

Private Security Forces in Afghanistan and Iraq: The Potential Impact of the Montreux Document

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The role of private security companies has been a constant source of concern and trouble in both Afghanistan and Iraq. Such forces are essential in nations which do not yet have adequate security forces or a rule of law but can quickly become a “necessary evil” -- or an “evil necessity” – if they do not have the proper controls. They also can become a critical source of corruption, power brokering, and a challenge to the state.

The Montreux Document is an effort by the Swiss government, the ICRC, and participating countries and experts to create an international standard for the companies providing such forces and for their use. It also sets clearly defined standards for host countries, outside powers, and corporations. The official description of the document notes that it is divided into two parts:

Part I differentiates between contracting States, territorial States and home States. For each category of States, Part I recalls pertinent international legal obligations according to international humanitarian law and human rights law. The question of attribution of private conduct to the State under with customary international law is also addressed. In addition, Part I devotes sections to the pertinent international legal obligations of “all other States”, to the duties of PMSCs [private military and security companies] and their personnel, as well as to questions of superior responsibility.

Like Part I, Part II also differentiates between contracting States, territorial States and home States. The good practices draw largely from existing practices of States not only directly with regard to PMSCs but also, for instance, from existing regulations for arms and armed services. They range from introducing transparent licensing regimes to ensuring better supervision and accountability - so that only PMSCs which are likely to respect international humanitarian law and human rights law, through appropriate training, internal procedures and supervision, can provide services during armed conflict.

The document was developed with the participation of governmental experts from Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the United Kingdom of Great Britain and Northern Ireland, Ukraine, and the United States of America in meetings convened in January and November 2006, November 2007, and April and September 2008.

What the Montreux Document Is

It is not a legally binding instrument and does not affect existing obligations of States under customary international law or under international agreements. It does, however, represent a major attempt to assign clearly defined responsibilities to private security firms, and to any contracting government, firm, and subcontractor. The full details of the document are described in an ICRC report entitled *The Montreux Document* and available on the web at <http://www.eda.admin.ch/psc>.

In brief, the document:

- Recalls the pertinent international legal obligations of states, PMSCs and their personnel in situations of armed conflict;
- Contains a compilation of good practices designed to help states take national measures to implement their obligations;
- Highlights the responsibilities of three types of states: Contracting States (countries that hire PMSCs), Territorial States (countries on whose territory PMSCs operate) and Home States (countries in which PMSCs are based);
- Makes it clear that states have an obligation to ensure respect for international humanitarian law and to uphold human rights law; as a result, they have a duty to take measures designed to prevent misconduct by PMSCs and ensure accountability for criminal behavior;
- Recalls that PMSCs and their personnel are bound by international humanitarian law and must respect its provisions at all times during armed conflict, regardless of their status;
- Recalls that misconduct on the part of PMSCs and their personnel can trigger responsibility on two levels: first, the criminal responsibility of the perpetrators and their superiors, and second, the responsibility of the state that gave instructions for, directed or controlled the misconduct;
- Provides a toolkit for governments to establish effective oversight and control over PMSCs, for example through contracts or licensing/authorization systems.

The document also defines good practices for states. These good practices include:

Corresponding good practices for Contracting States

- > Establish a procedure for the selection and contracting of PMSCs [GP 2] and ensure that it is transparent and supervised [GP 4].
- > Adopt quality criteria for the selection of PMSCs that are relevant to ensuring respect for relevant national law, international humanitarian law and human rights law [GP 5].
- > Select PMSCs according to: past conduct; possession of required authorizations; personnel and property records; adequate training in international humanitarian law and human rights law; lawful acquisition and use of equipment (in particular weapons); adequate internal policies [GP 6-12].
- > Include in the contract an obligation to comply with the selection criteria and specifically require respect for international humanitarian law [GP 14], also by subcontractors [GP 15]. The terms of the contract should also oblige contracted PMSCs to ensure that PMSC personnel are personally identifiable when carrying out their activities [GP 16].
- > Monitor compliance with contracts and ensure accountability of PMSCs, for example by establishing criminal jurisdiction over crimes or by including penalty clauses in contracts [GP 19-23].

Corresponding good practices for Territorial States

- > Establish an authorization scheme that requires companies either to obtain authorizations to operate or to apply for authorization for specific services [GP 25a]. Territorial States can also register or provide licenses to individuals [GP 25b].
- > Establish a procedure for the selection of PMSCs that applies selection criteria similar to those of Contracting States (see above) [GP 26-39]. Here as well, the capacity of a PMSC to carry out its activities in conformity with international humanitarian law, for example, should play a key role [GP 28, 30].
- > Condition authorizations or licenses on compliance with the selection criteria and specifically require respect for international humanitarian law [GP 40], also by subcontractors [GP 31].

- > Establish specific rules on the provision of services by PMSCs and their personnel, for instance on the use of force, the possession of weapons and identification [GP 43-45].
- > Monitor compliance with authorizations or licenses and ensure accountability of PMSCs, for example by imposing administrative sanctions for non-compliance [GP 46-52].

Corresponding good practices for Home States

- > Establish an authorization scheme, particularly for the “export” of PMSC services abroad [GP 54-56].
- > Apply procedures [GP 57-59], selection criteria [GP 60-66] and terms of authorization [GP 67] that are similar to those for Contracting States and Territorial States (see above). The same holds true for monitoring compliance with authorizations or licenses and ensuring accountability of PMSCs [GP 68-73].

