

# 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**



Schweizerische Eidgenossenschaft  
Confédération suisse  
Confederazione Svizzera  
Confederaziun svizra

Département fédéral des affaires étrangères DFAE  
Federal Department of Foreign Affairs FDFA



ICRC



International Committee of the Red Cross  
19, avenue de la Paix  
1202 Geneva, Switzerland  
**T** + 41 22 734 60 01 **F** + 41 22 733 20 57  
**E-mail:** [icrc.gva@icrc.org](mailto:icrc.gva@icrc.org)  
**www.**[icrc.org](http://www.icrc.org)  
© ICRC, August 2009



Schweizerische Eidgenossenschaft  
Confédération suisse  
Confederazione Svizzera  
Confederaziun svizra

**Département fédéral des affaires étrangères DFAE**  
**Federal Department of Foreign Affairs FDFA**

Directorate of International Law DIL  
3003 Berne, Switzerland  
Email: [dv-menschenrechte@eda.admin.ch](mailto:dv-menschenrechte@eda.admin.ch)  
[www.eda.admin.ch/psc](http://www.eda.admin.ch/psc)

# **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**



# Contents

|                 |          |
|-----------------|----------|
| <b>Foreword</b> | <b>5</b> |
|-----------------|----------|

|                              |          |
|------------------------------|----------|
| <b>The Montreux Document</b> | <b>7</b> |
|------------------------------|----------|

|         |   |
|---------|---|
| Preface | 9 |
|---------|---|

|                                                                                                               |    |
|---------------------------------------------------------------------------------------------------------------|----|
| Part One:<br>Pertinent international legal obligations relating<br>to private military and security companies | 11 |
|---------------------------------------------------------------------------------------------------------------|----|

|                                                                                 |    |
|---------------------------------------------------------------------------------|----|
| Part Two:<br>Good practices relating to private military and security companies | 16 |
|---------------------------------------------------------------------------------|----|

|                             |           |
|-----------------------------|-----------|
| <b>Explanatory Comments</b> | <b>29</b> |
|-----------------------------|-----------|

|                                     |    |
|-------------------------------------|----|
| The Montreux Document in a nutshell | 31 |
|-------------------------------------|----|

|                                                            |    |
|------------------------------------------------------------|----|
| The main rules and good practices of the Montreux Document | 32 |
|------------------------------------------------------------|----|

|                                                |    |
|------------------------------------------------|----|
| Questions and answers on the Montreux Document | 38 |
|------------------------------------------------|----|

|                                                  |    |
|--------------------------------------------------|----|
| How can the Montreux Document be useful for you? | 43 |
|--------------------------------------------------|----|

## Support for the Montreux Document

In the preface to the Montreux Document, the participating States “invite other States and international organizations to communicate their support for this document to the Federal Department of Foreign Affairs of Switzerland”. States and international organizations can thus join in the international support for the Montreux Document.

A number of States have already sent an official letter or a diplomatic note to the Swiss Federal Department of Foreign Affairs in support of the Montreux Document. An up-to-date list of supporting States and organizations is available online at [www.eda.admin.ch/psc](http://www.eda.admin.ch/psc).

Neither NGOs nor companies can join the Montreux Document officially (as it is the outcome of an initiative primarily aimed at recalling State responsibility), but they are encouraged to use it as a reference in their own relations with PMSCs.

## Contact information

**Switzerland:** Federal Department of Foreign Affairs FDFA, Directorate of International Law, Section for Human Rights and Humanitarian Law, Federal Palace North, 3003 Berne, Switzerland, Email: [dv-menschenrechte@eda.admin.ch](mailto:dv-menschenrechte@eda.admin.ch). See also: <http://www.eda.admin.ch/psc>.

**International Committee of the Red Cross:** 19, avenue de la Paix, 1202 Geneva, Switzerland, Email: [dc\\_jur\\_them.gva@icrc.com](mailto:dc_jur_them.gva@icrc.com). See also: <http://www.icrc.org/eng/privatisation-of-war>.

# Foreword

The presence of private military and security companies (PMSCs) in armed conflicts has traditionally drawn scant attention. In some ways this is surprising; as such, reliance on private entrepreneurs during war is nothing new. Such entrepreneurs have played a role in wars past and present, from ancient times to the conflicts of our day. But historians apparently considered them no more than an ancillary aspect of military affairs, their status and significance warranting no particular scrutiny.

This has now changed. Today, PMSCs are viewed in some quarters as an indispensable ingredient of military undertakings. Since the end of the Cold War, demand for PMSCs has increased to such an extent that there is now a lively PMSC industry offering an ever wider range of services, with some companies employing well beyond 10,000 staff. In terms of scale and scope of services involved, PMSCs today are a wholly new phenomenon.

In response, several diplomatic initiatives were launched to clarify what the role of PMSCs in armed conflicts is and should be. Yet it was only with the Montreux Document of September 2008, the fruit of a joint initiative by the Swiss Government and the International Committee of the Red Cross (ICRC), that the discussion around PMSCs was carefully brought to a first conclusion. The Swiss Initiative brought together 17 governments from various regions of the world and drew widely on the knowledge of industry representatives, academic experts and non-governmental organizations. For the first time, an intergovernmental statement clearly articulates the most pertinent international legal obligations with regard to PMSCs and debunks the prevailing misconception that private contractors operate in a legal vacuum.

It addresses substantive legal concerns, such as the status of PMSC personnel under the 1949 Geneva Conventions, individual accountability for misconduct in different jurisdictions, and the authorities' duty to oversee and screen the actions of firms for potential misconduct. The Montreux Document is explicitly geared to have a bearing on the practical aspects of work in the field.

The Montreux Document is not the final word on all questions – regulatory or otherwise – associated with PMSCs. This was never the intention. It does not endeavour to establish new regulations but simply seeks to provide guidance on a number of thorny legal and practical points, on the basis of existing international law. It does so without taking a stance on the much broader question of the legitimacy and advisability of using PMSCs in armed conflicts – a matter on which debate is no doubt important and necessary. But for humanitarian purposes, it appears equally important and necessary that a restatement of the law such as the Montreux Document provides remain impartial on the matter, that it acknowledge the reality on the ground, and that it do so now.

Now that the Montreux Document has been finalized, the question is how it will be brought to have a bearing on conduct in the field. This brochure seeks to play a part in that effort. Knowledge being the first condition for compliance, the brochure explains the Montreux Document – what it is, what it does, why it is useful – in a concise and accessible manner. It is intended as much for government officials and officials of international organizations as for the PMSC industry, civil society and interested individuals.



**Paul Seger**  
Head, Directorate of International Law  
Swiss Federal Department  
of Foreign Affairs



**Philip Spoerri**  
Director for International Law  
and Cooperation within the Movement  
International Committee of the Red Cross



# **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**

**Montreux, 17 September 2008**

# Contents

|                |          |
|----------------|----------|
| <b>PREFACE</b> | <b>9</b> |
|----------------|----------|

|                                                                                                      |           |
|------------------------------------------------------------------------------------------------------|-----------|
| <b>PART ONE</b>                                                                                      |           |
| <b>Pertinent International Legal Obligations relating to Private Military and Security Companies</b> | <b>11</b> |

|                              |    |
|------------------------------|----|
| Introduction                 | 11 |
| A. Contracting States        | 11 |
| B. Territorial States        | 12 |
| C. Home States               | 13 |
| D. All other States          | 14 |
| E. PMSCs and their personnel | 14 |
| F. Superior responsibility   | 15 |

|                                                                           |           |
|---------------------------------------------------------------------------|-----------|
| <b>PART TWO</b>                                                           |           |
| <b>Good Practices relating to Private Military and Security Companies</b> | <b>16</b> |

|                                                                     |    |
|---------------------------------------------------------------------|----|
| Introduction                                                        | 16 |
| A. Good practices for Contracting States                            | 16 |
| I. Determination of services                                        | 16 |
| II. Procedure for the selection and contracting of PMSCs            | 17 |
| III. Criteria for the selection of PMSCs                            | 17 |
| IV. Terms of contract with PMSCs                                    | 18 |
| V. Monitoring compliance and ensuring accountability                | 19 |
| B. Good practices for Territorial States                            | 20 |
| I. Determination of services                                        | 21 |
| II. Authorization to provide military and security services         | 21 |
| III. Procedure with regard to authorizations                        | 21 |
| IV. Criteria for granting an authorization                          | 21 |
| V. Terms of authorization                                           | 23 |
| VI. Rules on the provision of services by PMSCs and their personnel | 23 |
| VII. Monitoring compliance and ensuring accountability              | 24 |
| C. Good practices for Home States                                   | 25 |
| I. Determination of services                                        | 25 |
| II. Establishment of an authorization system                        | 25 |
| III. Procedure with regard to authorizations                        | 25 |
| IV. Criteria for granting an authorization                          | 26 |
| V. Terms of authorization granted to PMSCs                          | 27 |
| VI. Monitoring compliance and ensuring accountability               | 27 |

# Preface

This document is the product of an initiative launched cooperatively by the Government of Switzerland and the International Committee of the Red Cross. It 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. Representatives of civil society and of the private military and security industry were consulted.

