But that wasn't the only influence obviously, the importance of different stakeholder and interactions are important (interview 23).

A senior congressional staff member supported such arguments and considered that from his experience, “not everybody is noble” when trying to reach specific goals, referring to people who left their office for industry, but came to ask for help later on (interview 26). One senior Congressional official suggested that there are two other modes for how revolving doors affect regulation. On the one hand, he recalls the Blackwater hearings before Congress and said that there were former senior executive officials “parading through the halls on the Hill” with Blackwater representatives trying to influence their treatment. The fact is, he claims, sometimes it

State Department folks will not talk to you unless they personally know you, and know you for 10 years, and it is very difficult to meet with various folks within State Department. They are just not interested. I think it is a cultural thing, they don't have the same, I think what you said about revolving door, that is true in the DoD, so because of that you do have more openness, you have willingness to take meetings and look at other points of view. State Department doesn't. They don't care, they don't have to listen to what they contractor say, they can just say "no, this is what we are doing". And they have different set of ideals, they have a different mission than DoD” (interview 9).

worked for them, while other times it had the opposite effect. On the other hand, he witnessed occasions when previous knowledge was used by people to avoid or influence certain decisions (interview 46).

The other consequence of the movement of people from their previous positions is institutional memory loss. Also, as a consequence of particularity of the US system, there are a lot of personnel changes in the US Government, in both the legislative and the executive branches. Firstly, unaware of the possibility of it presenting a serious obstacle to the regulatory process, this research has not contemplated its effects on the regulatory process. Hence, through the process of scheduling and executing interviews, the difficulty in finding knowledgeable people involved in the regulatory process presented a serious challenge. Later on, even some interviews with senior Congressional staff working for Congressmen/women active on the issue were not considered for the purpose of the investigation because their knowledge of regulation of PSCs was very limited, even in the best case. As such, in the 50 interviews that counted for this research, interviewees were asked about the importance of institutional memory loss on the regulatory process. The first conclusion was that there were not many people closely involved in the regulatory process, so a lack of knowledge from staff (of members and committees involved in regulation) was expected.[199]

The main contribution to institutional memory loss is frequent changing of personnel in Congress (as well as Congressmen/women) and in executive agencies, leading to a loss of information. This happens because information is not systematically passed from one person to another, meaning that there are no

[199] In one interview, near the end of the fieldwork, when asked about the number of people that I covered from different stakeholders, a senior industry representative concluded, ‘‘sounds about right’’ (interview 32).

explanations as to why the process took a certain direction or where it should go, so a great deal of experience is lost. That effect was also recognized at the ground level by senior DoD officials (interviews 27 and 41). A former senior Congressional staff member stated,

> I think it does (affect institutional memory loss). Senator Leahy staff in particular passed through several different staff that worked on this, representative Price too, unfortunately after I left he had couple of different people working on this so it´s like 3 different people. On the member level I think it is pretty fortunate given how much the Congress changed over last 10 years. Obviously senator Obama moved on, but Leahy was involved from beginning because he was involved in leadership position in Judiciary Committee, so you had Price and Leahy stable in their positions throughout the whole time, and Grassley too. In member level there was some stability. In the executive branch it has been a lot of turnover in terms of people who work on these issues, so yeah, I do think that has been challenging. (…) It has been turnovers in human rights committee too that is another thing. One of the folks that I have worked very closely with initially is long gone from position. You have policy positions held down without necessarily the people who inherited these policy positions understand how the organization got to that positions. (interview 31).

Institutional memory in executive agencies is usually held by senior staff. As a senior DoD official confirmed,

> Traditionally civilians in DoD provided a long time institutional memory. And what is happened in Iraq and Afghanistan is a reverse is true, the institutional memory is a contractor. Not the government official. You have been in Afghanistan as a trainer for 8 years, you had already 8 different bosses from the government, who has the institutional memory? That put you as a weakness as a government. You mitigate that by good training, good policy, good procedures. But you can't eliminate it completely. When the contractor is smarter than you are, and that is reality, they know why they are doing it this way and they have all the answers why we cannot do it another way (interview 41).

Institutional memory loss influences regulation in two ways: firstly, by acting with limited knowledge (from the governmental side), in comparison to a private

agent, because the proposals of regulatory procedures might be discarded by a company on the ground, given that an appointed senior DoD official would hold the knowledge of what is possible and what may work in practice. Clearly, those influences may work both ways, positively and negatively, and here the focus is given to the negative side. Secondly, bureaucracies take too long, and in the meantime, people change. With the change of staff, both in Congress and in the executive branch, there is a chance of some issues being forgotten because the new administration does not consider them urgent (interview 25 with senior congressional staff). Such opinions were confirmed by others (interviews 20 and 34), stating that the staff does not push topics – the administration does. Therefore, if there is no push to consider some changes as necessary, then they (staff) may leave processes in the bottom of a drawer and the document may stay there, completely forgotten (interviews 20 and 34).

Considering all the arguments, institutional memory loss is fairly easy to prevent. On the members´ level, stability is never foreseeable, so the knowledge is left aside and lost if a member ceases activity or employment. That is simply the political reality and cannot be prevented. However, memory loss due to a change of staff, in Congress or executive agencies, is possible to counteract. As a former senior oversight officer stated,

> To fight institutional memory loss you need to balance it. One way to deal with institutional memory loss is to ensure that you have sufficient overlap between the people who are leaving and the ones that are taking functions. They need to have detailed books on what they've done and why they have done it and if they didn't why they didn't. Particularly in Congress is difficult, it you have change of majority or personnel movement they change the continuity of the staff and the knowledge they have.

> You don't really legislate that, it is really best practices and it up to the agencies to ensure that there is sufficient overlap between the person who is going to take the place and the one leaving. They need to pass their procedures, the major challenges you faced and how you resolved them, so somebody will be able to look up at it (interview 45).

Urgency caused by the headlines

The influence of the media on the regulatory process is significant, since it stimulates public debate. Headlines give issues a sense of urgency and politicians tend to address those first in order to gain political advantage with voters. However, when the PSCs are not involved in bigger incidents, there is no particular reason to focus media attention on them. Also, as a consequence, political representatives tend to focus on other subjects that are currently attracting a lot of attention.[200] In over 90% of interviews, the importance and influence of media putting pressure on both the legislative and the executive branches to find effective solutions was mentioned. Since such pressure has dropped in recent years, as a consequence of the great withdrawal of US presence from both Iraq and Afghanistan, it is to be expected that the pressure and presence of such an issue in the media would be greatly reduced.[201] Most of the interviewees agreed that this does not mean that the problem is solved –

[200] A senior oversight official stated "Let me put it this way: On the Hill, they interest is very limited, they are like a child, they have very short attention span, something is hot topic today and then they move to something else. Let's face it, how often do you see Afghanistan in the papers these days, it's not very often right. Because that´s not priority any more. We don't have hundreds thousands troops there so they are the same way you know. If it's not hot to public it is not hot to them. So, I would say probably its waning" (interview 4).

[201] A senior industry representative said "They are focusing on bright and shine objects, and we were bright and shine object for a while"(interview 23).

far from it, in fact. This simply means that there are other more urgent topics that need to be addressed. A senior industry representative stated that a clear example of the shift in focus was shown by US Representative Henry Waxman, who held “media circus” hearings regarding security contractors in Iraq, and then abruptly dropped the subject for another matter that was making more headlines.[202]

The effect of media pressure was felt in the numerous hearings held by various committees in Congress after major incidents involving security contractors in stability operations. Those hearings were characterized as political theater by most of the interviewees, but it was a unanimously accepted opinion that they did contribute to bringing attention and focus to issues and to putting pressure and maintaining active discussion. This is important since there is a division among people about how the US Government deals with security contractors in stability operations. There are people who think that the US approach is fixing the issues raised, but integrated into the larger topic of the contractors in stability operations in general (interviews 24 and 48), and there are others defending that the US government has a fire extinguisher approach, or a patchwork approach, fixing the most urgent issues and then moving on to other hot issues (interviews 8, 14, 21, 23, 32 and 40). Whichever one is chosen, the fact is that any pressure coming from the media and the public, in general, encourages a reconsideration of this topic.

In fact, senior Congressional staff members suggested that the American public is not aware of the scope of contracting over the last decade, simply because it is something that is not frequently discussed (interview 3). Of course, political attention is dependent on the results that the involvement of political representatives

[202] He stated “Waxmen was so focused on this issue and another issue pops up (drug abuse by baseball players) and he was gone” (interview 6).

is going to have, since they live in a continuous cycle of elections.[203] Their future election results depend on the voters and their interests, and when the voters are not even aware that there is an issue with the regulation of PSCs, then the attention given to such a topic is often reduced from little to none (interviews 5, 8, 14, 17 and 20). The general impression of the interviewees is that the major impulse in dealing with security contractors in more intensive ways will happen soon, since future interventions will certainly be heavily dependent on contractors, and some issues will inevitably emerge again. As a senior industry representative stated, "until there is no more media attention it probably will not be addresses. With the standards (PSCs.1 and ISO18788) the regulation is much better and everybody hopes that will be sufficient in prevention of further incidents" (interview 23).

The influence of the voters is also very important and, as a consequence of the lack of awareness, there is usually not much pressure by them to address this topic. As a senior oversight official stated,

> It depends on how many voters and in what districts are putting the pressure on the members of Congress. The members have role in Armed Services Committee or Government Affairs and for how long? It does become academic argument, newspapers and everything else, but when it comes right down to it, it´s pressure on local level, so if it is not your constituency you can't do much about it. And if you are not on Oversight committees, it is really much smaller group of members who would come in contact with issue, if you are in Science and Space Committee and oversee NASA and that is your focus area, the other issues are tangential unless they have a reason to be personally involved, because they have interest or family member or what not, or they have some constituency interests into. Otherwise, they may not get involved (interview 14).

[203] A senior DoD official stated: "We have 450 Congressmen who are up for election every two years and we have another 100 senators, and these 450 Congressman have very limited staff and they are spending at least a half of their time running for a reelection. And their staff is...they are doing good job and not everybody can have good experience and be competent. We have been in that way for 225 years so, it´s how it works. Our Government was designed to be inefficient, was truly designed to be inefficient, and lives up to that" (interview 27).

