

# Regulating Private Military and Security Companies: Weaknesses and Promises of Existing International Legal Framework

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**Abstract** – PMSCs are manifesting themselves everywhere. After remaining underground for one hundred-fifty years, the business of private military has returned in just two decades, and without any matter of surprise is growing at an alarming rate. Because of their efficiency, availability of manpower and resources, War Futurists are of the opinion that PMSCs are going to bury the conventional system of war. The problem with their status arises, when it becomes difficult to define when and what services they can/cannot provide also with the jurisdictional aspect as well. Indeed, it is not a lawless field, there exists few self-regulations for them, but they have their own restrictions. The draft PMSCs convention has also failed to be executed. In this article, I argue that a comprehensive regulation which takes into consideration all the self-regulating documents and the draft PMSCs convention is the need of the hour.

**Key Words** – International Humanitarian Law, Private Military and Security Companies, Montreux Document

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## I. INTRODUCTION

After almost a year since the war started in Iraq in 2003, in one of the most brutal outbursts of anti-American rage, four Americans working for a private security company were attacked and killed in March 2004. Their dead bodies were then triumphantly dragged by the enraged mob through the streets of Fallujah, and then two of the corpses were hanged from a bridge over the Euphrates River.[1] Same year next month, the U.S. government's headquarters in Najaf was attacked by hundreds of Iraqi militia members on was repulsed not by the U.S. military, but by eight commandos from a private security firm. Before U.S. reinforcements could have arrived, the firm, Blackwater Security Consulting, sent in its own helicopters amid an intense firefight to resupply its commandos with ammunition and to ferry out a wounded Marine.[2] In 2007, 17 Iraqi civilians were killed and 20 seriously injured after the guards working for the US State Department fired heavy machine guns and grenade launchers from their armoured convoy in the mistaken belief they were under attack by insurgents.[3] The incident today known as Nisour Square massacre. The one notable thing that is common in all the above incidents is that none of the soldiers involved in killings were military personnel. They were private individuals employed by the private military and security companies (PMSCs).

Private military and security companies are defined as corporates which provides of the professional services linked to war. They are business enterprises specialised in providing military services, conducting tactical combat operations and strategic planning, providing intelligence services, operational and logistics support etc. The practice of hiring soldiers in armed conflicts is not something new for humankind. They were known as mercenaries in the past and the PMSCs are the corporate evolution of mercenaries. The range of PMSCs is remarkably diverse, from small consulting firms which are being run by the retired generals to international corporations renting out fighter jets and battalions of commandos. Broadly speaking, the industry can be divided into three basic business sectors, *first*, military provider firms, these offer direct, strategical military assistance, including serving as combatants. *Second*, military consulting firms, like management consultants. These companies' work is restricted only to bringing in the retired senior and non-commissioned officers to provide military advice and training and do not carry out operations themselves. *Third*, military support firms these companies provide logistics, intelligence, and maintenance services.[4]

A quite common belief about warfare is that it involves the state militaries or armies comprising of the citizens who have a common political cause to

fight for. This belief, however, is an idealization. Throughout the history, the combatants in the war have often been for the profit of private entities and were not loyal to any one government. The state monopoly over violence is not a rule rather it is an exception in the history. Every empire, from Ancient Egypt to Victorian England, utilized contract forces.[5] In fact, most of the military history is privatized, and mercenaries are as old as war itself. The reason is simple: renting force is cheaper than owning it. From the 18<sup>th</sup> century the modern states started to arise and crystallised, they demanded their monopoly on violence and the practice of state militarisation grew amazingly fast and mercenaries were sidelined to a great extent. The practice continued for centuries. During World War II, about 10 percent of the armed forces were contracted. By the end of the Cold War, a huge number of trained military personnel and soldiers were left without a war and became unemployed. This opened the gates for PMSCs.