The following understandings guided the development of this document:

1. That certain well-established rules of international law apply to States in their relations with private military and security companies (PMSCs) and their operation during armed conflict, in particular under international humanitarian law and human rights law;
2. That this document recalls existing legal obligations of States and PMSCs and their personnel (Part One), and provides States with good practices to promote compliance with international humanitarian law and human rights law during armed conflict (Part Two);
3. That this document is not a legally binding instrument and does not affect existing obligations of States under customary international law or under international agreements to which they are parties, in particular their obligations under the Charter of the United Nations (especially its articles 2(4) and 51);
4. That this document should therefore not be interpreted as limiting, prejudicing or enhancing in any manner existing obligations under international law, or as creating or developing new obligations under international law;
5. That existing obligations and good practices may also be instructive for post-conflict situations and for other, comparable situations; however, that international humanitarian law is applicable only during armed conflict;
6. That cooperation, information sharing and assistance between States, commensurate with each State's capacities, is desirable in order to achieve full respect for international humanitarian law and human rights law; as is cooperative implementation with the private military and security industry and other relevant actors;
7. That this document should not be construed as endorsing the use of PMSCs in any particular circumstance but seeks to recall legal obligations and to recommend good practices if the decision has been made to contract PMSCs;
8. That while this document is addressed to States, the good practices may be of value for other entities such as international organizations, NGOs and companies that contract PMSCs, as well as for PMSCs themselves;
9. That for the purposes of this document:
  - a) "PMSCs" are private business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel.

- b) "Personnel of a PMSC" are persons employed by, through direct hire or under a contract with, a PMSC, including its employees and managers.
- c) "Contracting States" are States that directly contract for the services of PMSCs, including, as appropriate, where such a PMSC subcontracts with another PMSC.
- d) "Territorial States" are States on whose territory PMSCs operate.
- e) "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".

The participating States commend this document to the attention of other States, international organizations, NGOs, the private military and security industry and other relevant actors, which are invited to adopt those good practices that they consider appropriate for their operations. The participating States invite other States and international organizations to communicate their support for this document to the Federal Department of Foreign Affairs of Switzerland. The participating States also declare their readiness to review and, if necessary, to revise this document in order to take into account new developments.

# Part One

## Pertinent international legal obligations relating to private military and security companies

### Introduction

The following statements aim to recall certain existing international legal obligations of States regarding private military and security companies. The statements are drawn from various international humanitarian and human rights agreements and customary international law. This document, and the statements herein, do not create legal obligations. Each State is responsible for complying with the obligations it has undertaken pursuant to international agreements to which it is a party, subject to any reservations, understandings and declarations made, and to customary international law.

### A. Contracting States

1. Contracting States retain their obligations under international law, even if they contract PMSCs to perform certain activities. If they are occupying powers, they have an obligation to take all measures in their power to restore, and ensure, as far as possible, public order and safety, i.e. exercise vigilance in preventing violations of international humanitarian law and human rights law.
2. Contracting States have an obligation not to contract PMSCs to carry out activities that international humanitarian law explicitly assigns to a State agent or authority, such as exercising the power of the responsible officer over prisoner-of-war camps or places of internment of civilians in accordance with the Geneva Conventions.
3. Contracting States have an obligation, within their power, to ensure respect for international humanitarian law by PMSCs they contract, in particular to:
  - a) ensure that PMSCs that they contract and their personnel are aware of their obligations and trained accordingly;
  - b) not encourage or assist in, and take appropriate measures to prevent, any violations of international humanitarian law by personnel of PMSCs;
  - c) take measures to suppress violations of international humanitarian law committed by the personnel of PMSCs through appropriate means, such as military regulations, administrative orders and other regulatory measures as well as administrative, disciplinary or judicial sanctions, as appropriate.
4. Contracting States are responsible to implement their obligations under international human rights law, including by adopting such legislative and other measures as may be necessary to give effect to these obligations. To this end they have the obligation, in specific circumstances, to take appropriate measures to prevent, investigate and provide effective remedies for relevant misconduct of PMSCs and their personnel.
5. Contracting States have an obligation to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, grave breaches of the Geneva Conventions and, where applicable, Additional Protocol I, and have an obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave

breaches and bring such persons, regardless of their nationality, before their own courts. They may also, if they prefer, and in accordance with the provisions of their own legislation, hand such persons over for trial to another State concerned, provided such State has made out a *prima facie* case, or to an international criminal tribunal.

6. Contracting States also have an obligation to investigate and, as required by international law, or otherwise as appropriate, prosecute, extradite or surrender persons suspected of having committed other crimes under international law, such as torture or hostage taking, in accordance with their obligations under international law. Such prosecutions are to be carried out in accordance with international law providing for fair trial, mindful that sanctions be commensurate with the gravity of the crime.
7. Although entering into contractual relations does not in itself engage the responsibility of Contracting States, the latter are responsible for violations of international humanitarian law, human rights law, or other rules of international law committed by PMSCs or their personnel where such violations are attributable to the Contracting State, consistent with customary international law, in particular if they are:
  - a) incorporated by the State into their regular armed forces in accordance with its domestic legislation;
  - b) members of organized armed forces, groups or units under a command responsible to the State;
  - c) empowered to exercise elements of governmental authority if they are acting in that capacity (i.e. are formally authorized by law or regulation to carry out functions normally conducted by organs of the State); or
  - d) in fact acting on the instructions of the State (i.e. the State has specifically instructed the private actor's conduct) or under its direction or control (i.e. actual exercise of effective control by the State over a private actor's conduct).
8. Contracting States have an obligation to provide reparations for violations of international humanitarian law and human rights law caused by wrongful conduct of the personnel of PMSCs when such conduct is attributable to the Contracting States in accordance with the customary international law of State responsibility.

## **B. Territorial States**

9. Territorial States have an obligation, within their power, to ensure respect for international humanitarian law by PMSCs operating on their territory, in particular to:
  - a) disseminate, as widely as possible, the text of the Geneva Conventions and other relevant norms of international humanitarian law among PMSCs and their personnel;
  - b) not encourage or assist in, and take appropriate measures to prevent, any violations of international humanitarian law by personnel of PMSCs;
  - c) take measures to suppress violations of international humanitarian law committed by the personnel of PMSCs through appropriate means such as military regulations, administrative orders and other regulatory measures as well as administrative, disciplinary or judicial sanctions, as appropriate.
10. Territorial States are responsible to implement their obligations under international human rights law, including by adopting such legislative and other measures as may be necessary to give effect to these obligations. To this end they have the obligation, in specific circumstances, to take appropriate measures to prevent, investigate and provide effective remedies for relevant misconduct of PMSCs and their personnel.

11. Territorial States have an obligation to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, grave breaches of the Geneva Conventions and, where applicable, Additional Protocol I, and have an obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and bring such persons, regardless of their nationality, before their own courts. They may also, if they prefer, and in accordance with the provisions of their own legislation, hand such persons over for trial to another State concerned, provided such State has made out a *prima facie* case, or to an international criminal tribunal.
12. Territorial States also have an obligation to investigate and, as required by international law, or otherwise as appropriate, prosecute, extradite or surrender persons suspected of having committed other crimes under international law, such as torture or hostage taking, in accordance with their obligations under international law. Such prosecutions are to be carried out in accordance with international law providing for fair trial, mindful that sanctions be commensurate with the gravity of the crime.
13. In situations of occupation, the obligations of Territorial States are limited to areas in which they are able to exercise effective control.

### **C. Home States**

14. Home States have an obligation, within their power, to ensure respect for international humanitarian law by PMSCs of their nationality, in particular to:
  - a) disseminate, as widely as possible, the text of the Geneva Conventions and other relevant norms of international humanitarian law among PMSCs and their personnel;
  - b) not encourage or assist in, and take appropriate measures to prevent, any violations of international humanitarian law by personnel of PMSCs;
  - c) take measures to suppress violations of international humanitarian law committed by the personnel of PMSCs through appropriate means such as administrative or other regulatory measures as well as administrative, disciplinary or judicial sanctions, as appropriate.
15. Home States are responsible to implement their obligations under international human rights law, including by adopting such legislative and other measures as may be necessary to give effect to these obligations. To this end they have the obligation, in specific circumstances, to take appropriate measures to prevent, investigate and provide effective remedies for relevant misconduct of PMSCs and their personnel.
16. Home States have an obligation to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, grave breaches of the Geneva Conventions and, where applicable, Additional Protocol I, and have an obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and bring such persons, regardless of their nationality, before their own courts. They may also, if they prefer, and in accordance with the provisions of their own legislation, hand such persons over for trial to another State concerned, provided such State has made out a *prima facie* case, or to an international criminal tribunal.
17. Home States also have an obligation to investigate and, as required by international law, or otherwise as appropriate, prosecute, extradite or surrender persons suspected of having committed other crimes under international law, such as torture or hostage taking, in accordance with their obligations under international law. Such prosecutions are to be carried out in accordance with international law providing for fair trial, mindful that sanctions be commensurate with the gravity of the crime.

