

# **PRIVATE MILITARY AND SECURITY COMPANIES**

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### **Session 1: Status and Interrelation of Major Standards Setting Initiatives**

#### **The Montreux Document**

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##### **Abstract:**

The Montreux Document is a restatement of existing legal obligations of States related to operations of PMSCs. It also set forth good practice in this respect. It is the result of an initiative launched by the Swiss government and the ICRC in 2006. It aims to raise awareness of humanitarian concerns at play when PMSCs operate in an armed conflict and seeks to provide guidance of different legal and practical points raised by PMSCs activities.

##### **Introduction:**

The increased presence of PMSCs in the context of armed conflict raised important humanitarian and legal concerns such as the use of civilians to carry out task traditionally reserved to armed forces, the intermingling of heavily armed security guards and civilian populations, the status of

private contractors under IHL, the respect of the principle of distinction, and flaws in accountability.

Furthermore, when reports of the increasing involvement of PMSCs in armed conflicts, in particular in Iraq and Afghanistan, started to attract public attention, there was an urgent need to counter the misconception too often circulating in the media that PMSCs were operating within a legal vacuum.

All these reasons, brought the ICRC and the Swiss government to get involved in an initiative aiming at reaffirming international obligations of States in respect of PMSCs activities in armed conflict situations and at providing good practice in this respect.

Between 2006 and 2008, four intergovernmental meetings where experts from governments, industry and civil society gathered to discuss this issue were organised. In September 2008, 17 States adopted the Montreux Document.

This was the first international document to address international law as it applies to the activities of private military and security companies whenever these are present in armed conflict situations.

Four years later, 42 States and an international organisation (the EU), support the Montreux Document.

**Clarifications:**

The Montreux Document should not be construed as endorsing the use of PMSCs in any particular circumstance or as taking a stance on the

broader question of legitimacy and advisability of using PMSCs in armed conflict.

It shall not be interpreted as limiting or prejudicing in any manner existing rules of international law or the development of new rules of international law.

The Montreux Document is neither treaty nor soft law, but a restatement of binding law.

Even if the Montreux Document focuses on situations of armed conflict, many of the rules it contains are also applicable outside situations of armed conflict. Especially, the Good practices it contains can be useful in any situation.

### **Overview of the Montreux Document:**

The Montreux Document focuses particularly on international legal obligations pursuant to international humanitarian law (IHL) and international human rights law (IHRL) and on the general principles of State responsibility for internationally wrongful acts.

It contains 27 statements recalling the main international legal obligations of States in regard to operations of PMSCs during armed conflicts. Each statement is the reaffirmation of a general rule of IHL, IHRL or State responsibility formulated in way that clarifies its applicability to PMSCs operations. Statements also recall that PMSCs and their personnel are bound by IHL and must respect its provisions at all times during armed conflicts, regardless of their status.

They highlight the responsibilities of three types of States: Contracting States, Territorial States and Home States.

"Contracting States" are States that directly contract the services of PMSCs, including, as appropriate, where such a PMSC subcontracts with another PMSC.

"Territorial States" are States on whose territory PMSCs operate.

"Home States" are States of nationality of a PMSC, i.e. where a PMSC is registered or incorporated; if the State where the PMSC is incorporated is not the one where it has its principal place of management, then the State where the PMSC has its principal place of management is the "Home State".

However, IHL and IHRL obligations of Contracting States, Territorial States and Home States are not implemented in watertight compartments and various States may have obligations toward one particular PMSC. Therefore, with the aim of ensuring respect for IHL and IHRL and access to remedy for victims, States should cooperate in elaborating and implementing their regulations as to avoid jurisdictional gaps.

### **Presentation of the main rules set forth in the Montreux Document:**

- **States cannot absolve themselves of their obligations under IHL and human rights law by hiring PMSCs**

State obligations under international law are not discontinued when it contracts a private company to carry out certain activities. Although

international law does not prevent States from contracting out various activities, failure of a State to meet its international obligations cannot be excused by the outsourcing of a particular task. Therefore, States shall ensure that the respect and implementation of their obligations under international law, and in particular under IHL and IHRL, are not impeded by their decision to contract out PMSCs.

- **States are under an obligation to ensure respect for IHL by the PMSCs**

While the responsibility to respect IHL means an obligation for the State to refrain from committing violations through its own authorities and armed forces, the obligation to ensure respect for international humanitarian law entails a duty to take measures to prevent and repress violations of humanitarian law not only by its armed forces but also by the civilian population, and especially by the industry of PMSCs.

- **States may be responsible for violations of IHL committed by the PMSCs**

Under international, the violation of a rule of international by certain public or private actors may trigger the responsibility of the State.

For instance, under international States will be responsible for wrongful acts committed by:

1) Their agents: this may include PMSCs personnel if, for instance, they are incorporated into the armed forces or police forces of the State.

2) Persons or entities empowered to exercise elements of governmental authority: Although there is no clear definition in international law of "elements of governmental authority", in general, activities such as

national defence and foreign policy are commonly understood, to varying degrees, as inherently governmental tasks.

3) Persons acting on the instructions of a state or under its direction or control.

- **States must investigate and, if warranted, prosecute violations of IHL alleged to have been committed by the staff of PMSCs**

Firstly, States have a clear obligation to provide jurisdiction of their courts over grave breaches of the Geneva Conventions and Additional Protocol I. Secondly, they have an obligation to investigate, prosecute and punish serious violations of IHL if committed by their nationals or on their territory. They can also choose to hand suspects over for trial to another State or to an international criminal tribunal.

It can be noted that in a number of countries, criminal law, including statutes on war crimes, does not only apply to individuals, but also to corporations. In these systems, not only the personnel or managers can be prosecuted for crimes, but also the company itself.

- **In respect to PMSCs personnel, the Montreux Document recalls that:**

They have to comply with applicable IHL;

Their status is determined by IHL (this question will be further developed during session 4);

If they are civilians under IHL, they may not be the object of attack unless and for such time as they directly participate in hostilities;

Are subject to prosecution if they commit conduct recognised as a crime under international or national law.

## Conclusion:

The Montreux Document is a restatement of existing legal obligations of States related to operations of PMSCs which aims to raise awareness of humanitarian concerns at play when PMSCs operate in an armed conflict and seeks to provide guidance of different legal and practical points raised by PMSCs activities.

But to be the useful and practical tool it intended to be, the Montreux Document needs to be implemented through effective national measures.

States should therefore take **practical measures** to ensure that PMSCs and their staff respects IHL. The following elements would seem useful:

- Imposing an obligation on PMSCs to vet staff to ensure they have not committed violations of IHL or relevant criminal offences in the past;
- Awareness of IHL: all PMSCs staff should receive a proper training in IHL. It is not sufficient to rely on training they may have received in their previous careers with the armed forces or police;
- PMSCs staff should be issued with standard rules of behaviour and especially rules on the use of force that comply with the relevant rules of IHL and, indirectly, with HR;
- Mechanisms should be established for investigating any alleged violations and ensuring accountability for any violations, including by communicating the results of such investigations to the relevant state authority for prosecution.

In this respect, the Swiss government and the ICRC remain ready to assist States in their efforts to implement the rules and good practices of the Montreux Document in their national regulations.