Today the network of PMSCs has grown to such an extent that almost all the states involved in the armed conflicts around the globe including United States,[6] Russia and United Kingdom have accepted the fact of their reliance upon PMSCs. There are not only private corporations, international and regional inter-governmental organisations in need of assistance from PMSCs but, nongovernmental organisations rely on them for assistance as well. Within the NGOs working in the humanitarian area, it still is a controversial thing as they have traditionally relied upon the humanitarian ethics to provide protection. NGO/PMSC interaction nevertheless includes several services: threat and context assessments, security audits, policy development for risk control and evacuation, security training, and the provision of security management and guards for both convoys and compounds.[7] PMSCs have become extremely crucial these days, so much so, that even the United Nations is increasingly hiring them (even in a tight budget environment). The UN argues that services by PMSCs are required to protect the staff of the organisation and the operations going on at different parts of the world from growing threats and unprecedented dangers. Available numbers of UN contracts with PMSCs are no doubt incomplete but they show that the organization has started to give a lot of priority in hiring private security services in a tight budget environment. Recorded security services contracting rose from \$44 million in 2009 to \$76 million in 2010 – an increase of 73% in just one year.[8]

The PMSCs have already acquired a prominent place in the war zones, and this can't be ignored. The reasons can be manifold, in some cases it can be their time, cost and skill efficiency and in other cases, they were the last resort available for the states. In any case, their efficiency cannot be ignored. For instance, in Sierra Leone, which has the world's largest deposits of diamonds, the mines were under constant attack by the rebels. The state

government and the UN feared that if rebels seized control of the diamond mines, they would be able to use conflict diamonds to further fund their madness. At that time, there was widespread starvation along with the threat that the conflict might spill over to Nigeria and other countries as well. Thousands of peacekeeping troops were placed by the UN, but they suffered several embarrassing losses. Then came the decision to engage Executive Outcomes (one of the world's biggest PMSCs). The company assembled a team of 300 best fighters in the world, professional in their corresponding disciplines. Each had extensive experience in multiple horrible wars, from Angola to East Timor, and many more. They faced a rebel army consisting of an undisciplined, but brutal force estimated between 50,000 and 60,000 rebels. The private military personnel relied on speed, surprise, coordinated tactics and logistics. In a matter of days, the rebels were removed from the capital city, few were flushed back into the jungle, and few were slaughtered by concealed fire teams and snipers.[9]

Where the efficiency of PMSCs is to some extent well established, the reports of them being involved in human rights abuses like killing of civilians[10], engaging in inhuman and degrading treatment.[11] In October 2014, the US Federal Jury convicted four Blackwater employees who had killed 17 Iraqi Civilians in Nisour Square massacre.[12] One example of the culture of impunity that surrounds PMSCs, specifically in the cases of sexual abuse, is the very infamous case of DynCorp. In 1999, in the background of the UN peacekeeping mission in Bosnia and Herzegovina, United Nations hired DynCorp to furnish police monitors to observe the public security. It was later found that, some of the employees of DynCorp were allegedly engaged in trafficking of women and girls from Eastern Europe. These allegations of exploitation and abuse of women did not get any sufficient response as none of the employees who were involved in alleged trafficking were brought to trial. This lack of accountability system prompted new incidents of sexual abuses by Dyncorp in Colombia.[13] Also private force is a big business, one that is global in scope. No authentic data is available about how many billions of dollars gush around this illicit market. The Middle East is swimming in these forces. Many of these for-profit warriors outclass local militaries, and a few can even stand up to America's most elite forces. Foreign policy expert, Sean McFate who is also a former DynCorp employee, writes, "If money can buy firepower, then large corporations and ultra-wealthy individuals could become a new kind of superpower. New mercenaries will emerge to meet this demand, offering more lethal services unhindered by laws of war." [14]

With the rampant use of PMSCs in the armed conflicts, the questions regarding their status and the limitations or regulations under the International Law have become a pressing issue. Even with all

the questions regarding the abuse of International Human Rights Law (IHRL) and International Humanitarian Law (IHL) by the PMSCs on the one hand and their efficiency in dealing with any armed conflict on the other, one fact is established, that a blanket ban on PMSCs is a complete impossibility. They have already acquired almost a permanent place in the field of humanitarian crisis. There are a lot of questions which are waiting to be answered. Like, when their services may be employed and what activities they could undertake, all or just a few? Where can PMSCs be held accountable? If any employee is working on a U.K. contract in Syria but he/she is a Third Country National from Canada, where would that individual be prosecuted for a potential war crime? What will happen if the states finally decide to completely privatise a war?[15] There might be chances that these PMSCs who are into war for money, where any kind of political will or patriotism is missing, may want to prolong the war to rack up larger bill for their clients and in effect prolong the human sufferings. These are just a few issues regarding PMSCs. Currently, there is no specific international legal framework to regulate them entirely. But it is high time that the international law must settle them.