## **D. All other States**

18. All other States have an obligation, within their power, to ensure respect for international humanitarian law. They have an obligation to refrain from encouraging or assisting in violations of international humanitarian law by any party to an armed conflict.
19. All other States are responsible to implement their obligations under international human rights law, including by adopting such legislative and other measures as may be necessary to give effect to these obligations.
20. All other States have an obligation to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, grave breaches of the Geneva Conventions and, where applicable, Additional Protocol I, and have an obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and bring such persons, regardless of their nationality, before their own courts. They may also, if they prefer, and in accordance with the provisions of their own legislation, hand such persons over for trial to another State concerned, provided such State has made out a *prima facie* case, or to an international criminal tribunal.
21. All other States also have an obligation to investigate and, as required by international law, or otherwise as appropriate, prosecute, extradite or surrender persons suspected of having committed other crimes under international law, such as torture or hostage taking, in accordance with their obligations under international law. Such prosecutions are to be carried out in accordance with international law providing for fair trial, mindful that sanctions be commensurate with the gravity of the crime.

## **E. PMSCs and their personnel**

22. PMSCs are obliged to comply with international humanitarian law or human rights law imposed upon them by applicable national law, as well as other applicable national law such as criminal law, tax law, immigration law, labour law, and specific regulations on private military or security services.
23. The personnel of PMSCs are obliged to respect the relevant national law, in particular the national criminal law, of the State in which they operate, and, as far as applicable, the law of the States of their nationality.
24. The status of the personnel of PMSCs is determined by international humanitarian law, on a case-by-case basis, in particular according to the nature and circumstances of the functions in which they are involved.
25. If they are civilians under international humanitarian law, the personnel of PMSCs may not be the object of attack, unless and for such time as they directly participate in hostilities.
26. The personnel of PMSCs:
  - a) are obliged, regardless of their status, to comply with applicable international humanitarian law;
  - b) are protected as civilians under international humanitarian law, unless they are incorporated into the regular armed forces of a State or are members of organized armed forces, groups or units under a command responsible to the State; or otherwise lose their protection as determined by international humanitarian law;
  - c) are entitled to prisoner-of-war status in international armed conflict if they are persons accompanying the armed forces meeting the requirements of article 4A(4) of the Third Geneva Convention;

- d) to the extent they exercise governmental authority, have to comply with the State's obligations under international human rights law;
- e) are subject to prosecution if they commit conduct recognized as crimes under applicable national or international law.

## **F. Superior responsibility**

27. Superiors of PMSC personnel, such as:

- a) governmental officials, whether they are military commanders or civilian superiors, or
- b) directors or managers of PMSCs, may be liable for crimes under international law committed by PMSC personnel under their effective authority and control, as a result of their failure to properly exercise control over them, in accordance with the rules of international law. Superior responsibility is not engaged solely by virtue of a contract.

# Part Two

## Good practices relating to private military and security companies

### Introduction

This Part contains a description of good practices that aims to provide guidance and assistance to States in ensuring respect for international humanitarian law and human rights law and otherwise promoting responsible conduct in their relationships with PMSCs operating in areas of armed conflict. They may also provide useful guidance for States in their relationships with PMSCs operating outside of areas of armed conflict.

The good practices do not have legally binding effect and are not meant to be exhaustive. It is understood that a State may not have the capacity to implement all the good practices, and that no State has the legal obligation to implement any particular good practice, whether that State is a Contracting State, a Territorial State, or a Home State. States are invited to consider these good practices in defining their relationships with PMSCs, recognizing that a particular good practice may not be appropriate in all circumstances and emphasizing that this Part is not meant to imply that States should necessarily follow all these practices as a whole.

The good practices are intended, *inter alia*, to assist States to implement their obligations under international humanitarian law and human rights law. However, in considering regulation, States may also need to take into account obligations they have under other branches of international law, including as members of international organizations such as the United Nations, and under international law relating to trade and government procurement. They may also need to take into account bilateral agreements between Contracting States and Territorial States. Moreover, States are encouraged to fully implement relevant provisions of international instruments to which they are Parties, including anti-corruption, anti-organized crime and firearms conventions. Furthermore, any of these good practices will need to be adapted in practice to the specific situation and the State's legal system and capacity.

### A. Good practices for Contracting States

States contemplating to contract PMSCs should evaluate whether their legislation, as well as procurement and contracting practices, are adequate for contracting PMSCs. This is particularly relevant where Contracting States use the services of a PMSC in a State where law enforcement or regulatory capacities are compromised.

In many instances, the good practices for Contracting States may also indicate good practices for other clients of PMSCs, such as international organizations, NGOs and companies.

In this sense, good practices for Contracting States include the following:

#### I. Determination of services

1. To determine which services may or may not be contracted out to PMSCs; in determining which services may not be contracted out, Contracting States take into account factors such as whether a particular service could cause PMSC personnel to become involved in direct participation in hostilities.

## **II. Procedure for the selection and contracting of PMSCs**

2. To assess the capacity of the PMSC to carry out its activities in conformity with relevant national law, international humanitarian law and international human rights law, taking into account the inherent risk associated with the services to be performed, for instance by:
  - a) acquiring information relating to the principal services the PMSC has provided in the past;
  - b) obtaining references from clients for whom the PMSC has previously provided similar services to those the Contracting State is seeking to acquire;
  - c) acquiring information relating to the PMSC's ownership structure and conducting background checks on the PMSC and its superior personnel, taking into account relations with subcontractors, subsidiary corporations and ventures.
3. To provide adequate resources and draw on relevant expertise for selecting and contracting PMSCs.
4. To ensure transparency and supervision in the selection and contracting of PMSCs. Relevant mechanisms may include:
  - a) public disclosure of PMSC contracting regulations, practices and processes;
  - b) public disclosure of general information about specific contracts, if necessary redacted to address national security, privacy and commercial confidentiality requirements;
  - c) publication of an overview of incident reports or complaints, and sanctions taken where misconduct has been proven; if necessary redacted to address national security, privacy and commercial confidentiality requirements;
  - d) oversight by parliamentary bodies, including through annual reports or notification of particular contracts to such bodies.

## **III. Criteria for the selection of PMSCs**

5. To adopt criteria that include quality indicators relevant to ensuring respect for relevant national law, international humanitarian law and human rights law, as set out in good practices 6 to 13. Contracting States should consider ensuring that lowest price not be the only criterion for the selection of PMSCs.
6. To take into account, within available means, the past conduct of the PMSC and its personnel, which includes ensuring that the PMSC has:
  - a) no reliably attested record of involvement in serious crime (including organized crime, violent crime, sexual offences, violations of international humanitarian law, bribery and corruption) and, insofar as the PMSC or its personnel had engaged in past unlawful conduct, has appropriately remedied such conduct, including by effectively cooperating with official authorities, taking disciplinary measures against those involved, and, where appropriate and consistent with findings of wrongdoing, providing individuals injured by their conduct with appropriate reparation;
  - b) conducted comprehensive inquiries within applicable law regarding the extent to which any of its personnel, particularly those who are required to carry weapons as part of their duties, have a reliably attested record of not having been involved in serious crime or have not been dishonourably discharged from armed or security forces;
  - c) not previously been rejected from a contract due to misconduct of the PMSC or its personnel.
7. To take into account the financial and economic capacity of the PMSC, including for liabilities that it may incur.
8. To take into account whether it and its personnel possess or are in the process of obtaining requisite registrations, licenses or authorizations.
9. To take into account whether it maintains accurate and up-to-date personnel and property records, in particular, with regard to weapons and ammunition, available for inspection on demand by the Contracting State and other appropriate authorities.

10. To take into account that the PMSC's personnel are sufficiently trained, both prior to any deployment and on an ongoing basis, to respect relevant national law, international humanitarian law and human rights law; and to establish goals to facilitate uniformity and standardization of training requirements. Training could include general and task- and context-specific topics, preparing personnel for performance under the specific contract and in the specific environment, such as:
- a) rules on the use of force and firearms;
  - b) international humanitarian law and human rights law;
  - c) religious, gender, and cultural issues, and respect for the local population;
  - d) handling complaints by the civilian population, in particular by transmitting them to the appropriate authority;
  - e) measures against bribery, corruption, and other crimes.

Contracting States consider continuously reassessing the level of training by, for example, requiring regular reporting on the part of PMSCs.