Therefore, media attention is closely linked to the progress of the regulatory process. Media attention might be useful for increasing awareness of the American public related to security contractors and, in some cases, even influencing their political representative. These indirect influences bring issues back to the table and encourage the pursuit of better solutions.

Organizational obstacles

This research identified different types of bureaucratic obstacles linked to organizational structure. The most important ones are the initial and continuous effect of inertia (particularly by the State Department), the lack of a specialized office to deal with contingency contracting, inadequate oversight on the ground as a consequence of the lack of career path for the contracting staff, the effects of staff rotation, inadequate staff education, and budgetary problems (not attributing funds for the DoJ to go after criminal cases, no funds attributed to the DoD for continuous work on regulatory improvements, or additional budgets to deal with increased responsibilities in wartime contracting).

The word inertia arose quite a lot in the interviews, usually when referencing behaviour of both the legislative and the executive branches. Lack of inertia was used to explain that those involved in the regulatory process were simply sufficiently content with how things were working and did not want to get involved in more profound alterations of existing procedures or legislation. Their behaviour might be summed up with “if it was working good enough it should not be tackled again, until it

appear to be inadequate". Such behaviour was particularly associated with the State Department and it has been suggested that such attitudes caused delayed action by Congress at best, and in the worst case, caused a complete lack of action. In the US political system, since Congress depends on the executive branch to identify needs and call on Congress to resolve them, departmental culture is very important to that process. Since the State Department did not have a strong security management culture before, senior officials did not believe that anything should change as a consequence of the mission in Iraq. Their attitude of "I don't think this is good idea, it is not needed" (interviews 13 and 14) was particularly present at the beginning of the Iraq mission (2003-6). That attitude was later supported by the Under Secretary for Management Kennedy's statement before the CWC, declaring that there was no need for a special office to deal with wartime contracting, and it refuted the necessity for any assistance in managing its contractors (Kennedy, 2011). As a former CWC commissioner concluded, "the enemy was people and agencies being happy in set up routines" (interview 40).

Senior DoD officials (interviews 27 and 41) stated that a good example of the opposite being true was the DoD initiative to support and, jointly with other stakeholders, develop a national standard. Their impulse and statement before Congress, supporting need and demonstrating how the contracting process would benefit from the development of a national standard (for contracting private security companies), eventually resulted in the DoD mandate to develop them.

Considering the challenges of enhancing better contracting and staff education, 65% of interviewees said they would be resolved by the establishment of a permanent body dealing with wartime contracting.[204] This suggestion is not new—it

[204] A former CWC Commissioner stated that there should be established a special inspector general who would deal with contracting, similar to SIGIR and SIGAR, since they don't deal with the oversight

was contemplated in the final CWC report (2011). The benefit of such an office would be, aside from continuous work on the improvement of the regulatory procedure, the accumulation of knowledge which would otherwise be lost as a consequence of the dispersion of the experienced people. Even though there was closer cooperation in the period of the MOA (DOD & DoS, 2007) between the State Department and the DoD, a senior DoD official (dealing with regulatory issues concerning security contracting by the DoD) considered himself uninformed about measures that the State Department had undertaken regarding private security management over the last couple of years (interview 27). A former senior State Department official confirmed the abandonment of specialized inter-agency mechanisms and processes used during the Iraq mission, stressing their importance in future missions and regretting the time it would take to put them back into commission (interview 20).

The necessity of having an office dealing with wartime contracting appears to be straightforward, since future operations and interventions are expected to heavily depend on contractors.[205] Peacetime contracting is very different from wartime, so using peacetime processes to do this in wartime is inadequate, a former senior State Department official stated (interview 20). Therefore, contingency contracting specialization appears to be a natural consequence. Even though the DoD took a step further than the State Department and established an office to deal with policies and their application in the contracting process, there are many issues still common to both Departments. One of these is the lack of a career path for the contracting officers and their representatives (CO and COR), as well as their education.

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issues of contractors (interview 17).

[205] A senior DoD official stated that guidelines for the DoD when confirming future missions should employ over 50% of their needs from contractors (interview 38).

The need to focus on oversight management is not new and has been previously approached, both by oversight bodies and by academics (GAO, 2006; Terry, 2010). The contracting officers and their representatives are those who handle the oversight, and if they are not compensated well, in terms of their career, they might seek other options that provide for their needs. That leaves the contracting process in a precarious position, since in Iraq and Afghanistan those officers were essential personnel to fill in the gaps, as one US senator explained (interview 33). His opinion is that their rotation affected oversight performance, since there was a lot of loss in the transmission of knowledge and information. Their training was also put into question, since there are constant updates concerning regulation and a continuous educational process should be established that regularly updates those officers on what they should look for (interviews with senior DoD officials 27 and 41). A former senior Congressional staff member found that even when the learning curve was high, at the end of the rotation period for these officers, when they knew what to look for, "they had limited resources to see what was going on behind, past their wires" (interview 35). As a former senior DoD official claimed, there needs to be more investment in quality control and education of the officers on the ground, as well as more of a focus on procedures to exercise continuous oversight, so officers know what to look for. The written regulation would not change if there were no substantial changes to how the oversight was executed on the ground.[206] These issues are far from new and have been previously touched on by some academics (Bruneau, 2013: 654; Cohn, 2011; Isenberg, 2009: 32), as well as by the military, namely in Gansler's report (Center for Constitutional Rights, 2015; DOD, 2007; Human Rights First, 2008). However, they were never connected with other problems and called on limiting effectiveness of the regulatory process.

[206] Interview 38, with Colonel Thomas Hammes.

There is no governmental investment in the development of this regulation at present, and as one senior DoD official confirmed, it is the agency's task to continue to work on it, as well as on the educational component, while there is a low demand for it. Their contribution is dependent on the department's ability to support it, with human resources and funds that would improve the application of the existing regulation on the ground level, and in the DoD, senior officials are grateful to be able to continuously work on the development of regulatory tools and teach their application to staff involved on the ground (interviews 27 and 41).

When considering the lack of prosecution of contractors´ criminal misconduct, the Department of Justice was often defended by different stakeholders for not having a special budget for such prosecutions. As explained in previous points, there is no special budget established for cases concerning wartime contracting; instead, those cases are add-ons to existing local cases. Such a limitation represents a blow to justice. Until there is a clear support structure (budgetary and organizational) for criminal investigation in the State, Defense and Justice Departments, justice and accountability will be discredited when the misconduct of contractors is discussed (Center for Constitutional Rights, 2015; Human Rights First, 2008). One academic stated, “this raise all type of issues how to fund, (…) who's paying for it, (there is) a limited budget, travelling budget, bringing in a witness here to testify, so there are so many(…) real barriers as cost, ideally they would need to fund something special in department of justice” (interview 8). There is support for the claim that there should be a Special Inspector General, not only based on the opinion of different stakeholders (interviews 4,12,17 and 40), but also because the prosecution of fraud related to contractors in stability operations is common practice. Two very senior oversight officials (interviews 4 and 12) stated that there is no reluctance to follow up with these cases, particularly because Special IG (as in SIGIR and SIGAR) does all the

investigation and collection of evidence, and actively seeks out and follows DoJ prosecutions.[207] Such a statement supports the necessity for a clear structure for the conduct of criminal investigations that would make the prosecution of contractor misconduct a technical issue, just like the cases of fraud.[208]

The influence of personality and personal connection

There are various other factors influencing the regulatory process that cannot be quantified. Social networks analysis has been previously explored by social and behavioural science (Glanville & Andersson, 2013; Scott, 2012; Wasserman & Faust, 1994). Applied to regulatory process of private security contractor, this topic was tackled by the Principal-Agent Theory (PAT). Looking from the standpoint of PAT, it is interesting to look at network of people involved in regulatory process and understand who was playing the role of principal and who of agent, as the complexity of relationships within US government is high. However, PAT did not include wide range of stakeholders, rather homogenised private entities under agent and public under principal, even though there were public agents which might as well be called agents, as for instance State Department, regarding their behaviour and tendency to avoid public oversight of their actions.

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[207] For more about the SIGAR inspections mission and their *modus operandi,* visit https://www.sigar.mil/investigations.

[208] We clearly recognize that fraud cases imply much lower costs, since the evidence collection does not have a sense of urgency to it. There is no necessity to isolate the perimeter of the crime scene, or to protect the chain of evidence custody. Fraud relates to people, rather than numbers, but the way it is conceptualized might be the right answer to the problem.

Instead, we proposed to look at this topic through Bourdieu´s lens, particularly looking at his concept of *habitus*. *Habitus*, as we saw in chapter three, defines social space essential for understanding of personal relationships and the importance they had on the regulatory process. As Bourdieu (1977) explained, it is the common space where stakeholders interact and consequently, their relations do affect their actions and motivations to act in certain way. Therefore, studying regulatory process without giving a due attention to relationships that determined course of action and reaction by diverse stakeholders involved is crucial for comprehensive understanding of regulatory process. The focus is on the personalities of agents, their connections, and how they shaped the regulatory process. Those influences might be observed in any stakeholder, including political representatives (both in Congress and in executive agencies), executive staff, oversight agents, or industry representatives, and can be a major determinant in establishing a regulatory path.

In Congress, some representatives were able to draw bipartisan support for certain issues, and others even alienated their own party representative with the way they presented their case. For instance, Senator Claire McCaskill was seeking to address regulatory issues through CWC bipartisan support, while Schakowsky (2010) fought an ideological battle. The open/closed mind towards understanding the standpoint of others, and agreeing to disagree, often differed from person to person. In the oversight bodies, particularly in the case of SIGIR and SIGAR, personality was very important, which was visible in the legacy of each of the Special IGs. Some were more proactive than others, and therefore, their mark on the regulatory process was different. The very loud approach, attributed to the currently acting SIGAR, John Sopko, is not unanimously seen as the best way to positively influence the regulatory process, as it requires being very aggressive and oriented towards drawing media attention (interview 4). In opposition, the former SIGIR, Stuart Bowen, was praised as

the person who most constructively contributed to contracting legislation advancement (interview 22).