To explore these issues, this article delves into the existing international documents which are expected to regulate the PMSCs including the Montreux Document, then the International Code of Conduct for Private Security Service Providers (ICoC) and then finally the Draft PMSC Convention. After giving the advantages and shortcomings of the documents some cautionary and closing remarks are given.

## **II. PMSCs AND THE EXISTING INTERNATIONAL LAW**

The term PMSCs does not find any reference in any of the documents related to International Humanitarian Law (IHL). This is plausible since most of the contemporary IHL developed much before the concept of PMSCs became predominant. Even till today neither there is a settled definition of PMSCs nor any binding regulations. They are operating in a 'grey zone'. The answer to who they are might help in solving the issue related to this 'grey zone'. At times, the terms PMSCs and mercenaries are used interchangeably. The definition of mercenaries given by Article 47 of 1977 Additional Protocol I to the Geneva Convention is very narrow. To be a mercenary, an employee of a PMSC must meet certain strict and cumulative criteria.[16] A closer analysis of the definition shows that not all the PMSC personnel falls under this term. Foreign policy experts like Dr. Sean McFate have different approach to it. According to him PMSCs and mercenaries are nothing but synonyms. If one is getting paid to do military things in a foreign conflict zone, he/she is a mercenary. Not everyone will admit it and some companies which provide these services will threaten to sue if the *M* word is mentioned.

There is no doubt that IHL does not provide any status or obligations to legal persons, hence PMSCs themselves are not generally encompassed by this body of law.[17] And hence any specific law is missing, but there are other IHL potentially be applicable to the PMSCs. Even in the other aspects as well it indeed is not a lawless environment, there exists certain self-regulations but then it creates a lot of problem when they come in contact with other factors.

## **III. PMSCS AND THE MONTREUX DOCUMENT**

The Montreux Document resulted from an initiative started by Swiss government and the ICRC in early 2006. It is a detailed document dealing not only with the legal orders but also the aspects related to the business, regulatory and administrative practices of PMSCs. On 17 September 2008, 17[18] states jointly finalised the *Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict*. Currently there are 57 states that support this document. The Document draws guidance from a variety of resources ranging from the Geneva Conventions to the ICRC Study on Customary International Humanitarian Law to different domestic regulations including the legislations from Afghanistan, Canada, France, Sierra Leone, South Africa, the UK, the United States etc. to industry practices to various codes of conducts.

## **IV. SIGNIFICANCE OF THE MONTREUX DOCUMENT**

A document with 24 pages and 100 operative paragraphs giving detailed guidance on the current legal obligations of the PMSCs and the good practices, Montreux Document is significant on some stages.

*Firstly*, this document signifies a very public confirmation by different group of states, which includes United States, about the applicability of IHL and IHRL to modern day armed conflict. Provided the ambiguity regarding the position of US on issues like these, from 2003 till 2008, this document not a small success.[19]

*Secondly*, in its first part, the Document recalls the especially important legal obligations of States, International Organizations, PMSCs and their personnel. One of the complexities of PMSCs is that they may be merged in one State that is the 'home State', their services can be hired by another State that is the 'contracting State' and may conduct operations in yet another State which is the 'territorial State'. To address these complexities, the Document recalls pertinent

obligations for all three types of States.[20] The Montreux Document presents an essential proclamation of *lex lata* regarding states' existing duties to IHRL and IHL, while dealing with PMSCs.[21] Three broad sets of obligations can be identified, namely:

- States may not engage the PMSCs to perform those tasks which are explicitly assigned to them under IHL.
- States have to make sure that PMSCs respect IHL and give effect to IHRL.
- States have to investigate and, if needed, prosecute, extradite or even surrender those employees of PMSCs who are suspected to have committed international crimes, especially war crimes.