11. To take into account whether the PMSC:
- a) acquires its equipment, in particular its weapons, lawfully;
  - b) uses equipment, in particular weapons, that is not prohibited by international law;
  - c) has complied with contractual provisions concerning return and/or disposal of weapons and ammunition.
12. To take into account the PMSC's internal organization and regulations, such as:
- a) the existence and implementation of policies relating to international humanitarian law and human rights law, especially on the use of force and firearms, as well as policies against bribery, corruption, and other crimes;
  - b) the existence of monitoring and supervisory as well as internal accountability mechanisms, such as:
    - i. internal investigation and disciplinary arrangements in case of allegations of wrongdoing by its personnel;
    - ii. mechanisms enabling persons affected by the conduct of the personnel of the PMSC to lodge a complaint, including both third party complaint mechanisms and whistleblower protection arrangements; and
    - iii. regular performance reporting, specific incident reporting, and reporting on demand to the Contracting State and under certain circumstances other appropriate authorities;
    - iv. requiring PMSC personnel and its subcontracted personnel to report any misconduct to the PMSC's management or a competent authority.
13. To consider the respect of the PMSC for the welfare of its personnel, as protected by labour law and other relevant national law. Relevant factors may include:
- a) providing personnel a copy of any contract to which they are party in a language they understand;
  - b) providing personnel with adequate pay and remuneration arrangements commensurate to their responsibilities and working conditions;
  - c) adopting operational safety and health policies;
  - d) ensuring personnel unrestricted access to their own travel documents; and
  - e) preventing unlawful discrimination in employment.

#### **IV. Terms of contract with PMSCs**

14. To include contractual clauses and performance requirements that ensure respect for relevant national law, international humanitarian law and human rights law by the contracted PMSC. Such clauses, reflecting and implementing the quality indicators referred to above as selection criteria, may include:
- a) past conduct (good practice 6);
  - b) financial and economic capacity (good practice 7);

- c) possession of required registration, licenses or authorizations (good practice 8);
- d) personnel and property records (good practice 9);
- e) training (good practice 10);
- f) lawful acquisition and use of equipment, in particular weapons (good practice 11);
- g) internal organization and regulation and accountability (good practice 12);
- h) welfare of personnel (good practice 13);

Contractual clauses may also provide for the Contracting State's ability to terminate the contract for failure to comply with contractual provisions. They may also specify the weapons required for contract performance, that PMSCs obtain appropriate visas or other authorizations from the Territorial State, and that appropriate reparation be provided to those harmed by the misconduct of PMSCs and their personnel.

15. To require by contract that the conduct of any subcontracted PMSC is in conformity with relevant national law, international humanitarian law and international human rights law, including by:
  - a) establishing the criteria and qualifications for the selection and ongoing employment of subcontracted PMSCs and personnel;
  - b) requiring the PMSC to demonstrate that subcontractors comply with equivalent requirements as the PMSC initially contracted by the Contracting State;
  - c) ensuring that the PMSC is liable, as appropriate and within applicable law, for the conduct of its subcontractors.
16. To require, if consistent with force protection requirements and safety of the assigned mission, that the personnel of the PMSC be personally identifiable whenever they are carrying out activities in discharge of their responsibilities under a contract. Identification should:
  - a) be visible from a distance where mission and context allow, or consist of a non-transferable identification card that is shown upon demand;
  - b) allow for a clear distinction between a PMSC's personnel and the public authorities in the State where the PMSC operates.

The same should apply to all means of transport used by PMSCs.

17. To consider pricing and duration of a specific contract as a way to promote relevant international humanitarian law and human rights law. Relevant mechanisms may include:
  - a) securities or bonds for contractual performance;
  - b) financial rewards or penalties and incentives;
  - c) opportunities to compete for additional contracts.
18. To require, in consultation with the Territorial State, respect for relevant regulations and rules of conduct by PMSCs and their personnel, including rules on the use of force and firearms, such as:
  - a) using force and firearms only when necessary in self-defence or defence of third persons;
  - b) immediate reporting to and cooperation with competent authorities, including the appropriate contracting official, in the case of use of force and firearms.

## **V. Monitoring compliance and ensuring accountability**

19. To provide for criminal jurisdiction in their national legislation over crimes under international law and their national law committed by PMSCs and their personnel and, in addition, to consider establishing:
  - a) corporate criminal responsibility for crimes committed by the PMSC, consistent with the Contracting State's national legal system;
  - b) criminal jurisdiction over serious crimes committed by PMSC personnel abroad.

20. To provide for non-criminal accountability mechanisms for improper or unlawful conduct of PMSCs and their personnel, including:
- a) contractual sanctions commensurate to the conduct, including :
    - i. immediate or graduated termination of the contract;
    - ii. financial penalties;
    - iii. removal from consideration for future contracts, possibly for a set time period;
    - iv. removal of individual wrongdoers from the performance of the contract;
  - b) referral of the matter to competent investigative authorities;
  - c) providing for civil liability, as appropriate.
21. To provide for, in addition to the measures in good practices 19 and 20, appropriate administrative and other monitoring mechanisms to ensure the proper execution of the contract and the accountability of contracted PMSCs and their personnel for their improper and unlawful conduct; in particular to:
- a) ensure that those mechanisms are adequately resourced and have independent audit and investigation capacity;
  - b) provide Contracting State government personnel on site with the capacity and authority to oversee proper execution of the contract by the PMSC and the PMSC's subcontractors;
  - c) train relevant government personnel, such as military personnel, for foreseeable interactions with PMSC personnel;
  - d) collect information concerning PMSCs and personnel contracted and deployed, and on violations and investigations concerning their alleged improper and unlawful conduct;
  - e) establish control arrangements, allowing it to veto or remove particular PMSC personnel during contractual performance;
  - f) engage PMSCs, Territorial States, Home States, trade associations, civil society and other relevant actors to foster information sharing and develop such mechanisms.
22. When negotiating agreements with Territorial States which contain rules affecting the legal status of and jurisdiction over PMSCs and their personnel:
- a) to consider the impact of the agreements on the compliance with national laws and regulations;
  - b) to address the issue of jurisdiction and immunities to ascertain proper coverage and appropriate civil, criminal, and administrative remedies for misconduct, in order to ensure accountability of PMSCs and their personnel.
23. To cooperate with investigating or regulatory authorities of Territorial and Home States, as appropriate, in matters of common concern regarding PMSCs.

## **B. Good practices for Territorial States**

The following good practices aim to provide guidance to Territorial States for governing the supply of military and security services by PMSCs and their personnel on their territory. Territorial States should evaluate whether their domestic legal framework is adequate to ensure that the conduct of PMSCs and their personnel is in conformity with relevant national law, international humanitarian law and human rights law or whether it needs to establish further arrangements to regulate the activities of PMSCs.

Acknowledging the particular challenges faced by Territorial States in armed conflict, Territorial States may accept information provided by the Contracting State concerning the ability of a PMSC to carry out its activities in conformity with international humanitarian law, human rights law and relevant good practices.

In this sense, good practices for Territorial States include the following:

### **I. Determination of services**

24. To determine which services may or may not be carried out on their territory by PMSCs or their personnel; in determining which services may not be carried out, Territorial States take into account factors such as whether a particular service could cause PMSC personnel to become involved in direct participation in hostilities.

### **II. Authorization to provide military and security services**

25. To require PMSCs to obtain an authorization to provide military and security services in their territory ("authorization"), including by requiring:
- a) PMSCs to obtain an operating license valid for a limited and renewable period ("corporate operating license"), or for specific services ("specific operating license"), taking into account the fulfilment of the quality criteria set out in good practices 31 to 38; and/or;
  - b) individuals to register or obtain a license in order to carry out military or security services for PMSCs.

### **III. Procedure with regard to authorizations**

26. To designate a central authority competent for granting authorizations.
27. To allocate adequate resources and trained personnel to handle authorizations properly and timely.
28. To assess, in determining whether to grant an authorization, the capacity of the PMSC to carry out its activities in conformity with relevant national law, international humanitarian law and international human rights law, taking into account the inherent risk associated with the services to be performed, for instance by:
- a) acquiring information relating to the principal services the PMSC has provided in the past;
  - b) obtaining references from clients for whom the PMSC has previously provided similar services or clients in the Territorial State;
  - c) acquiring information relating to the PMSC's ownership structure and conduct background checks on the PMSC and its personnel, taking into account relations with subcontractors, subsidiary corporations and ventures, or obtain information from the Contracting State on these matters.
29. To ensure transparency with regard to authorizations. Relevant mechanisms may include:
- a) public disclosure of authorization regulations and procedures;
  - b) public disclosure of general information on granted authorizations, including on the identity of authorized PMSCs and their number of personnel, if necessary redacted to address national security, privacy and commercial confidentiality requirements;
  - c) publication of an overview of incident reports or complaints, and sanctions taken where misconduct has been proven; if necessary redacted to address national security, privacy and commercial confidentiality requirements;
  - d) oversight by parliamentary bodies, including through annual reports or notification of particular contracts to such bodies;
  - e) publishing and adhering to fair and non-discriminatory fee schedules for authorizations.