The personality of people is more important for the regulatory process than for the stakeholder to which they belong. One senior industry representative (interview 6) gave an example of Christopher Mayer, currently positioned as the director of acquisition and contract management in the DoD, who moved from the DoD (working with contractors on the ground in Iraq) to industry for a short period, worked on the same issues (contract management), and was then invited back to the DoD to work as a civilian, where he continues to work today. It was his integrity and attitude towards the advancement of the regulatory process that were most important, rather than the role in which he performed those functions. His personality has been considered crucial for the advancement of the regulatory process by different stakeholders, including academics, industry representatives, and oversight officials, and his integrity has been recognized in both positions (public and private).[209]

The common difficulty in the regulatory process, when mediation and negotiation of any kind is involved, is the openness of the person who represents a certain stakeholder to understand other points of view. A senior oversight official stated,

> Personalities on the government side play a huge role. Sometimes behind that personality is actually a perspective with which you can begin to identify, the culture of certain. (…) there are people who have a way of organizing thought in their head and communicate that is very different from other people. Those differences can lead to real problems and understanding of what somebody is really saying or looking at from different perspective, problems with communicating. And the perception that you are completely opposed to idea, when in fact you may actually accept a lot of parts of that idea but you don't like the way the idea is organized, or you don't like certain aspects about the way you pursue idea. Some of those perception issues

[209] Interviews 1, 6, 8, 34, 41, 42 and 47.

> were at play, and that is personality thing, I don't think that is departmental institutional issue. Somebody with really flexible mind set that has the ability to diagnose and understand a lot of different perspectives wouldn't necessarily bug down on it (interview 42).

Another senior oversight official stressed that personality might be the most important factor that has influenced the regulatory process in the case of security contractors. She said, “personalities are key, persons that are flexible, that listen other point of view, that compromises, are willing to try something different, this kind of personality is essential. For all stakeholders” (interview 44). Confirmation by seeing the opposite was evident in the discussions related to the CEJA legislation in the Judiciary Committee, where the personality of one Senator and his appointed lawyer caused serious impediments to the regulatory process. “Senator Chambliss´s lawyer is just big pain (…), that is personal thing. But I don't think that there were some malevel and intentions.(…) If senators Chambliss and Grassley understood the legal context around this concept better they would probably compromise by now” (interview 31).

At higher levels, particularly in executive agencies, personality does matter. The initiative depends on people who are going to push certain issues and who will consider it important enough to invest their time and resources to pursue the advancement of the regulatory process.[210] As stated in the example given above, even though Congress did not allocate funds for the continuous improvement of regulatory tools or for the education of the agency´s staff, there is currently an initiative in the

[210] As stressed in this section, human factor is placed as a crucial element in understanding regulatory practices and contextualizing interactions, actions and reactions of people involved in regulatory process, and the marks left on bodies they represented is of crucial importance. Structures do not act, people do, and the *habitus* where regulatory process occur is social space determinant for the outcome of this process. Social space consists of social networks, and the complexity of connections among participants is important and interesting to observe. Even if it wasn't in the scope of this research, in the course of interviews was interesting to observe the most improbable connections through the snowball effect. Further research on impact of social networks on regulatory process would be very interesting.

DoD to close the educational gap and seek out possible difficulties that may appear in future contingency contracting. Such an initiative is dependent on the political willingness of the Secretary of Defense, and his deputies, to pursue and prioritize those issues, even when there is no imposition from Congress (interviews 27 and 41).

The same applies to political elites in Congress, where certain politicians need to decide if the regulation of private security contractors is high enough on their list to make it a yearly priority, to deliver time and effort to push such an issue forward, and to gather support among other political representatives. As a former senior Congressional staff member stated, to make changes “initiative need to get bipartisan support and you would have to take up a lot of floor time to do it, which you can do, but senator Leahy or whoever offering it would have to really need to make it a priority for the year. And Leahy is a president of the Judiciary Committee so he always has a number of priorities and this is not his nº1, so didn't happen” (interview 31). Personality is crucial in politics, and in the relationships among legislators, who is proposing the idea and how the subject is approached are very important (interview 46).

Another example of the importance of personality was demonstrated by Senator McCaskill, who led the Senate Committee on Homeland Security and Governmental Affairs. She brought challenges regarding the oversight and accountability of contractors in wartime overseas contracting during a legislative debate in 2010, and continued to be closely involved in Congressional efforts in the following years. She was behind the establishment and following up of the

Commission on Wartime Contracting. Sources closely involved in the working of the CWC recognize her impulse and involvement as being crucial in maintaining accountability issues in legislative debate for several years (interviews 17, 33, 39 and 40).

At lower levels, personality can influence if and how existing procedures and regulations are applied. A senior DoD official suggested that commanders on the ground may have strong opinions on how security contractors should operate, namely what they should/should not do, which affects the application of the regulatory procedures (interview 41). He stated that the DoD is working on the education of all commanders so that such decisions will no longer be left to their judgement, but they will instead recognize and apply established procedures.

Closely related to personality are the interrelationships between people involved in the regulatory process. All of them operate in a society where, aside from their professional involvement, they also nurture other aspects of their lives. The friendships made through their political party, religious beliefs, family ties, or other social occasions are very important. Professional connections are very important and might influence the regulatory process more than other types of relationships, particularly since continuous debate forms strong ties between people. As a senior DoD official claims,

> You do not underestimate the importance of personal relationships. We have huge government, we have large population. It is critical. It should be that way. You have to bring personal perspective and individual judgements. “This is good idea, I know this person, I know where he comes from, and he is not wrong he is just seeing it differently then me. And so we need to find a way to work together.” And without those personal relationships it would not work (interview 27).

Supporting his claim, from the scope of the conducted interviews, more than 50% knew each other fairly well, or at least knew where they came from and what they did. It was interesting to observe the snowball effect, eventually revealing all the same people, even though they were representing other stakeholders than the person who was actually recommending them.[211]

Beginning with professional relationships, their influence on the regulatory process was particularly apparent in the executive branch. In the State Department, close relationships between some contractors and State Department officers led to a less than strict approach to their accountability. A senior industry representative stated, “I absolutely do think that people who have known the right people at State Department for a number of years have been able to influence things”, continuing that others, who have not been involved with the State Department for a decade, could no longer pass their message there.[212] In the DoD, a senior DoD official claimed that those personal relationships just facilitate interactions between stakeholders. He gave an example of a former subordinate staff member who went to work for a particular company:

> One guy who used to work on my staff, he is now working for PSCs, but is really good because my contact is him now. That´s fine. And some people in industry stay, usually on top level. State Department, the people there move their office, even the Department, but in DoD it is usually the military staff that move in private sector not civilians. And that is not a bad thing, because that

[211] Even the snowball effect of interviews documented the fact that interactions between different stakeholders resulted in strong personal relationships. The snowball effect led from Congressional officials to industry representatives that otherwise were not available to talk, from NGO representatives and academics to people from industry and executive agencies, and from industry to Congressional officials; it was a complex network that allowed me to observe their connections, which definitely influenced the regulatory process.

[212] “State Department is very difficult agency to interact with. DoD is much open. State Department folks will not talk to you unless they personally know you, and know you for 10 years, and it is very difficult to meet with various folks within State Department. They are just not interested” (interview 9).

> forces you to renew your own education and to stay on top of the things" (interview 27).

One academic who worked for PSCs a decade ago claimed that the influence of personal relationships is particularly visible on the ground level, in terms of ambassadors and generals on the ground dealing with contractor issues. That is because those officers are opening a door for their future after leaving office, and due to their close connection with some of their former colleagues, are already working for PSCs (interview 10). A former CWC commissioner supported that claim,

> It is just natural. If somebody is working in your office and you like that person, you know that they passed on the contractor side, they will do something to help that person. And that person does not even ask you to. He does not have to say a word, he does not need to pick up the telephone (interview 17).

When political relationships are considered, there is an understanding that words are not necessary. Those relationships and actions mostly overlap with lobbying and, as the former CWC Commissioner stated, there is usually no money involved, and the actions are not something that you could consider criminal (interview 17). Political relationships have been more obvious in the Committees, where most of the representatives do not have comprehensive knowledge about many issues, and their vote would go towards a person with whom they share the same ideas in general (partisan level) or due to friendship, if that is the case. A former senior Congressional staff member stated that he witnessed a number of occasions on which this occurred in the Judiciary Committee, particularly between 2009 and 2012 (interview 31). There are certainly other personal relationships that have been invoked to influence the regulatory process. Scahill (2008: 17) gave an example of how religious influences affect the industry, but there are still other personal connections that might affect the regulatory process. Other examples of support from

politicians include Texas Congressman Pete Sessions, who embraced the cause of DynCorp (idem), and Colin Powell, former Secretary of State, who claimed that the president of MPRI was one of his dearest friends (Schreier & Caparini, 2005: 69).

Conclusion

There are several impediments that fall under the political and bureaucracy umbrella, but which are rarely approached by the academic community when discussing the regulation of security contractors. This chapter aimed to fill that gap by demonstrating with practices, from secondary sources and particularly using the experiences of stakeholders involved in the regulatory process, to understand and demystify what is hidden beneath it. The aim was to deconstruct the famous claim that “it is a political issue” in answer to the question of why regulation is not more efficient.

With that defined, this section demonstrated that political impediments can be observed on two levels. Firstly, bipartisan division is rooted in the deeper philosophical debate of understanding inherently governmental functions and the opposition to outsourcing security services. The division of opinion between Democrats and Republicans on the necessity to further regulate the industry and understand if the intelligence community should or should not be protected from accountability due to the nature of its business were the main constraints that Congress faced in the course of the regulatory process. On the institutional level, agency cultures are very different, as are their attitudes towards the regulation of armed security contractors in stability operations. The DoD has had a more proactive role (seeking standards, being responsive to Congress, having a management culture

rooted in departmental structure, and having a policy where some casualties are expected in conflict zones), while the State Department was often seen to be stalling the process of regulation (slowing down regulatory efforts and nurturing “cosy” relationships with their contractors, including failing to investigate misbehaviour, due to the State Department policy to use any measures that result in zero casualties). The DoJ was also contributing to political impediments, in a sense, by not making the troubles of prosecution public knowledge and asking for more help (budgetary or otherwise) to apply existing regulations/laws or to raise concern for the necessity of other, more efficient tools that would allow for more successful prosecution of contractor misconduct.