The Montreux Document also recalls the responsibility of the States for the wrongful acts committed by private contractors if they have been combined into the armed forces of a State; form part of a group or unit under a command responsible to the State; are empowered by law to exercise elements of governmental authority; or act, in any way, on the orders of the State or under the states' direction or control.[22]

*Thirdly*, part two of the Document provides guidance on what might be the practices, while trading with PMSCs. It gives 73 'good practices', which is expected to lay down the foundation for the next practical regulation of PMSCs through contracts, codes of conduct, domestic laws, regional instruments and international standards. These good practices address wide variety of issues, which are as diverse as regulation of use of force by the PMSCs, their direct participation in the hostilities, training of the personnel, accountability obligations and immunities from foreign jurisdiction.

*Finally*, it is important because it exposes the conflict between two different international regulatory approaches which are equally relevant to both, conflict, and security: first, the hard law obligations which are backed by the state and second, the cross-jurisdictional regulatory arrangements which are backed by the industry which will encourage the reduction of transaction costs.[23]

## V. PROBLEMS OF THE DOCUMENT

The Montreux Document, when adopted, was welcomed by the PMSCs. Nevertheless, all the important NGOs, which were engaged in the whole process, though praised some aspects of the text but also raised certain noteworthy apprehensions.[24] Amnesty International stated that few of the important and well-recognized principles of IHRL are not entirely mirrored in the text, that includes the

state's responsibility to protect and apply the standard of 'due diligence'.[25]

Another concern was that the document refers to human rights obligations regularly, but the focus is only on the application of IHL to PMSCs during armed conflict. The PMSC companies are generally active in post-conflict situations as well. In such situations, the application of IHRL principles is extremely important.[26] The organisation also indicated that the document failed to refer to the UN Human Rights Council Resolution 8/7 of June 2008, which unanimously approves a policy framework on business and human rights. UN Special Representative of the Secretary-General on Human Rights and Transnational Corporations and other Business Enterprises developed a framework on the 'Protect, Respect, and Remedy' principles between 2005 and 2011. It affirms three overarching principles: the duty of the state to protect, the PMSCs obligation to respect human rights, and the requirement of providing access to effective remedies to the victims of corporate-related human rights abuses.[27]

Even with few lacunas the Document has proved to be successful in raising awareness regarding States' obligations with respect to the operations of PMSCs as well as on the importance of adopting and implementing adequate domestic legislation. Also, it is safe to say that the document is kind of a success against the widespread notion that PMSCs operate in a legal.

This is not the only legal document available in the international arena. Time and again efforts have been made to regulate them at the international level. The next document is also equally important to be discussed.

## VI. INTERNATIONAL CODE OF CONDUCT FOR PRIVATE SECURITY SERVICE PROVIDERS (ICoC)

The International Code of Conduct for Private Security Service Providers (ICoC) is the second document that tries to fill the void in the arena of international legal framework with respect to PMSCs. ICoC provides the rules and principles for this industry, which are based on IHRL and IHL. The document was launched at the proposal of several actors governmental as well as non-governmental including Switzerland. It enjoys the support of almost all the players in the field of warfare including private security companies and humanitarian and non-governmental organisations. The Code contains all the important provisions regarding appropriate use of force by these companies as well as prohibition of certain activities, which particularly includes torture, discrimination, and human trafficking. It also establishes the management policies, which helps to ensure that the personnel of these companies

comply with the code. It also specifies the principles for recruitment, training and the implementation of internal reporting and governance mechanisms.[28]

Both Montreux Document and ICoC are important in a way that both brings clarity about the status of PMSCs, but the problem is that they are part of 'Soft Law' since both are non-binding. They will not be able to put any sanctions in case of the violations. Hence the need of the hour is a proper legally binding instrument which can ensure the respect for both International Humanitarian Law and International Human Rights Law and mechanisms of its own to deal with the violations.

## **VII. DRAFT INTERNATIONAL CONVENTION ON THE REGULATION, OVERSIGHT AND MONITORING OF PRIVATE MILITARY AND SECURITY COMPANIES**

In July 2005, by the resolution 2005/2 of the commission on Human Rights, the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the rights of peoples to self-determination was established. It succeeded the mandate of the Special Rapporteur on the use of mercenaries, which had been in existence since 1987. This Working Group is comprised of five independent experts of balanced geographical representation.[29] In July 2009 the working group tabled a draft PMSC convention. The draft convention has 52 articles.