### **IV. Criteria for granting an authorization**

30. To ensure that PMSCs fulfil certain quality criteria relevant for the respect of relevant national law, international humanitarian law and human rights law by the PMSC and its personnel, including those set out below.
31. To require that the conduct of PMSCs and of any PMSC subcontracted is in conformity with relevant national law, international humanitarian law and international human rights law,

which includes ensuring that:

- a) the PMSC notifies any subcontracting of military and security services to the authorization authority;
- b) the PMSC can demonstrate that its subcontractors comply with equivalent requirements as the PMSC which initially obtained an authorization by the Territorial State;
- c) the subcontractor is in possession of an authorization;
- d) the PMSC initially granted authorization is liable, as appropriate and within applicable law, for the conduct of its subcontractors.

32. To take into account, within available means, the past conduct of the PMSC and its personnel, which includes ensuring that the PMSC has:

- a) no reliably attested record of involvement in serious crime (including organized crime, violent crime, sexual offences, violations of international humanitarian law, bribery and corruption) and, insofar as the PMSC or its personnel had engaged in past unlawful conduct, has appropriately dealt with such conduct, including by effectively cooperating with official authorities, taking disciplinary measures against those involved, and where appropriate and consistent with findings of wrongdoing, providing individuals injured by their conduct with appropriate reparation;
- b) conducted comprehensive inquiries within applicable law regarding the extent to which any of its personnel, particularly those who are required to carry weapons as part of their duties, have a reliably attested record of not having been involved in serious crime or have not been dishonourably discharged from armed or security forces;
- c) not previously had an operating license revoked for misconduct of the PMSC or its personnel.

33. To take into account the financial and economic capacity of the PMSC, including for liabilities that it may incur.

34. To take into account whether the PMSC maintains accurate and up-to-date personnel and property records, in particular, with regard to weapons and ammunition, available for inspection on demand by the Territorial State and other authorities.

35. To take into account that the PMSC's personnel are sufficiently trained, both prior to any deployment and on an ongoing basis, to respect relevant national law, international humanitarian law and human rights law; and to establish goals to facilitate uniformity and standardization of training requirements. Training could include general and task- and context-specific topics, preparing personnel for performance under the specific contract and in the specific environment, such as:

- a) rules on the use of force and weapons;
- b) international humanitarian law and human rights law;
- c) religious, gender, and cultural issues, and respect for the local population;
- d) complaints handling;
- e) measures against bribery, corruption, and other crimes.

Territorial States consider continuously reassessing the level of training by, for example, requiring regular reporting on the part of PMSCs.

36. Not to grant an authorization to a PMSC whose weapons are acquired unlawfully or whose use is prohibited by international law.

37. To take into account the PMSC's internal organization and regulations, such as:

- a) the existence and implementation of policies relating to international humanitarian law and human rights law, especially on the use of force and firearms, as well as policies against bribery and corruption;
- b) the existence of monitoring and supervisory measures as well as internal accountability mechanisms, such as:

- i. internal investigation and disciplinary arrangements in case of allegations of wrongdoing by its personnel;
- ii. mechanisms enabling persons affected by the conduct of the personnel of the PMSC to lodge a complaint, including both third party complaints mechanisms and whistleblower protection arrangements;
- iii. regular reporting on the performance of the assignment and/or specific incident reporting;
- iv. requiring PMSC personnel and its subcontracted personnel to report any misconduct to the PMSC's management or a competent authority.

38. To consider the respect of the PMSC for the welfare of its personnel.

39. To take into account, in considering whether to grant a license or to register an individual, good practices 32 (past conduct) and 35 (training).

## **V. Terms of authorization**

40. To include clauses to ensure that the conduct of the PMSC and its personnel is continuously in conformity with relevant national law, international humanitarian law and international human rights law. The authorization includes, where appropriate, clauses requiring the PMSC and its personnel to implement the quality criteria referred to above as criteria for granting general and/or specific operating licenses and relating to:

- a) past conduct (good practice 32);
- b) financial and economic capacity (good practice 33);
- c) personnel and property records (good practice 34);
- d) training (good practice 35);
- e) lawful acquisitions (good practice 36);
- f) internal organization and regulation and accountability (good practice 37);
- g) welfare of personnel (good practice 38);

41. To require the PMSC to post a bond that would be forfeited in case of misconduct or non-compliance with the authorization, provided that the PMSC has a fair opportunity to rebut allegations and address problems.

42. To determine, when granting a specific operating license, a maximum number of PMSC personnel and equipment understood to be necessary to provide the services.

## **VI. Rules on the provision of services by PMSCs and their personnel**

43. To have in place appropriate rules on the use of force and firearms by PMSCs and their personnel, such as:

- a) using force and firearms only when necessary in self-defence or defence of third persons;
- b) immediately reporting to and cooperation with competent authorities in the case of use of force and firearms.

44. To have in place appropriate rules on the possession of weapons by PMSCs and their personnel, such as:

- a) limiting the types and quantity of weapons and ammunition that a PMSC may import, possess or acquire;
- b) requiring the registration of weapons, including their serial number and calibre, and ammunition, with a competent authority;
- c) requiring PMSC personnel to obtain an authorization to carry weapons that is shown upon demand;
- d) limiting the number of employees allowed to carry weapons in a specific context or area;
- e) requiring the storage of weapons and ammunition in a secure and safe facility when personnel are off duty;
- f) requiring that PMSC personnel carry authorized weapons only while on duty;

- g) controlling the further possession and use of weapons and ammunition after an assignment is completed, including return to point of origin or other proper disposal of weapons and ammunition.
45. To require, if consistent with force protection requirements and safety of the assigned mission, that the personnel of the PMSC be personally identifiable whenever they are carrying out activities in discharge of their responsibilities under a contract. Identification should:
- a) be visible from a distance where mission and context allow, or consist of a non-transferable identification card that is shown upon demand;
  - b) allow for a clear distinction between a PMSC's personnel and the public authorities in the State where the PMSC operates.

The same should apply to all means of transportation used by PMSCs.

## **VII. Monitoring compliance and ensuring accountability**

46. To monitor compliance with the terms of the authorization, in particular:
- a) establish or designate an adequately resourced monitoring authority;
  - b) ensure that the civilian population is informed about the rules of conduct by which PMSC have to abide and available complaint mechanisms;
  - c) requesting local authorities to report on misconduct by PMSCs or their personnel;
  - d) investigate reports of wrongdoing.
47. To provide a fair opportunity for PMSCs to respond to allegations that they have operated without or in violation of an authorization.
48. To impose administrative measures, if it is determined that a PMSC has operated without or in violation of an authorization; such measures may include:
- a) revocation or suspension of the authorization or putting the PMSC on notice of either of these steps in case remedial measures are not taken within a set period of time;
  - b) removing specific PMSC personnel under the penalty of revoking or suspending the authorization;
  - c) prohibition to re-apply for an authorization in the future or for a set period of time;
  - d) forfeiture of bonds or securities;
  - e) financial penalties.
49. To provide for criminal jurisdiction in their national legislation over crimes under international law and their national law committed by PMSCs and their personnel and, in addition, to consider establishing corporate criminal responsibility for crimes committed by the PMSC, consistent with the Territorial State's national legal system.
50. To provide for non-criminal accountability mechanisms for improper and unlawful conduct of PMSC and its personnel, including:
- a) providing for civil liability;
  - b) otherwise requiring PMSCs, or their clients, to provide reparation to those harmed by the misconduct of PMSCs and their personnel.
51. When negotiating agreements with Contracting States which contain rules affecting the legal status of and jurisdiction over PMSCs and their personnel:
- a) to consider the impact of the agreements on the compliance with national laws and regulations;
  - b) to address the issue of jurisdiction and immunities to ascertain proper coverage and appropriate civil, criminal, and administrative remedies for misconduct, in order to ensure accountability of PMSCs and their personnel.
52. To cooperate with investigating and regulatory authorities of Contracting and Home States in matters of common concern regarding PMSCs.

## **C. Good practices for Home States**

The following good practices aim to provide guidance to Home States for governing the supply of military and security services by PMSCs and their personnel abroad ("export"). It is recognized that other good practices for regulation – such as regulation of standards through trade associations and through international cooperation – will also provide guidance for regulating PMSCs, but have not been elaborated here.

In this understanding, Home States should evaluate whether their domestic legal framework, be it central or federal, is adequately conducive to respect for relevant international humanitarian law and human rights law by PMSCs and their personnel, or whether, given the size and nature of their national private military and security industry, additional measures should be adopted to encourage such respect and to regulate the activities of PMSCs. When considering the scope and nature of any licensing or regulatory regime, Home States should take particular notice of regulatory regimes by relevant Contracting and Territorial States, in order to minimize the potential for duplicative or overlapping regimes and to focus efforts on areas of specific concern for Home States.