The uncovering of content related to bureaucracy issues led to the observation of several issues affecting the regulatory process from an organizational standpoint. Therefore, under bureaucracy, some challenges were revolving doors, institutional memory loss, the importance of being a “hot” topic, organizational challenges, the importance of personality, and personal relationships. Revolving doors have been shown to have both positive and negative effects on regulation. On the one hand, the revolving doors helped to make people aware of different aspects and possibilities of regulation for people who saw it from both sides; on the other hand, their exit to industry is making them more market-oriented (their efforts lie where the money is). Turnover in Congress frequently means a change of people involved in certain issues, and since there are often no procedures for recycling a process previously in place, there are many staff members involved by the same Congressman or Senator who do not follow or are not informed about previous efforts. This happens on the agency level as well, where the DoD noticed that the best institutional memory in contingency operations is possessed by contractors. This is a disturbing fact, since that heavily influences the available information that shapes

regulation. The importance of the media focus on regulation of PSCs in post conflict operations, e.g., turning it into a “hot” topic, is crucial, but since neither Iraq nor Afghanistan now fits the description of a “hot issue,” the press is not particularly involved or interested. Political representatives often follow issues that are important to their voters, since they are almost continuously in a campaign process. As some of my interviewees stated, when the issue becomes “hot” again, they will say, “Why have we still not solved this?”

Organizational challenges include the effect of inertia (particularly by the State Department), the lack of a specialized office that would deal with contingency contracting, inadequate oversight on the ground, the consequence of a lack of career path for the contracting staff, the effects of staff rotation, inadequate staff education, and budgetary problems. In examples and statements from stakeholders, it was demonstrated how those issues influenced the regulatory process. Last, but not least, focus was given to the importance of personality and personal connections for the regulatory process. Both positive and negative effects demonstrated that relationships are very important in the regulatory process, as they shape both the direction and the content of regulatory initiatives.

Conclusions

Understanding a phenomena that was dramatically changed from the way it was previously used, as it occurred with the outsourcing of the private violence in unstable environments, is a difficult task, but rather necessary if any improvements are desired. Even though outsourcing private violence is not new phenomena, the use of mercenaries through history has many differences from the use of contemporary private security companies. The mode how security contractors are used in unstable environments has significantly changed in the beginning of 21st century, and their roles include carrying weapons, and not solely providing cleaning and cooking services. Also, their stance in front of the law is very different from the mercenaries, since modern private security contractors are seen as civilian workers and not associated with their ancestors.

This particular regulatory process may have had added difficulties, such as low transparency of both stakeholders and regulatory process itself, and on counterpart, very little ground level research (Cerefano, 2008). As a consequence, many time repeated opinions have turned in rather commonly accepted wisdom, which further deviated interest of researchers to look after real regulatory obstacles. The tendency to accept labelling stakeholders and attribution of identities that might not mirror from the ground reality, brought difficulties to study of the regulatory process. Such reduction of the stakeholders on certain labels and “boxing” them to fit in established theories did not help advancing regulatory process. For instance, looking at solely economic gains and making suppositions that industry would act no matter what to reduce costs, as this research demonstrated, was misleading. By

searching to uncover real identities of stakeholders in their full diversity and plurality the study of regulatory process would have a lot to gain, since motivations and behaviour of stakeholders might be better understood in the context in which it occurred.

To demonstrate how that was apparent in the regulatory process of private security contractors in the US, we started with an introduction where was presented the puzzle of this investigation, the fact that regulatory framework of private security contractors working for US government in unstable environment is inefficient and that up to date, there is no approach that permits fully exploring the reasons for its inefficiency. It was recognized that often commonly accepted truths have discouraged further academic research and the approaches used to address inefficiencies have been very restricting, by focusing on solely one element at the time (such as a legal inefficiencies, economic motivation or political aspects). To address those shortcomings, new framework was proposed. By focusing on the structural shift that occurred in the late 20th century, from government to governance, and consequences of establishment of new security assemblages (Abrahamsen and Williams, 2010), it is possible to see how scope of stakeholders has been expanded and permit looking closely in their effects on regulatory process. Further on, relying heavily on Bourdieu's theory of practice, and enriching it with several contemporary contributions, it is proposed to look at practices that made regulatory process and learn more about constraints and challenges from the ground level.

Second chapter offered an evolution of regulatory practices concerning outsourcing violence by a state/ sovereign and the existing regulatory tools, both international and US domestic used for regulation of the security contractors in unstable environments. Comparing regulatory mechanisms (oversight and accountability) this chapter

stressed similarities between how our ancestors dealt with use of private violence (such as sovereigns of Roman Empire and old Greeks, among others) and that not much has changed. By presenting a legal framework under which use of private violence is considered, there is a clear distinction between mercenaries and modern security providers. It is mapped evolution of regulatory framework, both internationally and in the US.

Third chapter looked at the theoretic problem of explaining regulatory inefficiency and offered an alternative to often used scrapbook of solutions. Focusing on the most explored alternatives, like Principal-Agent Theory (PAT) and law study alternatives, it was demonstrated how those failed to recognize plurality of motivations in regulatory context as well as plurality of stakeholders. While PAT does explain how industry gains comparative advantage through concepts of adverse selection and ethical/moral problems (Dogru, 2010; Feaver, 2003), it fails to see beyond the stereotyped boxes in which stakeholders are placed. Plurality of principals and agents, and necessity to go beyond socially accepted identities is left aside. Legal approaches look after a contractual and/or constitutional solution for accountability issues (Brown, 2013; Dickinson, 2011), but again leave aside all other challenges that stakeholders face.

As an alternative is offered approach that permit “unboxing” stakeholders identities, by looking at their motivations to be involved in regulatory process, as well as their motivations to hold off of turning it more efficient. While looking at structural change from government to governance allows contemplation of the scope of stakeholders that need to be brought to analysis, Bourdieu's social theory (1977,1990) provides concepts like *doxa*, *habitus* and field that permit us tools to watch closely interaction of stakeholders and study their motivations. Such framework allows to observe wide range of practices where private security contractors and

others stakeholders involved in regulatory process interact. From their actions and interactions it possible to see that there is no one stakeholder that determine regulatory outcome, and so close observations of their actions and understanding of their motivations would allow looking at the real constraints in regulatory process, that might be otherwise hidden in generalizations and commonly accepted assumptions.

In fourth chapter focus was given to contextualization of stakeholder´s actions and revealing of their diversity within the same category (such as industry, oversight body or contracting department). It was mapped the network of stakeholders and their input on regulatory process, and the channels through which they affected regulation. After introduction of the scope of stakeholders, the rest of the chapter dealt with rupture of some misconceptions and deconstruction of common wisdom. In particular are addressed and deconstructed five misconceptions/myths, and through their deconstruction was uncovered identity of different stakeholders, in particular industry, State Department and Department of Defense. First misconception deconstructed is the idea that the US regulatory approach is relying on political institutions. Secondly, it looks at the overreaction to either the importance of industry or to its total exclusion, amid claims that regulation is a matter of government. Thirdly is addressed the misconception that regulatory issues are solely, or at least primarily, legal issues. Fourthly, it is analysed the idea of a clean cut between what is considered to be private and public values, and lastly, the half truths about the transparency and secrecy of both the regulatory process and industry itself.

The fifth chapter identified obstacles in regulatory process of private security contractors. Both political and bureaucratic constraints have been studied. Relying heavily on declarations of stakeholders and examples was demonstrated how different political issues, like bipartisan division regarding the issue of outsourcing

security. Bureaucratic challenges have been found in revolving doors, institutional memory loss, importance of media involvement, importance to local voters, organizational obstacles, the influence of personality and personal connections. Analysis was focusing primarily Congress, Department of Defense and State Department, although other stakeholders have been considered as well.

And that brought us to this last part of dissertation, conclusions, which is divided in general conclusions, contributions this investigation made to study of regulatory process of private security providers, recommendations to policy-makers and a way forward from here on.

What can be learn from history?

One of the first questions this dissertation placed was if history can teach us something about regulatory mechanisms? Are there similarities between how sovereigns dealt with oversight and control of private violence they contracted and contemporary states, despite of differences between mercenaries in ancient times and modern security providers. By looking closely at historical use of private violence, history has verified that private agents contracted for the use of violence abroad in the name of what nowadays might be called state, had motivations that led them to act in a more responsible and accountable mode that ultimately might be economic, but certainly brought about some regulatory procedures that it should be possible to find in the 21st century as well. For instance, private providers of violence kept their forces disciplined, and dealt with misconduct of their forces in order to set them apart from rogues (Trundle, 1996, 2008; McMahon, 2014). This was the first proof of investment in quality standards, as we call them today. In addition, it was common during history

for the contracting agent to be present during the integration of the contracted agent, and to provide oversight of contracted tasks. There was a close relationship between the contractor and the contracted, as insurance that contracted services were carried out as was established in the contract (Backman, 2003). Occasional wild behaviour, such as unnecessary killing and robbery, were always done with the knowledge and acceptance of the contracting party (Cannan and Brógáin, 2010). Those characteristics can be easily traced in the behaviour of the State Department after Nisour Square. Therefore, there is a lot of common places that might be observed despite of structural changes from monarchies to contemporary states.

That led to another outcome of this investigation, and that is the concept of identity of the stakeholders. Having defended that labelling groups might be a misconception, during research such a premise was confirmed. It is impossible, and rather confining, to consider stakeholders as a part of some group that holds to certain behaviour (Leander, 2010). There is a plurality of actors in many of the groups, and extending the bad behaviour of part of the group to all involved is not only an injustice, but also can lead to drawing wrong conclusions. Differences between, for instance Department of Defense and State Department attitude clearly stressed this assumption. By being both part of the governmental approach, it is clear that any attempt to summarize their actions would be misleading. What research demonstrated was that although industry had their interests in stalling regulatory process, there were parts of industry that were clearly pushing for changes to be made. It could be argued that they were defending their own particular interests, but the fact is that the whole regulatory process benefited from it. Public institutions may be called saints or devils, depending on whom you ask, but after a closer look it is possible to understand their behaviour and why certain decision were made. Those decisions might not have been the most beneficial for the regulatory process, but they

need to be seen in the context in which they were made to fully understand why they were made, and how to eventually improve on them.

The answer to the question of what changes have been made in the way how regulation functions, has no simple answer. Some things have changed, others not so much. For example, the context in which the present outsourcing of the private use of violence is observed (neoliberal democracies) certainly is different from the middle ages. In the 21st century, outsourcing itself has turned out to be political issue, and so also its regulation. Besides, democracies are much more bureaucratic than they used to be in history. All in all, regulation presently appears to be less effective, and penalization of disobedience not prioritized.