The draft Convention sets out its purpose very clearly which is that the principle of State responsibility for the use of force must be strengthened and that few functions which are inherently governmental cannot be outsourced. It requires countries to effectively address any challenges to the implementation of human rights which includes taking legislative, administrative and other measures.[30] The draft convention defines a Private Military and/or Security Company (PMSC) as a corporate entity which provides on a compensatory basis military and/or security services, including investigation services, by physical persons and/or legal entities.[31] There is a distinction been made between private security services and military services. Scope of application is also very wide as it includes States, intergovernmental organizations and non-State actors, including private military and security companies and their personnel.[32] A new arrangement, which is generally not found in the human rights treaties, has been made keeping in mind the difference in the legal personality of parties. States can express their consent to be bound by the convention either through ratification or accession, for intergovernmental organisation an option of formal confirmation and for PMSCs option of communication of support has been created.[33]

A few international law principles are at the core of the draft Convention. To name a few; state responsibility for the use of force,[34] observance of the rule of law,[35] imposes responsibilities of the State parties to respect for state sovereignty[36] and ensure respect for and protection of human rights and observance of the norms of International Humanitarian Law.[37]

The draft Convention also prohibits certain activities; functions which are intrinsically governmental, including waging war and/or combat operations, taking prisoners, espionage, intelligence, and police powers,[38] excessive use of firearms.[39] The convention reinforces the prohibition of mercenary activities,[40] it also regulates the illicit trafficking in firearms.[41]

The Convention gives power to the states to take such legislative, judicial, administrative and other measures which are necessary to ensure that these PMSCs are operating within the limits of their license being issued by them[42] and can also revoke license in case the company has been found to be violating the human rights or been found to be indulged in any other criminal activity.[43]

The convention has also resolved questions regarding the establishment of jurisdiction,[44] extradition,[45] transfer of criminal proceedings[46] as well as mutual legal assistance[47] upon breach of the convention.

Another significant part of the convention is where it provides for states to establish funds to rehabilitate the victims of offenses under this Convention[48] and put obligations on the state to notify the outcome of proceedings to the Secretary-General of the United Nations, who shall transmit the information to other States Parties and to the host State.[49]

The most important feature of the convention is that just like the human rights treaties it provides for International Oversight Monitoring. For this an International Committee[50] will be established with a monitoring mechanism of its own. This will include submission of reports by the state parties,[51] the complaint mechanism[52] and the inquiry procedure as well[53] and issue imperative comments.[54]

The draft PMSC convention has received mixed responses in its adoption, with 32 votes in favour, 12 against and three of the participating countries abstaining. It garnered support from the African group, four BRICS members (Brazil, Russia, China and South Africa), the Organization of the Islamic Conference, and the Arab Group, but witnessed serious criticism from the Major Western Powers, which are the majority exporters of the PMSC industry standing in at 70 percent compared to

other states on the lines that it is biased against the PMSC industry and is at odds with Montreux Document and the ICOC. However, amongst criticisms, an important and noteworthy outcome of this convention is the acceptance that PMSCs and their employees are not classified as mercenaries. This is quite significant as it came from a group which was tasked with an anti-mercenary agenda.

The worldwide reluctance to cooperate with the OEIGWG clearly shows the international communities' lack of readiness to adopt a detailed treaty on this matter, and this is a widely acknowledged fact. Although it is understood that adoption of such a treaty will take its time to be incorporated in a regime, this should not undermine the importance of establishing an international regulatory system. The roadblocks for formulation and adoption of such a treaty are many; it is on a country's onus to adopt and enforce a regulatory regime, and moreover the cost of enforcing might become a barrier for many countries as suggested by the licensing regime. One can still be hopeful though as the draft PMSC convention enjoys support of the United Nations and this has a potential of encouraging other countries to follow suit. Regardless of the challenges and bottlenecks, the draft PMSC convention has been a valuable undertaking in cementing thoughts and encouraging debates around an issue which has historically been disputed.