In this sense, good practices for Home States include the following:

### **I. Determination of services**

53. To determine which services of PMSCs may or may not be exported; in determining which services may not be exported, Home States take into account factors such as whether a particular service could cause PMSC personnel to become involved in direct participation in hostilities.

### **II. Establishment of an authorization system**

54. To consider establishing an authorization system for the provision of military and security services abroad through appropriate means, such as requiring an operating license valid for a limited and renewable period ("corporate operating license"), for specific services ("specific operating license"), or through other forms of authorization ("export authorization"). If such a system of authorization is established, the good practices 57 to 67 set out the procedure, quality criteria and terms that may be included in such a system.
55. To have in place appropriate rules on the accountability, export, and return of weapons and ammunition by PMSCs.
56. To harmonize their authorization system and decisions with those of other States and taking into account regional approaches relating to authorization systems.

### **III. Procedure with regard to authorizations**

57. To assess the capacity of the PMSC to carry out its activities in respect of relevant national law, international humanitarian law and international human rights law, taking into account the inherent risk associated with the services to be performed, for instance by:
- a) acquiring information relating to the principal services the PMSC has provided in the past;
  - b) obtaining references from clients for whom the PMSC has previously provided similar services or clients in the Territorial State;
  - c) acquiring information relating to the PMSC's ownership structure and conduct background checks on the PMSC and its personnel, taking into account relations with subcontractors, subsidiary corporations and ventures.
58. To allocate adequate resources and trained personnel to handle authorizations properly and timely.
59. To ensure transparency with regard to the authorization procedure. Relevant mechanisms may include:

- a) public disclosure of authorization regulations and procedures;
- b) public disclosure of general information on specific authorizations, if necessary redacted to address national security, privacy and commercial confidentiality requirements;
- c) oversight by parliamentary bodies, including through annual reports or notification of particular contracts to such bodies;
- d) publishing and adhering to fair and non-discriminatory fee schedules.

#### **IV. Criteria for granting an authorization**

60. To take into account the past conduct of the PMSC and its personnel, which include ensuring that the PMSC has:

- a) no reliably attested record of involvement in serious crime (including organized crime, violent crime, sexual offences, violations of international humanitarian law, bribery and corruption) and, insofar as the PMSC or its personnel had engaged in past unlawful conduct, has appropriately dealt with such conduct, including by effectively cooperating with official authorities, taking disciplinary measures against those involved, and where appropriate and consistent with findings of wrongdoing, providing individuals injured by their conduct with appropriate reparation;
- b) conducted comprehensive inquiries within applicable law regarding the extent to which its personnel, particularly those who are required to carry weapons as part of their duties, have a reliably attested record of not having been involved in serious crime or have not been dishonourably discharged from armed or security forces;
- c) not previously had an authorization revoked for misconduct of the PMSC or its personnel.

61. To take into account the financial and economic capacity of the PMSC, including for liabilities that it may incur.

62. To take into account whether the PMSC maintains accurate and up-to-date personnel and property records, in particular, with regard to weapons and ammunition, available for inspection on demand by competent authorities.

63. To take into account that the PMSC's personnel are sufficiently trained, both prior to any deployment and on an ongoing basis, to respect relevant national law, international humanitarian law and human rights law; and to establish goals to facilitate uniformity and standardization of training requirements. Training could include general and task- and context-specific topics, preparing personnel for performance under the specific contract and in the specific environment, such as:

- a) rules on the use of force and firearms;
- b) international humanitarian law and human rights law;
- c) religious, gender, and cultural issues, and respect for the local population;
- d) complaints handling;
- e) measures against bribery, corruption and other crimes.

Home States consider continuously reassessing the level of training by, for example, requiring regular reporting on the part of PMSCs.

64. To take into account whether the PMSC's equipment, in particular its weapons, is acquired lawfully and its use is not prohibited by international law.

65. To take into account the PMSC's internal organization and regulations, such as:

- a) the existence and implementation of policies relating to international humanitarian law and human rights law;
- b) the existence of monitoring and supervisory as well as internal accountability mechanisms, such as:
  - i. internal investigation and disciplinary arrangements in case of allegations of wrongdoing by its personnel;

- ii. mechanisms enabling persons affected by the conduct of the personnel of the PMSC to lodge a complaint, including both third party complaints mechanisms and whistle-blower protection arrangements.

66. To consider the respect of the PMSC for the welfare of its personnel as protected by labour law and other relevant national law.

#### **V. Terms of authorization granted to PMSCs**

67. To include clauses to ensure that the conduct of the PMSC and its personnel respect relevant national law, international humanitarian law and international human rights law. Such clauses, reflecting and implementing the quality criteria referred to above as criteria for granting authorizations, may include:

- a) past conduct (good practice 60);
- b) financial and economic capacity (good practice 61);
- c) personnel and property records (good practice 62);
- d) training (good practice 62);
- e) lawful acquisitions (good practice 64);
- f) internal organization and regulation and accountability (good practice 65);
- g) welfare of personnel (good practice 66).

#### **VI. Monitoring compliance and ensuring accountability**

68. To monitor compliance with the terms of the authorization, in particular by establishing close links between its authorities granting authorizations and its representatives abroad and/or with the authorities of the Contracting or Territorial State.

69. To impose sanctions for PMSCs operating without or in violation of an authorization, such as:

- a) revocation or suspension of the authorization or putting the PMSC on notice of either of these steps in case remedial measures are not taken within a set period of time;
- b) prohibition to re-apply for an authorization in the future or for a set period of time;
- c) civil and criminal fines and penalties.

70. To support Territorial States in their efforts to establish effective monitoring over PMSCs.

71. To provide for criminal jurisdiction in their national legislation over crimes under international law and their national law committed by PMSCs and their personnel and, in addition, consider establishing:

- a) corporate criminal responsibility for crimes committed by the PMSC, consistent with the Home State's national legal system;
- b) criminal jurisdiction over serious crimes committed by PMSC personnel abroad.

72. To provide for non-criminal accountability mechanisms for improper and unlawful conduct of PMSCs and their personnel, including:

- a) providing for civil liability;
- b) otherwise requiring PMSCs to provide reparation to those harmed by the misconduct of PMSCs and their personnel.

73. To cooperate with investigating or regulatory authorities of Contracting and Territorial States, as appropriate, in matters of common concern regarding PMSCs.



# **EXPLANATORY COMMENTS**

# Contents

|                                                                                                                                                   |           |
|---------------------------------------------------------------------------------------------------------------------------------------------------|-----------|
| <b>The Montreux Document in a nutshell</b>                                                                                                        | <b>31</b> |
| What it is                                                                                                                                        | 31        |
| What it does                                                                                                                                      | 31        |
| Why it is useful                                                                                                                                  | 31        |
| <b>The main rules and good practices of the Montreux Document</b>                                                                                 | <b>32</b> |
| Field of application                                                                                                                              | 32        |
| Non-transferable responsibilities of the State                                                                                                    | 32        |
| Obligation to ensure respect for international humanitarian law                                                                                   | 33        |
| Obligation to protect human rights                                                                                                                | 34        |
| Obligation to ensure criminal accountability                                                                                                      | 35        |
| State responsibility for PMSC acts                                                                                                                | 35        |
| Obligations of PMSCs as companies                                                                                                                 | 36        |
| Status of PMSC personnel                                                                                                                          | 36        |
| Protection of PMSC personnel from attack                                                                                                          | 37        |
| Rights and responsibilities of PMSC personnel                                                                                                     | 37        |
| Superior criminal responsibility                                                                                                                  | 37        |
| <b>Questions and answers on the Montreux Document</b>                                                                                             | <b>38</b> |
| Why are PMSCs a source of humanitarian concern?                                                                                                   | 38        |
| What is the difference between private military and private security companies?                                                                   | 38        |
| Does any international treaty mention the rights and obligations of PMSCs directly?                                                               | 38        |
| Do PMSCs operate in a legal vacuum?                                                                                                               | 38        |
| When does the Montreux Document apply?                                                                                                            | 39        |
| What rules apply to States with regard to PMSCs?                                                                                                  | 39        |
| What rules apply to PMSCs and their personnel?                                                                                                    | 39        |
| Is an armed PMSC employee considered to be a civilian who therefore enjoys the protection all civilians are granted under the Geneva Conventions? | 39        |
| Are PMSC employees mercenaries?                                                                                                                   | 40        |
| Who has the authority to prosecute suspected war criminals?                                                                                       | 40        |
| How does the Montreux Document enhance the protection of civilians in armed conflict?                                                             | 40        |
| Does the Montreux Document legitimize the activities of PMSCs?                                                                                    | 41        |
| How did the Montreux Document come about?                                                                                                         | 41        |
| Why were only 17 States involved in developing the Montreux Document?                                                                             | 41        |
| Can others be part of the Montreux Document?                                                                                                      | 41        |
| Why is the Montreux Document not an international treaty?                                                                                         | 42        |
| What are the next steps for the Montreux Document?                                                                                                | 42        |
| <b>How can the Montreux Document be useful for you?</b>                                                                                           | <b>43</b> |
| Government officials                                                                                                                              | 43        |
| Officials of international organizations                                                                                                          | 43        |
| Members of parliament                                                                                                                             | 43        |
| NGOs                                                                                                                                              | 43        |
| Companies                                                                                                                                         | 43        |
| PMSC employees                                                                                                                                    | 43        |

# The Montreux Document in a nutshell

## What it is

The Montreux Document is an intergovernmental document intended to promote respect for international humanitarian law and human rights law whenever PMSCs are present in armed conflicts. It is not legally binding as such; rather, it contains a compilation of relevant international legal obligations and good practices.