When we observe the actors involved, and focus is given to the contracting and contracted agent, the situation has a lot of similarities to historical analysis. PSCs behaviour has more in common with its predecessors, than public entities do. While sovereign were open and transparent regarding their expectations from contracted mercenaries, nowadays public entities are hiding their directives. Even though the results of both disciplined oversight and attempt of punishment are found in contemporary examples as well, there are also the ones where public entities opt to support misconduct and rogue behaviour if they consider that would protect their interests, without ever publicly recognizing it. In private sector, there is a wide range of companies: from ones who choose to provide services that have quality as a priority to those which have gone into the business just for the fast profit. The ones who look to introduce quality standards consider that if they are planning to stay for the long haul, they must clearly demonstrate their capability to restrain potential misbehaviour of their employees. This investment, they assume, will be returned, as future clients may opt for better quality over lower cost. These assumptions of quality

induced growth of business have been used by successful mercenaries throughout history, and there is a similarity in their mind set.

Therefore, it is possible to observe similarities present through history regarding oversight, but also their divergence. While the contracting entity used to be more directly involved in the oversight and control of the use of force, there is a certain detachment from this by some of the contracting entities in the 21st century. Often private violence was incorporated in the forces contracted by the agent, for example, and this might be still found in the operations of the Department of Defense. Hence, State Department did not own their role of contractor, and was not seeking either effective oversight or demanding firmer handling of the criminal misconduct of their contractors.

Modern times, after all, did bring many changes. Italian city states and empires turned into modern democracies, but what are the changes concerning how the private use of violence is contracted? Current theoretical perspectives have their own assumptions about why an actor holds to certain behaviour, and grounds that behaviour within power relationships. However, there is no ultimate attempt to learn from the ground reality what motivates actors behaviour, and what effect it has on the regulatory process. This problem of lack of ground level studies and analysis is not new, and has been called upon for years now (Cerafano, 2008). Hence, it appears that there is strong resistance to learn more from practices. Such need for studying from practices was recently stressed by Leander (2015).

We recognize there was lot of damage done, that prevented better understanding of the regulatory approach, by accepting certain conventional wisdom and attempting to fit the study of the regulatory process (particularly the outsourcing

of security services abroad by state) into theoretical frameworks usually used for other purposes. The premises of certain theoretical frameworks limited academic research on one of the levels of analysis, these being: the inclusion/exclusion of stakeholders, taking an unintegrated approach toward regulation (focusing only on one dimension like economy or law), and the private-public dichotomy. As mentioned above, trying to explain industry's involvement with PAT has hidden other dynamics, equally economically oriented from further study. Clashing against defended rejection for any further regulatory attempts were quality standards development initiatives, and there are no studies trying to look into dynamics resulting from it. The assumption that principals act on imperfect information because they do not have other choice, as demonstrated by looking at practices, might not be complete true. State Department was aware of misconduct and on occasion considered, even by its own officers, to foment them to protect what they found to be their own foreign policy interests.

An additional challenge of the regulatory process of security services outsourced abroad is the clear lack of transparency, but again, there is no in-depth study of the reasons behind it. That was one of the objectives of this dissertation – to turn regulatory process as transparent as possible and construct a comprehensive framework for further analysis.

The only way we found that possible was by learning from practices. By departing from Bourdieu's practice theory (1977,1990) and complementing it with more recent academic contributions, such as Anna Leander´s (2010) proposals to look through the practices of this particular industry and leave behind traditional social constructions of identities, a new framework for studying the regulatory process is proposed. It enables liberation from the constraints of socially constructed identities and gives a framework where practices allow the deconstruction of commonly

accepted misconceptions. The division on public and private do not make sense, since in practice is possible to observe both set of values in either stakeholder. Liberating our analysis from set-up labels and boxes permits delving into the political and bureaucratic process, and analysing impulses and hindrances from both agents and structure.

By observing practices, and looking at both the available documentation and at data gathered through interviews, it is possible to deconstruct some of the commonly accepted assumptions, and demonstrate that even though stakeholders do fall into rough groups, attributing them a group identity is not beneficial for better comprehension of regulatory process. For instance attributing governmental identity and joining in the same group all departments is misleading and it covered up dynamics, political and bureaucratic that might have been addressed before. The same way, considering industry as homogeneous actor and their motivations uniform, demonstrated to be deceptive, since there was a clear incentive from part of industry to invest in rising quality standards.

The impact of economic, political and bureaucratic drivers on regulatory process has been demonstrated and identified obstacles have been highlighted. Economic gain has been considered as both a stimulus and hindrance to the regulatory process. While PSCs did look to minimize their costs, and for that reason stall regulation that might bring them further costs, part of the industry was insistent on raising quality standards in order to maintain the industry, after serious misconduct by some PSCs. The gains they should obtain from expanding market that is more conscious of image protection and guarantees to avoid association with a bad public image resulting from incidents where services are provided by low cost alternatives

have not been considered until now. The industry was certainly not the cause of the state of the regulatory process, as it stands in 2015.

After closer observation of the public sector, serious obstructions have been seen in different branches. It would be wrong to observe US governmental approach to regulation as anything homogeneous in nature. While observing Department of Defense and State Department more closely, and briefly Department of Justice, it was possible to observe how inter-departmental and budgetary politics did affect regulatory process of private security contractors. Often actions and reactions of responsible to represent Departments were more concerned with power relations between agencies than with successful regulatory solutions. The clearest example was distancing of State Department from any joint initiatives that involved DoD, as a way to stress their autonomy and independence. This investigation points to flaws in the US political system that have contributed not only to the state of this process, but also to other regulatory processes.

Ideological division in Congress has contributed substantially to simply maintaining the status quo of regulation for at least the last five years. Bipartisan division over outsourcing security has turned regulatory issues political, not technical (Tiefer, 2013; Avant & De Nevers, 2011). This means any compromise by either side might be seen as a weakness, and has prevented any firm attitude being adopted in regard to regulation of PSCs. The clear example presented here was the process of introduction of the CEJA proposal and consequent issues of its association to Senator, now president, Obama, who originally proposed it. The ideological division between Democrats and Republicans over necessity to regulate industry and to formulate clearly their limitations left deep trace in this particular regulatory process. Such division has significantly affected contracting departments, namely the State

and Defense Department, but has also affected the Justice Department. While there is no clear political stand prioritizing the follow up of criminal misconduct, a few improvements are possible. Allocating funds to support the administering of existing laws, and criminal conviction of contractors guilty of misconduct, would serve in future as a dissuasion to others. While example of Nisour Square trial demonstrated lacunes of lack of better organized process of collection of evidences and difficulties in legal resources to prosecute such misconducts, there is no what so ever attempt or willingness to change it.

Dissuasion tactics appeared to be successful in the DoD, as senior DoD officials stated, with the introduction of the possibility for contractors to be court-martialed under UCMJ. That was furthermore confirmed, they suggest, with absence of the serious incidents under DoD watch. We are not necessarily suggesting extending this to non-DoD contractors; instead we propose that finding a similar operational model applicable to others would greatly improve the perception of effectiveness of regulation. There is necessity to cover accountability of civilian contractors that work for all other department and agencies that are not DoD (Brown, 2013).

The other part of obstacles was found in bureaucratic structure and *modus operandi*. The problems caused both by agents and structures are identified and those are possible to explain by various departmental cultures, personalities and the impact of personal connections. There are phenomenon like the “revolving door”, institutional memory loss and high media attention that can incite or stall regulatory process. While some of the problems appear to have fairly straight forward fix, others are going much deeper in the organizational culture and the mode US government is established. The clear example is the election cycle in US Congress that every two

years are elected Congressman/woman and pursuing long-term policies and goals is compromised.

Contributions

The state of the art of regulatory field, when I first took leap in fate and decided to study one of the fields covered in a heavy veil of secrecy, was in status quo for quite some time. There was no ground level studies that would provide more information about specific offices and organizations and their input in regulatory process. Rather, existing research was profoundly marked by stereotypes, such as seeing security contractors as mercenaries (Gaston, 2008; Hedahl, 2009; Wittels, 2010), watching a state as a main/unique responsible for regulatory framework (Bakker & Sossai, 2012; Krahmann, 2010) and undermining influence of industry input on international and US regulatory framework (de Nevers, 2009; Percy, 2006b). The approach to regulatory obstacles was faced from passive stance, as something given, arguing that is not enough or effective (Chesterman & Lehnardt, 2009; Christopher Kinsey, 2005b, 2008; Percy, 2007). Five years later, it is good to see things moving forward: there is more work on the rupture of identity misconceptions (Franke & von Boemcken, 2011; Joachim & Schneiker, 2014; Petersohn, 2015), more study of the ground reality (McFate, 2015; Dunigan, 2014) and advancement in seeking regulatory obstacles (Cusumano & Kinsey, 2015; Krahmann, 2016).

The goal of this dissertation was to contribute in turning the regulatory process concerning private security contractors a bit more transparent and to

demonstrate that there are lot of lessons that could be learned from studying ground reality. Therefore, contribution of this dissertation is twofold. First, from theoretical standpoint, it is offered alternative to up until now (ab)used PAT theory to explain dynamics of regulatory process. There was clear necessity to present a framework that does not follow meta theories, rather employ middle range and micro level theories to explain specificities of regulatory process of private security contractors. In that sense, contribution of regulatory state used by criminology, and micro theories, such Abrahamsen and Williams propose, was very useful for understanding changes that brought current regulatory state where it is nowadays. The recognition that shift from government to governance brought a plurality to regulatory process is important. And introducing that plurality, by liberating analysis of socially constructed identities is the first step that need to be given in order to understand the place and input of all stakeholders involved in regulatory process. New security assemblages (Abrahamsen and Williams, 2010) turned network of actors working on regulation of private security contractors very broad and each of their contribution is important to acknowledge. As one industry representative stated, the regulatory process is like a sausage machine where each of stakeholders gives some input and outcome is something that has a piece of them all.