## VIII. CONCLUSION

The PMSCs are becoming more powerful than Westerners or for that matter any other state realizes. Those who presume that PMSCs are cheap impersonations of national armed forces, invite disaster, because the profit warriors constitute a wholly different genus and species of fighter. Patriotism is unimportant for them and sometimes a liability. Indeed, there is an urgent need to regulate this grey zone, where they are operating. The international community has become so desperate that even a soft law is being lauded.

When it comes to the national legislations or regulations, few states like USA[55] and UK[56] have made domestic laws to regulate them, but there are loopholes within those legislations for e.g., the issue of jurisdictional limitations or slow enforcement mechanisms etc.[57] While there are some self-regulations available to the PMSCs, but this is like asking the proverbial fox to guard the henhouse, the problem of accountability will certainly be there.

From PMSCs' point of view, greater regulation is must for the reason that it will bring not only legal certainty as to the status of PMSC personnel under IHL, but, more importantly, will strengthen their reputational legitimacy. With this they will certainly get responsibilities but some rights to assert as well. Strict international framework regarding the required

eligibilities to operate as PMSC (explaining who can become a service provider and who cannot or who will get accredited or licensed) may help in dealing with the issue of the activities being undertaken by the mercenaries. A clear division between PMSCs and mercenaries will help the humanitarian relief organisations also, to hire PMSCs without any fear of losing donors or credibility. Proper training of IHL, IHRL and the activities amounting to 'inherent state functions may become prerequisite for obtaining a license to operate. States, before giving a license to operate may make sure that the applicant company must comply to the arms control laws regarding the illegal acquisition of weapons and illicit trafficking in arms. The states hiring the PMSCs should also do a background check on these grounds.

States should further insist that corporations operating on their soil engage only contract licensed or accredited PMSCs to lower their risk of state liability for international law violations. Similarly, all foreign PMSC companies should be prohibited from engaging in security services on foreign soil unless they have international accreditation. To this end, it may even be beneficial to provide accreditation at the international level.

It still is a long way to go. There must also be some regulations regarding the business. Superbuyers[58] can use their market power to shape the industry's behaviour by rewarding good force providers with lucrative contracts while driving the rest out of business. The additional administrative work which will be brought in by this accreditation and licensing process may affect the process of deployment of the PMSCs. The domestic legal frameworks can be taken into consideration while making the international ones. Over and above, more also needs to be done regarding enforcement at domestic level.

In any military strategy, there are five spheres of war: land, sea, air, space and cyber. In less than 20 years, PMSCs boomed among every domain except space, but that, too, may change. Space exploration is already ordered, for example, with companies like SpaceX, it is a possibility that private arms satellites may one day orbit the earth. worse things are to come. in just ten years, the market for force has moved beyond Blackwater in Iraq and become more lethal. PMSCs are appearing everywhere, and they are no longer just on the fringe. Warfare through PMSCs has become a new way of warfare one resurrected by the United States and emitted by others. The has come to put a leash on this.

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  2. A mercenary is any person who:
    - (a) is specially recruited locally or abroad in order to fight in an armed conflict;
    - (b) does, in fact, take a direct part in the hostilities;
    - (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
    - (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
    - (e) is not a member of the armed forces of a Party to the conflict; and
    - (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.
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33. Article 44.
34. Article 4.
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37. Article 7.
38. Article 8.
39. Article 11.
40. Article 9.
41. Article 12.
42. Article 16.
43. Article 13.
44. Article 22 & 23.
45. Article 24.
46. Article 26.
47. Article 25.
48. Article 29.
49. Article 27,
50. Article 32.
51. Article 33.
52. Article 37.
53. Article 36.
54. Article 43.
55. Arms Export Control Act (AECA), the Uniform Code of Military Justice 1950 (UCMJ), Military Extraterritorial Jurisdiction Act 2007 (MEJA)- to regulate and license the import and export of military articles and services by PMSCs.
56. Foreign Enlistment Act, 1870 (though the regulation process is stalled since it came in for criticism in the Diplock Report)
57. For ex in the case of South Africa where domestic regulations are harsh, the PMSCs have either relocated their operations to other countries with less onerous legislation or have gone underground.
58. The United States was during the Iraq and Afghanistan Wars. United Nations could be if it privatises some of its peacekeeping missions.

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