The Montreux Document is the result of an international process launched by the Government of Switzerland and the ICRC. It was finalized by consensus on 17 September 2008 by 17 States: Afghanistan, Angola, Australia, Austria, Canada, China, France, Germany, Iraq, Poland, Sierra Leone, South Africa, Sweden, Switzerland, the United Kingdom of Great Britain and Ireland, Ukraine and the United States of America. The number of participating States is growing steadily.

For up-to-date information on participation, see [www.eda.admin.ch/psc](http://www.eda.admin.ch/psc)

## What it does

The Montreux 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 behaviour;
- 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.

## Why it is useful

The Montreux Document is useful because it enhances the protection afforded to people affected by armed conflicts. It does so by clarifying and reaffirming international law, by encouraging the adoption of national regulations on PMSCs designed to strengthen respect for international law, and by offering guidance on how and in what light this should be done, based on lessons learnt.

# The main rules and good practices of the Montreux Document

The conduct of parties to an armed conflict is regulated by international humanitarian law. Another branch of international law – human rights law – also provides protection in armed conflicts. Most of the rules (expressed as statements) and good practices (GP) assembled in the Montreux Document derive from international humanitarian law and human rights law. Other branches of international law, such as the law of State responsibility and international criminal law, also serve as a basis.

## Field of application

The preface to the Montreux Document states that the document was developed with a view to situations of armed conflict. International humanitarian law only applies during armed conflicts. However, the Montreux Document is not strictly confined to armed conflicts. Most of the good practices identified (for example, to establish a licensing regime for PMSCs) are ideally put into place during peacetime.

### Main addressees of the Montreux Document

The Montreux Document 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).

While these three types of States are the main target groups, the document also contains sections of resonance to all States and international organizations, to PMSCs and to their personnel.

## Non-transferable responsibilities of the State

**Statement 1** explains that Contracting States retain their obligations under international law even if they contract PMSCs to perform certain activities. The fact that PMSCs are private enterprises and not State authorities does not relieve States from their international obligations. For example, they retain their obligation not to start a war in contravention of the Charter of the United Nations.

That some State responsibilities are non-transferable is particularly relevant in situations of occupation. If a State occupies foreign territory and uses PMSCs to perform certain functions (provide security or logistic support, guard detention centres), the occupying State still has obligations towards the occupied population. It has to ensure public order in the occupied territory and the population's safety.

**Statement 2** reminds States that their liberty to contract out activities to PMSCs is limited. International humanitarian law requires the State authorities to carry out certain activities themselves, so it would be unlawful to contract them out. The supervision of prisoner-of-war camps and civilian places of internment is an example. While certain administrative tasks can be outsourced, overall responsibility must rest with the State authorities.

#### Corresponding good practices

- > Not only are certain services not to be contracted out as a matter of law, States may also choose to limit the services that can be performed by PMSCs. In the interest of clarity, it is good practice to determine which services can or cannot be performed by PMSCs [GP 1, 24, 53]. Whether the service would cause the PMSC to participate directly in the hostilities (in simplified terms, in combat operations and other operations of a military nature) should be given special consideration.<sup>1</sup>

### Obligation to ensure respect for international humanitarian law

Statements 3, 9, 14 and 18 emphasize the general obligation that States have under Article 1 common to the four 1949 Geneva Conventions to ensure respect for international humanitarian law. This general obligation is important because it requires the States not only to refrain from committing violations of international humanitarian law, but also to take all measures in their power to ensure that PMSCs, as entities separate from the State, respect the law. It is universal and applies to any State.

However, **Contracting States** are particularly well placed to ensure respect for international humanitarian law. It is relatively easy for them, when selecting companies and entering into contracts with them, to influence how PMSCs operate in the field. As a matter of law, Contracting States must ensure, in the contract, that PMSCs and their personnel are aware of their obligations when they are deployed to conflict situations and that they are trained accordingly.

#### 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].

**Territorial States** are also in a strong position to influence the behaviour of companies. They have the authority, based on their territorial sovereignty, to impose restrictions on PMSCs through national law. In practice, however, ongoing armed conflict may severely limit what a Territorial State can do to ensure respect for international humanitarian law. It may not have sufficient control over parts of its territory.

---

<sup>1</sup> An Interpretative Guidance on the Notion of Direct Participation in Hostilities under IHL has recently been published by the ICRC, see: <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/direct-participation-ihl-article-020609>.

#### Corresponding good practices for Territorial States

- Establish an authorization scheme which 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 licences 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 licences 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].

**Home States** are countries in which PMSCs are based. They can similarly ensure respect for international humanitarian law by regulating PMSCs that are based within their jurisdiction.

#### 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].

### Obligation to protect human rights

**Statements 4, 10, 15 and 19** refer to the general obligation to protect human rights. While PMSCs and their personnel are not bound to respect international human rights law (which is only binding on States), States are required under that law to protect individuals against misconduct by PMSCs that would have an impact on their human rights. In other words, States have an obligation to take measures to prevent misconduct by PMSCs and to assist persons harmed by such misconduct. This also includes misconduct by PMSCs against their own employees.

It would be unrealistic, however, to expect States to prevent all and any possible harm caused by private companies. Instead, States are expected to exercise due diligence, that is, to do what can reasonably be expected to prevent or minimize harm. For example, they must investigate misconduct and, if the misconduct is criminal, prosecute perpetrators and grant victims of misconduct access to remedies (for instance, through civil action in court).

#### Corresponding good practices

- Apply the good practices designed to ensure respect for international humanitarian law to prevent human rights abuses: select companies and personnel with no criminal records, ensure adequate training, and establish internal investigative and disciplinary mechanisms (see good practices above).
- Require PMSCs to respect and ensure the welfare of their personnel by providing adequate pay, operational safety and health policies, and by abstaining from unlawful discrimination [GP 13,38,66].
- Ensure that victims of misconduct by PMSCs have adequate remedies and can claim adequate reparation. In order to ensure that PMSCs are able to provide such compensation, require them to have adequate financial and economic capacity, including for any liabilities they may incur [GP 7,33,61], and provide civil liability mechanisms or otherwise require companies to provide reparation to victims [GP 50].

## Obligation to ensure criminal accountability

**Statements 5, 11, 16 and 20** paraphrase the text of the Geneva Conventions. States have a specific obligation to hold PMSC personnel accountable for so-called grave breaches of the 1949 Geneva Conventions and (for States that are party to it) Additional Protocol I. Any individual who commits such a grave breach must be brought to trial, either at home, through extradition to another country or through surrender to an international tribunal. Examples for grave breaches are wilful killing of a civilian or inhuman treatment.

**Statements 6, 12, 17 and 21** recall, in a very general fashion, that States are required to exercise criminal accountability for all international crimes. "International crimes" are all offences for which international law, most often on the basis of a specific treaty, demands criminalization. Examples of international crimes are war crimes in general (a broader notion than that of grave breaches) and offences not necessarily related to armed conflicts, such as torture or genocide. The point is that there is no exception for PMSC personnel and that States are clearly obliged to apprehend and prosecute perpetrators.

### Corresponding good practices

- Exercise criminal jurisdiction for any serious crime committed by PMSCs abroad, whether or not international humanitarian law requires such extension of jurisdiction **[GP 19b, 71b]**.
- Provide for corporate criminal responsibility in order to hold not only the individual, but also the company accountable **[GP 19a, 49, 71a]**. Some but not all States have adopted this practice.

Agreements on jurisdiction, such as status-of-forces agreements, can constitute another obstacle to criminal accountability. States should formulate agreements affecting the legal status of and jurisdiction over PMSCs in such a way that at least one of them can exercise jurisdiction, in order to prevent impunity **[GP 22, 51, 73]**.

Since criminal investigations in situations of armed conflict, thousands of miles from the Contracting State and under restrictive security conditions, can be so difficult as to impede justice, it is recommended that the investigative authorities of the Territorial, Contracting and Home States cooperate with each other **[GP 23 and 52]**.

## State responsibility for PMSC acts

**Statement 7** explains that, in certain circumstances, the conduct of a PMSC is attributable to the Contracting State as a matter of international law. The State in question then must assume responsibility for any wrongdoing on the part of the PMSC. Such circumstances are the exception, rather than the rule, since States are generally speaking not responsible for the acts and omissions of private companies or individuals.