Implications for Afghanistan and Iraq

Given this content, the Montreux Document deserves close attention as a tool for reforming legal contracting standards affecting both foreign and local private security forces in Afghanistan and Iraq, particularly in the current effort to restructure military, civilian, and NGO contracting efforts in Afghanistan. It also has broad application to many of the states in ISAF and in the aid effort in Afghanistan.

It should be noted that the document has the limitation that it makes the assumption that the state where operations take place has a functioning rule of law, is committed to meeting UN-related human rights standards, and that contracting states can exercise proper supervision and control. None of these conditions are fully met in much of Afghanistan and they are often uncertain in Iraq.

Nevertheless, the Montreux Document addresses many of the concerns expressed by senior Afghans like President Karzai and by Iraqi officials looking at the problems of both protecting entities like US State Department operations in Iraq and key operations like those of oil companies. Moreover, it establishes broadly reasonable standards for controlling private security operations, setting legal standards for their operations, reporting on their behavior, and dealing with possible abuses.

The fact it is international and an ICRC document also gets around the impression the US might somehow dictate such terms and ignore the needs of host countries. It also has broad enough European backing to set potential standards for a coordinated approach in Afghanistan.

A total of 17 states jointly finalized the document on the occasion of a concluding meeting in Montreux, Switzerland, on 17 September 2008:

1. Afghanistan
2. Angola
3. Australia
4. Austria
5. Canada
6. China
7. France

8. Germany
9. Iraq
10. Poland
11. Sierra Leone
12. South Africa
13. Sweden
14. Switzerland
15. United Kingdom
16. Ukraine
17. United States of America

The following additional States have joined the Montreux Document since its release, (with date of communication of support):

18. Macedonia (3 February 2009)
19. Ecuador (12 February 2009)
20. Albania (17 February 2009)
21. Netherlands (20 February 2009)
22. Bosnia and Herzegovina (9 March 2009)
23. Greece (13 March 2009)
24. Portugal (27 March 2009)
25. Chile (06 April 2009)
26. Uruguay (22 April 2009)
27. Liechtenstein (27 April 2009)
28. Qatar (30 April 2009)
29. Jordan (18 May 2009)
30. Spain (20 May 2009)
31. Italy (15 June 2009)
32. Uganda (23.07.2009)
33. Cyprus (29.09.2009)
34. Georgia (22.10.2009)
35. Denmark (09.08.2010)

International Code of Conduct for Private Security Service Providers

Moreover, more than states are involved. An analysis by the Swiss government shows that 58 major companies, including Xe, have already agreed to the document. This at least establishes a precedent that companies will agree to some modified form of the document, even in the less secure environments in Afghanistan and Iraq.

This support from major private firms is particularly important because The Montreux Document is supported by an International Code of Conduct for Private Security Service Providers. This code is the result of an inclusive, transparent multi-stakeholder initiative launched in June 2009 by industry associations, corporations and individual business leaders with the assistance of the Government of Switzerland and in consultation with the Governments of the United Kingdom and the United States, as well as other stakeholders and relevant experts.

In brief, the International Code of Conduct for Private Security Service Providers, in its own words, requires that:

Signatory Companies commit to the following, as set forth in this Code:

- a) to operate in accordance with this Code;
- b) to operate in accordance with applicable laws and regulations, and in accordance with relevant corporate standards of business conduct;
- c) to operate in a manner that recognizes and supports the rule of law; respects human rights, and protects the interests of their clients;
- d) to take steps to establish and maintain an effective internal governance framework in order to deter, monitor, report, and effectively address adverse impacts on human rights;
- e) to provide a means for responding to and resolving allegations of activity that violates any applicable national or international law or this Code; and
- f) to cooperate in good faith with national and international authorities exercising proper jurisdiction, in particular with regard to national and international investigations of violations of national and international criminal law, of violations of international humanitarian law, or of human rights abuses.

It also requires the following practical administrative and reporting efforts:

...Recognizing that further effort is necessary to implement effectively the principles of this Code, Signatory Companies accordingly commit to work with states, other Signatory Companies, Clients and other relevant stakeholders after initial endorsement of this Code to, within 18 months:

- a) Establish objective and measurable standards for providing Security Services based upon this Code, with the objective of realizing common and internationally-recognized operational and business practice standards; and
- b) Establish external independent mechanisms for effective governance and oversight, which will include Certification of Signatory Companies' compliance with the Code's principles and the standards derived from the Code, beginning with adequate policies and procedures, Auditing and Monitoring of their work in the field, including Reporting, and execution of a mechanism to address alleged violations of the Code's principles or the standards derived from the Code ; and thereafter to consider the development of additional principles and standards for related services, such as training of external forces, the provision of maritime security services and the participation in operations related to detainees and other protected persons.

Looking Towards the Future

Any effort such as the Montreux Document presents the risk that unrealistic constraints can be placed on military action and civil-military operations. The fact is, however, that something similar to it is critical to being able to sustain the use of private security contractors, to avoid their becoming a political and military liability, to winning the acceptance of host governments and peoples, and giving reputable firms both the credit for their conduct and rules and condition they know are acceptable. None of these goals have been met in Afghanistan and Iraq. The failure risks depriving the US and its allies of a critical method of supplanting military forces at far lower cost, as well as giving international investors the security they need.

These same standards are equally critical to developing contracting procedures that limit the gross abuses and corruption of local private security forces in Afghanistan, and

requiring ISAF and other allied governments and prime contractors to meet the standards that are vital in COIN, civil military operations, peacemaking, and armed nation-building. It is all too clear that local private security contractors in Afghanistan are not only the source of direct corruption and waste, but of abuses ranging from extortion to firefights over money and influence. Up until now, the US and other allied governments have often fallen dismally short of the standards they need to meet in bringing these problems under control.