Applying Bourdieu's theory of practices as a new approach to regulatory analysis opens up analysis on what the regulatory process really looks like and what are the real obstacles to it. With applying the concepts of practice, field and doxa to regulatory process of private security contractors it is possible to recognize the multiple venues where regulatory practices occur, the importance of the network of knowledgeable people who discuss those issues and dynamics that happen in their relationships. Also, it is necessary to contextualize the actions and reactions of stakeholders involved to understand their motivations and actions they took. Using

those tools allows to look closer at regulatory process and to pinpoint constraints and obstacles stakeholders face or produce, and ultimately which obstruct regulatory process of being more effective. Without a framework that would give us tools to observe practice, such endeavour would not be possible.

Secondly, our contribution is in finding regulatory obstacles in this particular process. That was possible to accomplish only after partially uncovering secrecy associated to regulatory process of private security contractors. What Hannah Arendt (1972), particularly in “Lying in politics”, called “crisis of the republic”, by defending that secrecy and political lie were impediment to public discussion of vital national security issues, can be very well transported not solely to analysis of regulatory process here undertaken, but on many other issues. Difference is, forty years later, the advantage of dynamics between agencies and Congress in such debates turned to national security elites (Horton, 2015: 12). It is true that many of documents continue to be unavailable to general population, even to political elites, as they claimed, but this dissertation sought to turn the stakeholders involved in regulatory process as transparent as possible. First contribution from the standpoint of transparency of data was introduction of figures and maps that describe stakeholders involved and their influence in regulatory network. As previously there were no such maps or analysis of stakeholders, the innovation provided here lays in mapping the offices dealing with regulatory issues and their interactions.

As Anna Leander (2016) stated, to overcome lacunes caused by lack of data, we should invest seriously on ethnographic method and that is what this research, up to the point, did. With consistent process-tracing employed in elaboration of this dissertation, new data has been presented to combat lack of official documents and information occulted with a premise of protection of national security. As a result it

was possible to identify and analyse obstacles to more effective regulatory process of private security contractors and to give a voice to stakeholders involved while doing it. The interviews with industry representatives enriched knowledge with their input and motivations and helped deconstruction of their socially attributed identity. The hope is that this is only the first step and that in future there will be more ground level information and analysis that will turn both industry and regulatory process itself closer to general public.

As regulatory process, as well as many details, remain uncovered, from this research is important to stress the nature of secrecy that this issue, but as well many others, posses. As Scott Horton (2015: 17) stated, the nation's national security elite (figures who occupy key decision- and policy-making positions in executive agencies) are lord of secrecy.[213] That demonstrates that there are many other regulatory processes that have same characteristics, namely secrecy due to protection of national security, where approach undertaken in this dissertation may apply and shed some light on dynamics of regulatory process that occur behind the veil of secrecy that envelops them. Those issues include, but are not limited to, regulation of drones, robotics and other contracted human and not-human involvement in complex environments. As mentioned during this dissertation, some of the issues of regulation of civilian contractors used by other agencies than not DoD, even if not in the specific context of unstable and complex environment, do have same characteristics as the ones explored here and so this type of analysis and the problems identified (at least

[213] "I call these elites the lords of secrecy for several reasons. They are by and large the sources of secrecy, and they control, through classification powers, what the public is allowed to know. Increasingly they use secrecy to enhance their own power and authority, both in notorious intra-agency rivalries and at the expense of Congress and the public. Secrecy is highly corrosive to any democracy. When facts are declared secret, decisions that need to be made with knowledge of those facts are removed from the democratic process and transferred to the apex of the secrecy system, where only the lords of secrecy can influence them".

structural) might be applicable there as well.[214] It is also a place to stress the growing number of areas where is invoked secrecy over national security protection, which with rise of concern with terrorism has been spreading like wildfire, particularly since September 11 attacks in the US. The lack of transparency to the public eye has become a rule instead of an exception.

Secondly, previous to this there has been no comprehensive analysis of the regulatory process of outsourcing private violence in unstable environments; there was only a scrapbook of analysis from different areas of study, such a law, criminology and IR. Compartmentalization of the problems of private security regulation did not have positive outcomes up to now, and therefore contribution of this research is a sense to provide an in-depth analysis of the process and stakeholders involved. It permits the making of more informed conclusions about the role of each stakeholder, as well as of their input into the regulatory process. For instance, attribution of the economic motivation to industry, explained with their desire to block any regulatory progress demonstrated to be false, and have prevented better understanding of the behaviour of industry, as well as the motivation of their incentive and stall of process. The same way, the under-stressing importance of governmental stakeholders´ influence of the stall of the process did not permit in-depth study of their influence of process and identification of the obstacles that result from inter-agency competition or organizational cultures, as it has been identified in the case of State Department and DoD. There was a lot of speculation made regarding the motivations and behaviour of stakeholders involved, but there was no study that examined it closely and contextualized their actions. Invoking politics as the reason of regulatory ineffectiveness (Avant, 2005; Avant& De Nevers, 2011; Percy, 2013), without

[214] Here is considered, for instance, the issues involving using private security contractors by US at Canada's airports and borders and the impasse in the negotiations due to a lack of firmer and clearer contracting and accountability framework.

deconstructing the meaning of what is political in the process and how it was manifested, aided in hiding motivations and bureaucratic obstacles resulting from existing dynamics between stakeholders. The analysis undertaken in this dissertation allows to make several recommendations that might be useful for policy-makers, and also permits academia to see the other side of the coin.

Recommendations

Even though there are a number of obstacles identified in this research, not all of them have an easy fix. Some of them, however, do appear to have more straightforward solutions. While issues like personality, ideological division and personal connections are hard to address, others might be addressed by taking some relatively simple measures:

1) Establishing a single office to deal with contracting in stability operations, as recommended by the Commission on Wartime Contracting.

There are multiples agencies and variation of rules they have for the use of same or similar services they contract from security providers. Such approach caused number of situations where both contractors and the contractor supervisors on the ground, particularly in the beginning of the Iraq interventions, were not sure what they could and could not do. Therefore, it is important to recognize that there are multiple approaches by US government about contracting and oversight, as well as an

accountability of their contractors. The consequences for the misconduct, the mode how contractors are supervised, and accountability tools applicable to different agencies, do form a sense of injustice and that some are more above the law than others. Particularly the differences between DoD and State Department have been very clear about that. As senior DoD officer claimed, the consequences of security contractors´misconduct committed by State Department´s contractors were attributed to DoD, even though they never had such serious incidents. There are numerous flaws appointed due to a lack of transmission of experiences and information due to rotation of staff and for that reason, DoD has claimed that industry has an institutional memory on the ground. As well, transitions from one office to another in governmental agencies, or moving from public to private sector (and vice versa) has caused a loss of valuable lessons that would help improve contract management and turn regulatory process more effective. In such a setting, a solution to establish one office to deal with all governmental contractors in wartime/ contingency/ stability contracting, appears to be common sense, as already proposed by the Commission on Wartime Contracting (CWC) and many other personalities interviewed in the course of this research. The benefits of such an office would be numerous: from the bringing together of all knowledgeable staff and the sharing of experiences (and therefore preventing institutional memory loss and the diminishing effects of the revolving door); to using one consistent approach to all contractors (equality); to ensuring efficient use of resources that are otherwise spread across departments; to increasing transparency of contracting and management process; to establishing rules that apply to everybody providing same services, independently from agency contracting them; to the possible depoliticization of the regulatory process – which in turn would result in more effective accountability. We recognize here that such an office would necessarily need to be imposed to agencies, since there are rooted strong power relations between agencies involved, as well as within Congress-agency structure. There are organizational

cultures, such as of State Department for instance, that would be very resistant to the establishment of such office. The culture of independence from both Congress and other agencies (particularly Department of Defense) would cause a strong opposition to any office which would be able to look at their business.

2) Investing in the education of CO and COR, and establishing a career path for those officers.

The contract management, and more particularly, contracting officers and their representatives have not been recognized by either agency as post-holders with established career path. Those posts have been temporarily, and fulfilled by people from most diverse backgrounds. Those jobs are seen as nor permanent positions because of the risk, low-pays considering the risks and discontinuous availability of the posts. The people placed in those positions have not been specially trained for the job, and for the most of the time in Iraq and Afghanistan, they were not empowered by agencies (particularly occurred in the State Department case, as stated by DOD senior officers) to fully perform their duties on the ground. The fact that such staff does not have initial and continuous trainings that would update and reflect the changes that occur in regulatory process just represents one more obstacle they face in executing their job effectively. With all those elements, it is not to blame individuals who perform such positions for not doing their job better. Some of the ways to motivate and retain experienced people in the lines of departments would be by recognizing that contract management is important. That would be achieved by integration of those positions as a part of careers within existing structures in departments and investing in the continuity of the people involved in contracting process. Such acknowledgement would permit retaining of knowledgeable staff and using their experiences, as much for training of others as for the improving existing

regulatory procedures. By doing it, contracting departments could regain some of the institutional memory loss they noticed slipped from their hands during Iraq and Afghanistan interventions. The most efficient and effective solution would be establishing a group of the CO and COR which would work across the board, meaning dealing with contractors of different departments. Pursuing such approach would render oversight more effective because the cultural vices within departments would be eliminated.

3) Implementing proper budgeting for departments dealing with contractors, as this would increase the effectiveness of regulatory measures.

The Iraq and Afghanistan interventions demonstrated that governmental role of supervisor rather than solely provider of services has been heavily present. Unfortunately, it also showed unpreparedness to deal with the task of supervision, since the previous structure never had to deal with such massive contracting before. Therefore, in any further intervention where contractors are to be used, it is necessary to deal with real expenses of their supervision. Outsourcing does not mean getting off burden of those services, it solely means they those services would be provided by someone else, who, because of the nature of the services, needs to be closely supervised. As a consequence, the cost of administration of those contracts is usually not truly reflected in the costs of the contract for department and back-up for it cannot be executed by existing personnel who is already dealing with contracts in other settings. Both DoD and State Department have recognized that reduced number of officers on the ground (where COR were at times responsible for dozens and sometime hundreds of contractors at time), and limited number of trained staff who understands bidding process and its mechanisms (and lacunas have been demonstrated with the sudden necessity to change almost whole office in State

Department after serious misconducts in bidding process), affected regulatory process, but have stated that without additional budget nothing will change. Investing in specialized force of workers who can deal with contingency contracting, and arming them with corresponding budget, so they can properly execute their tasks, would guarantee better success in the future operations. Beside investing in people, it is necessary to make a shift how US government purchase services (buying higher quality over low-cost approach), and in last two years there are evidence of shifting in that direction, particularly with an adoption of the PSC.1 and ISO18788, as conditions to participate in the bidding process. Lastly, if there is an intention to take existing accountability tools seriously in the future, it is necessary to empower their use. This can be achieved by making additional funding available for the misconducts resulting from oversees operations and specializing again personnel who will deal with those cases. As it was demonstrated through research, many prosecutors will not go after misconducts on contractors because of difficulties to collect evidences and trial them, particularly when they need to use their staff and resources that were attributed without taking those cases in account. By making prosecution of criminal misconduct a priority, it is sent a message to contractors that they are punishable and that period when impunity was ruling is over. As confirmed by senior DoD staff, those measured of effective trial do serve well to dissuade potential misconducts.

Way forward

This research raised more questions than it saw answered. It established that regulatory process of private security providers in complex environments needs profound changes, in a mode how it is addressed. Admitting that Iraq and Afghanistan were not one-time event, and the use of contractors in future will be rule rather than exception, would permit political shift necessary to address many of lacunas that current scrapbook approach has. The choice of the US for this study, as it was explained in the introduction, was due to an extent of their outsourcing, and the place of the biggest governmental contractors of private security services in the world. Their history of use of private violence, and massive growth and presence in last two decades, had strong impact on the regulatory framework and might be considered the most advanced at this time. Their effect on international organizations in which they take part is also an important factor, since those venues are the first places where their experiences and knowledge are going to be shared. Therefore, even though we looked here at the example of the US, careful reader did not miss that it was given eco that many of the issues are rather generalizable, not only to other governments, but to international institutions. Recent research presented by Krahmann (2016) at ISA Convention in Atlanta confirmed that NATO deals with numerous challenges here identified, but since there is no pressure to deal with them, NATO does not pursue their solution. Even though PAT permitted her to look at some obstacles, further research on international organizations and other governments would gain by expanding their framework to look at the bureaucratic obstacles that might be further observed from practices.

In the future, there will be necessity to deal with an establishment of the new type of special force, both within governments who are contracting out security (or plan to do it) and in international organizations, more global and general as United Nations, or more regional and security related, as NATO. Such special force would consist of experts in contracting, management and holding contractors accountable. The sooner there is an acknowledgement of the benefits of such specialists, sooner providing security will lose pejorative adjectives associated to it and become just one of the industries, as any other is.

With that said, it might sound easy, but it is anything but. Political implications of acknowledgement of the need for such specialization might be too costly for many to take. And it will take a generation to train people and turn provision of security in technical, rather than political issue. In our opinion, academia might play a crucial role in solving regulatory obstacles. Up to this point, academic research contributed to stall in the study of the regulatory process of private security providers, by divorcing academic research from ground reality. While regulatory process has advanced, if not so much in results, than certainly in initiatives, academic writings did not reflect on it. There is a discrepancy between ground reality and the mode regulatory obstacles are addressed academically. If academia would focus more on technical aspects and obstacles of regulatory process, there would be closer cooperation between scholars and policy-makers and such cooperation might bring better solutions for regulatory process.

For such shift to happen, it is necessary to invest more on research from the ground reality, like Carafano (2008) called on. Such studies are the only way to learn more about practices and how they might get improved. Ethnographic study of the industry that has baggage of secrecy would contribute a lot to understanding pitfalls

of existing mechanisms and construction of more effective ones. As Leander (2016) stated, there is a need to disrupt misconception that such study is not scientific, and embrace advantages it will bring to study of topics with less data available.

Finally, what appears to be interesting, is to look out how major international organizations are dealing with contracting and regulating contractors they use. United Nations are very interesting example, for instance. While, on one side, they still study issue of outsourcing security services under UN Working group on the use of mercenaries, their practices of outsourcing security are ever growing and the standards under which they contract them are focused on low-cost providers. The NATO, as Krahmann (2016) demonstrated, is heavily dependent on security providers, but not at all interested in their regulation.

These examples demonstrate that there is a way to put pressure on both governments and organizations by exposing their practices and the lack of accountability. The safer outsourcing security is consequence of the joint venture of responsible scholars, governments, international organizations (IO), industry and civil society. If governments/IO are responsible contractors of services, their provision will not cause more reluctance than any other defence contracting.

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Annex 1

US Legal framework governing private security contractors

Source: Lanigan (2008) “Legal Regulation of PMSCs in the United States: The Gap between Law and Practice”, privatesecurityregulation.net.

Legal Provision	Comment
Federal Statutes	
Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350, www4.law.cornell.edu/uscode/28/1350.notes.html	Provides federal court jurisdiction over any civil action by an alien for a tort (civil wrong), committed in violation of the “law of nations” or a U.S. treaty.
Anti-Torture Act, 18 U.S.C. §§ 2340-2340B, www.law.cornell.edu/uscode/18/usc_sup_01_18_10_I _20_113C.html	Implements the obligation to criminalize torture under Article 5 of the United Nations Convention Against Torture and Cruel, Inhuman and Degrading Treatment, applying only to prohibited acts attempted or committed outside U.S. territory, but applying to U.S. nationals found anywhere in the world, and to anyone found in the United

	States.
Arms Export Control Act (AECA), 22 U.S.C. § 2778, www.law.cornell.edu/uscode/html/uscode22/usc_sec_ 22_00002778----000-.html	Controls the export (and import) of certain defense-related articles and services, including PSC services.
Federal Activities Inventory Reform (FAIR) Act, Pub. L. 105-270, 112 Stat. 2382 (1998), frwebgate.access.gpo.gov/cgibin/getdoc.cgi?dbname=105_cong_public_laws&docid=f:publ270.105	Requires identification of federal government functions that are not "inherently governmental" as a predicate for private contracting.
Federal Tort Claims Act (FTCA), 28 U.S.C. § 1346(b), www.law.cornell.edu/uscode/html/uscode28/usc_sup_ 01_28_10_VI_20_171.html	Permits private parties to sue the U.S. government in a federal court for most torts committed by persons acting on behalf of the United States.
Foreign Assistance Act (FAA), 22 U.S.C. §§ 2301-2349bb-4, http://www.law.cornell.edu/uscode/html/uscode22/usc _sup_01_22_10_32_20_II.html	Authorizes (with AECA, above) the Foreign Military Sales (FMS) program, which regulates some U.S. PMSC military- and police-training operations abroad.

Military Extraterritorial Jurisdiction Act (MEJA), 18 U.S.C. §§ 3261-67, www.law.cornell.edu/uscode/18/usc_sup_01_18_10_I I_20_212.html	Permits the prosecution in U.S. federal court of certain persons who commit acts that would be crimes under the SMTJ punishable by imprisonment for more than a year, had the conduct occurred within the United States, including employees and contractors of all US government agencies (excluding citizens and "usual" residents of the territorial state) "to the extent such employment relates to supporting the mission of" DoD.
Special Maritime and Territorial Jurisdiction (SMTJ) Act, 18 U.S.C. § 7, www.law.cornell.edu/uscode/18/usc_sec_18_00000 00 7----000-.html	Expands jurisdiction of U.S. courts to cover "buildings, parts of buildings, and land appurtenant or ancillary thereto or used for purposes of [U.S. government] missions or entities, irrespective of ownership" in a foreign state, with respect to certain enumerated offenses committed by or against a US national.
Torture Victims Protection Act (TVPA), PL 102-256, 106 Stat. 73 (1992), thomas.loc.gov/cgibin/query/D? c102:5:./temp/~c102HPEin0::	Permits the filing of civil suits in the U.S. courts against individuals who, acting in an official capacity for any foreign nation, committed torture or extrajudicial killing.
Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 801-946, www.law.cornell.edu/uscode/10/usc_sup_01_10_10_A_20_II_30_47.html	U.S. criminal law and procedure applicable to the U.S. military; in 2006 Congress amended the UCMJ to expand the U.S. military's already-existing authority to prosecute crimes committed by civilians "serving with or accompanying" the armed forces to include civilians serving in a "contingency operation," the current doctrinal term for the sorts of military operation in which the United States is currently engaged in Iraq and Afghanistan.

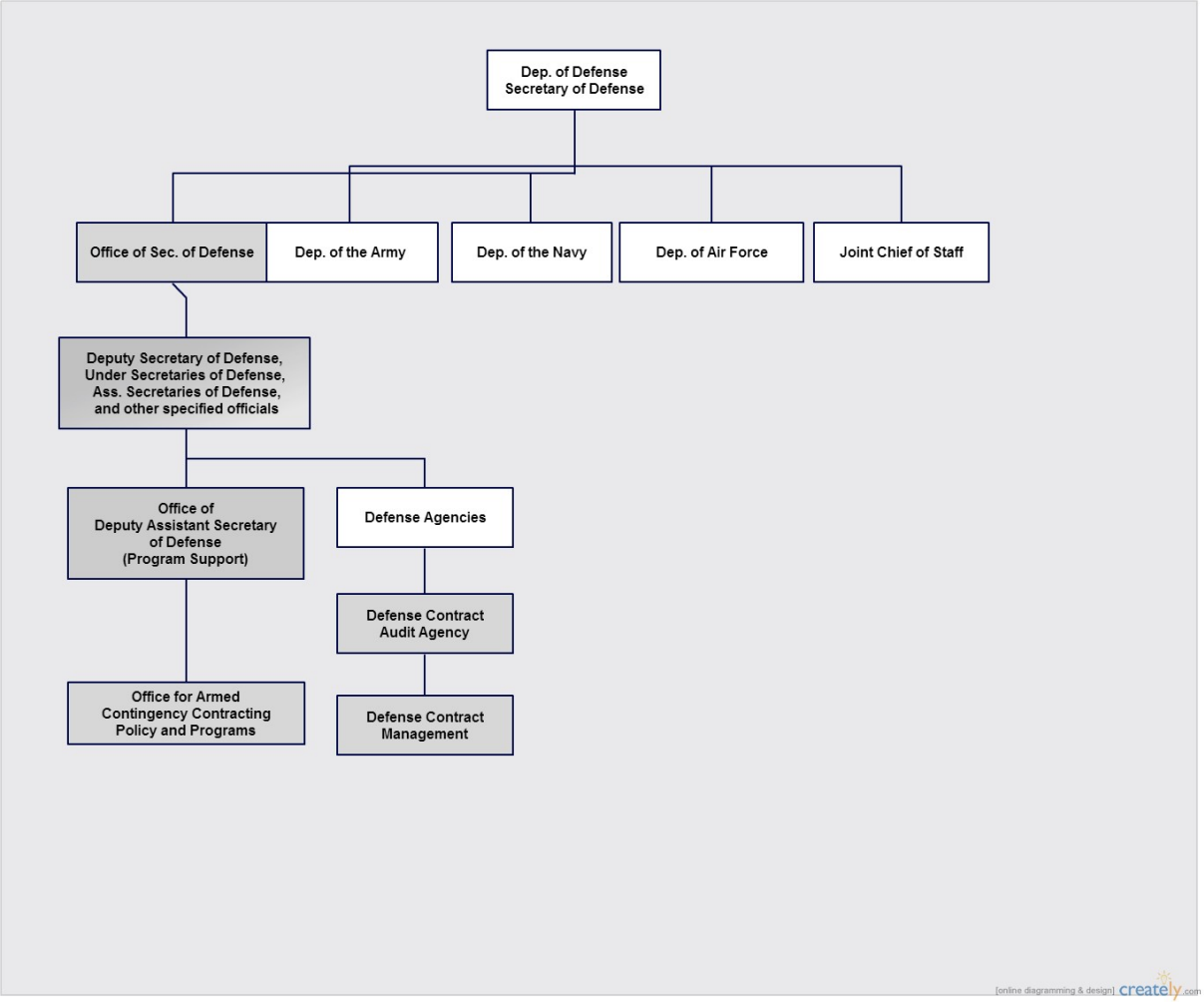
Victims of Trafficking and Violence Protection Act (VTVPA), Pub. L. 106-386, 114 Stat. 1464 (2000), frwebgate.access.gpo.gov/cgibin/getdoc.cgi?dbname=106_cong_public_laws&docid=f:publ386.106	Requires the inclusion of clauses in federal contracts, grants and cooperative agreements for "major functional project, programs, or activities abroad," allowing termination if the primary contractor or any subcontractor engage in trafficking, procuring a commercial sex act, or using forced labor.
War Crimes Act (WCA), 18 U.S.C. § 2441, www.law.cornell.edu/uscode/18/usc_sec_18_00002441----000-.html	Authorizes the prosecution of war crimes committed anywhere in the world by or against a U.S. national or member of the U.S. armed forces.
Federal Regulations	
Defense Federal Acquisition Regulation Supplement (DFARS), www.acq.osd.mil/dpap/dars/dfarspgi/current/index.html	Provides additional regulations (beyond the FAR, below, that applies to all federal agencies) that DoD must apply in its PMSC and other contracts.
Federal Acquisition Regulation (FAR), www.arnet.gov/far/loadmainre.html	Provides detailed requirements governing U.S. government agency contracts with PMSCs (and other contractors), spanning the development of requests for contract proposals through termination of contracts.

International Traffic in Arms Regulations (ITARs), www.pmddtc.state.gov/official_itar_and_amendments .htm	Requires (under authority of the AECA, above) export licenses for U.S. PMSCs that do business abroad, and in connection with their business wish to ship and use certain weapons, protective equipment or electronics.
Federal Agency Instructions, Field Manuals, Circulars & Memoranda	
Department of Defense Instruction Number 1100.22, Guidance for Determining Workforce Mix (Sep. 11, 2006; incorporating Change 1, Apr. 6, 2007), www.dtic.mil/whs/directives/corres/pdf/110022p.pdf	DoD's identification of its "inherently governmental" activities (required by OMB Circular No. A-76, below.
Department of Defense Instruction Number 3020.41, Contractor Personnel Authorized to Accompany the U.S. Armed Forces (Oct. 3, 2005), www.dtic.mil/whs/directives/corres/pdf/302041p.pdf	Prescribes DoD policies and procedures concerning DoD contractor personnel authorized to accompany the U.S. military.
Department of Defense Instruction Number 5525.11, Criminal Jurisdiction Over Civilians Employed By or Accompanying the Armed Forces Outside the United States, Certain Service Members, and Former Service Members (Mar. 3, 2005), www.dtic.mil/whs/directives/corres/pdf/552511p.pdf	Details policies and procedures, and assigns responsibilities, for DoD support to and cooperation with the Department of Justice (DoJ) for MEJA implementation.

Department of the Army Field Manual No. 3-100.21, Contractors on the Battlefield (Jan. 3, 2003), www.afsc.army.mil/gc/files/fm3_100x21.pdf	Defines U.S. Army doctrine regarding planning, management, and use of PMSCs in areas of operations.
Office of Management and Budget (OMB) Online Circular No. A-76 (Revised) (29 May 2003), www.whitehouse.gov/omb/circulars/a076/a76_incl_t e ch_correction.pdf	Requires (under the FAIR Act) U.S. government agencies to use government personnel and not private contractors to perform “inherently governmental” activities.
Memorandum from Gordon England, Deputy Secretary of Defense, to Secretaries of the Military Departments, et al., SUBJECT: Management of DoD Contractors and Contractor Personnel Accompanying US Armed Forces in Contingency Operations Outside the United States (Sep. 25, 2007), acc.dau.mil/CommunityBrowser.aspx?id=171478	Provides guidance to U.S. military commanders regarding lines of command responsibility for oversight and management of DoD contractors and for discipline of DoD contractor personnel.
Memorandum from Robert M. Gates, Secretary of Defense, for Secretaries of the Military Departments, et al., SUBJECT: UCMJ Jurisdiction over DoD Civilian Employees, DoD Contractor Personnel, and Other Persons Serving with or Accompanying the Armed Forces Overseas During Declared and in Contingency Operations (Mar. 10, 2008), www.fas.org/sgp/othergov/dod/gates-ucmj.pdf	DoD’s implementing guidance for UCMJ criminal jurisdiction over certain contractors and other civilians, as expanded by Congress in 2006.

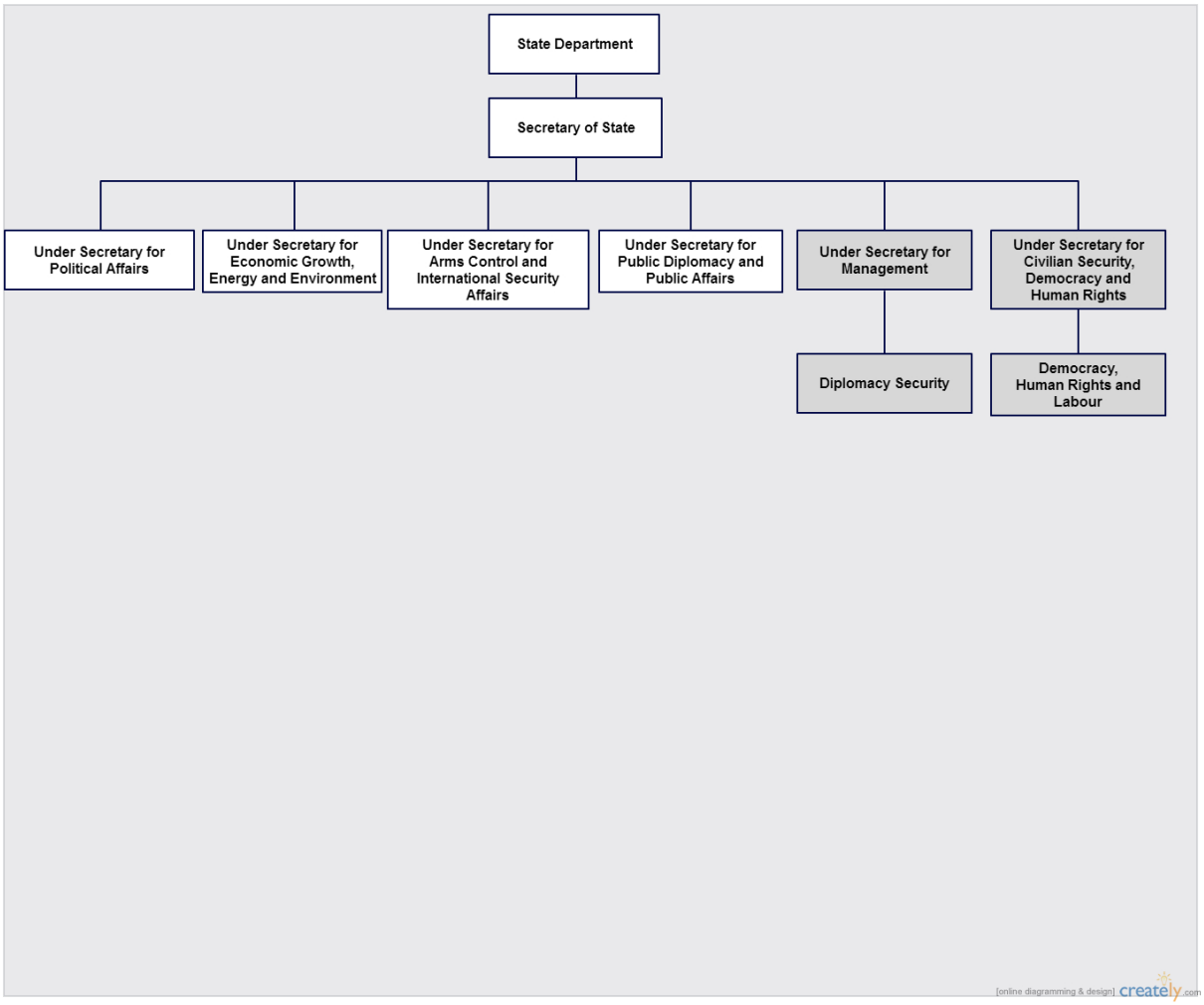
Memorandum of Agreement between the Department of Defense and the Department of State on USG Private Security Contractors (Dec. 5, 2007), www.defenselink.mil/pubs/pdfs/Signed%20MOA%20 Dec%205%202007.pdf	Provides some definition over the two agencies' relative areas of authority and responsibility for the accountability and operations of U.S. government PSCs (in Iraq only), and requires establishment of some coordination mechanisms.

Annex 2



Department of Defense: organizational chart of offices involved in regulatory process

Annex 3



State Department: Organizational chart of offices involved in regulatory process

Annex 4

US regulatory network