Statement 7 lists the cases in which PMSC conduct is attributable to the Contracting State. A first clear case is when PMSCs are incorporated into the Contracting State's armed forces and are thus part of what constitutes the State. The same holds true if the Contracting State contracts a company to perform so-called elements of governmental authority. For example, any act of criminal investigation or prosecution to which a PMSC contributes would be considered as an element of governmental authority, since the justice system is inherently governmental. It is also likely that the running of prisons, which is a law-enforcement function, is inherently a government function. While it may be contracted out, the State remains responsible. Finally, PMSC conduct is also attributable to the Contracting State if the PMSC is in fact acting on the instructions of the State (i.e. the State has specifically instructed the private actor's conduct) or under its direction or control.

**Statement 8** affirms that whenever violations are attributable to it, the Contracting State has an obligation to provide reparations for the injury incurred. Reparation can take several forms. Usually it consists of monetary compensation, but it can also take the form of satisfaction (an apology) or restitution (for instance of property).

## Obligations of PMSCs as companies

**Statement 22** is the only rule that addresses PMSCs as companies. As companies, PMSCs per se are not bound to respect international humanitarian law, which is binding only on parties to a conflict and individuals, not corporate entities. Nor are PMSCs directly bound by human rights law, which is only binding on States. As statement 22 explains, however, insofar as those bodies of law are integrated into national law and made applicable to companies, PMSCs are nonetheless obliged to uphold them. The same holds true, obviously, for all national law – criminal law, tax law, immigration law, labour law – and of course for any specific regulations on PMSCs that might be in place.

## Status of PMSC personnel

International humanitarian law distinguishes between combatants and civilians.

**Statement 24** explains that the status of PMSC personnel in armed conflicts is determined on a case-by-case basis. It cannot be said, for instance, that PMSC personnel are always combatants just because they carry weapons; nor can it be said that they are always civilians because they are not members of the armed forces. The status of PMSC personnel depends on the contract under which they are employed and on the services they provide. Personnel of PMSCs can be:

**Civilians** – this is probably the case for the large majority of PMSC personnel. As such, they benefit from the protection afforded to civilians in situations of armed conflict (see explanatory comment on statement 25 below).

Civilians accompanying the armed forces in the meaning of Article 4A(4) of the Third Geneva Convention – a category that only exists in international armed conflicts, which are rarer than non-international armed conflicts. To qualify, civilians must have a real link with, i.e. provide a service to, the armed forces, not merely the State. This means that, for instance, contractors employed by civilian State authorities or by private companies do not fall into this category. The status of civilians accompanying the armed forces does not apply in non-international armed conflicts. On the privileges associated with the status, (see explanatory comment on statement 26c below).

**Members of the armed forces** if they are formally incorporated into these forces. PMSCs usually work outside the chain of command and on a mandate basis only. They thus rarely qualify for this status. But if they do, they are bound not only by international humanitarian law but, as State agents, also by human rights law (see explanatory comment on statement 26d below).

**Militias or other volunteer corps belonging to a State party** to an armed conflict in the sense of Article 4A(2) of the Third Geneva Convention or Additional Protocol I. This is the case if, in a situation of international armed conflict, PMSCs constitute an organized armed group “belonging to” a party to the conflict and fulfil the four criteria defining that group: to be under responsible command, to have a distinctive fixed sign, to carry arms openly and to obey the laws and customs of war.

### Corresponding good practices

In order to ensure that contractors are clearly distinguishable in their functions, the Montreux Document recommends that they carry clearly visible identification insofar as this is compatible with safety requirements and that their means of transport also be clearly distinguishable **[GP 16,45]**.

## Protection of PMSC personnel from attack

**Statement 25** explains that if PMSC personnel qualify as civilians (which they do in most cases) they may not be attacked. However, international humanitarian law provides that civilians lose their protection against attack if and for such time as they directly participate in hostilities.

**Direct participation in hostilities** is a rather complex term. Simply put, it means participation in combat operations or activities aimed at weakening the enemy's military capacity and specifically meant to support one party to the conflict against the other. Guarding military bases against attacks from the enemy party, gathering tactical military intelligence, operating weapons systems in a combat operation are examples of direct participation in hostilities in which PMSC personnel may be involved.<sup>2</sup>

## Rights and responsibilities of PMSC personnel

**Statement 26a** recalls that whatever their status, the personnel of PMSCs must always comply with international humanitarian law. Indeed, humanitarian law must be respected not only by all parties to the conflict, but by all individuals acting in relation to a conflict – whether or not they are acting on behalf of a government.

**Statement 26b** mentions the circumstances, referred to above, in which PMSC personnel do not qualify as civilians. The last part of the sentence ("or otherwise lose their protection as determined by international humanitarian law") refers, in particular, to the situation where a PMSC employee is part of the armed wing of a party to a non-international armed conflict and, in effect, qualifies as a "rebel soldier". In this case, he or she can be attacked under humanitarian law.

**Statement 26c** explains that even if they are civilians, PMSC personnel are entitled to prisoner-of-war status when, in an international armed conflict, they are hired to work as "civilians accompanying the armed forces". The armed forces should provide such civilians with identity cards identifying them as such.

**Statement 26d** recalls that PMSC employees acting as State agents are directly bound to respect human rights, since these are binding on States.

**Statement 26e** is a corollary to statement 26a and recalls that PMSC personnel are subject to prosecution if they commit certain crimes, especially war crimes.

## Superior criminal responsibility

**Statement 27** explains that the superiors of PMSC personnel can be prosecuted for the most serious crimes (war crimes, torture and other crimes under international law) not only if they commit these themselves, but also if, as superiors, they fail to prevent or put an end to crimes committed by their subordinates.

International law distinguishes between military superiors and civilian superiors. Military commanders are at the top of a clear and strict chain of command and consequently bear responsibility for crimes committed by their subordinates as soon as they know or *should know* about them. Civilian superiors, who are assumed to have less control over their subordinates, can only be held responsible if they either know or *consciously disregard* information about a crime committed by their subordinates.

---

<sup>2</sup> An Interpretative Guidance on the Notion of Direct Participation in Hostilities under IHL has recently been published by the ICRC, see: <http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/direct-participation-ihl-article-020609>.

# Questions and answers on the Montreux Document

## **Why are PMSCs a source of humanitarian concern?**

The humanitarian need to address the phenomenon of PMSCs stems from their presence and role in today's armed conflicts. Inasmuch as they are armed and mandated to carry out activities that bring them close to actual combat, they potentially pose an additional risk to the local population and are themselves at risk of being attacked. So far, PMSCs have been largely left without oversight by States and no specific international regulations are in place for them. International humanitarian law is applicable to them, but there was a clear need to spell out the rules for PMSCs and offer practical advice on how to deal with them. The Montreux Document is designed to meet that need.

## **What is the difference between private military and private security companies?**

There is no standard definition of what is a "military" company and what is a "security" company. In ordinary parlance, certain activities (such as participating in combat) are traditionally understood to be military in nature and others (such as guarding residences) related to security. In reality many companies provide a wide range of services, which can go from typically military services to typically security services. They are therefore not easily categorized. Moreover, from the humanitarian point of view, the relevant question is not how a company is labelled but what specific services it provides in a particular instance. For this reason, the Montreux Document avoids any strict delimitation between private military and private security companies and uses the inclusive term "private military and security companies" (PMSCs) to encompass all companies that provide either military or security services or both.

## **Does any international treaty mention the rights and obligations of PMSCs directly?**

No international humanitarian law or human rights treaty mentions PMSCs specifically. The Montreux Document compiles those rules of international law that are most pertinent to PMSC operations, for easy reference.

## **Do PMSCs operate in a legal vacuum?**

No. It is true that States often discover that they lack the necessary domestic legislation to deal with PMSCs. It is also true that international law on mercenaries is largely inapplicable to the relatively new phenomenon of PMSCs (see below). However, in situations of armed conflict certain well-established rules and principles do clearly apply, namely under international humanitarian law, which regulates both the activities of PMSC staff and the responsibilities of the States that hire them. Also, human rights law imposes a number of obligations on States to protect persons against misconduct on the part of PMSCs. The Montreux Document explains these rules and principles.

## **When does the Montreux Document apply?**

The Montreux Document, in line with international humanitarian law, was written bearing in mind that PMSCs operate in an armed conflict environment. However, it is also meant to provide practical guidance in other contexts (see paragraph 5 of its preface). A current example is the contracting of PMSCs to protect merchant shipping against acts of piracy. Even if fighting piracy is best understood as a matter of law enforcement (and not of armed conflict), the Montreux Document's statements on jurisdiction remain pertinent reading.

## **What rules apply to States with regard to PMSCs?**

States that contract PMSCs can, under certain conditions, be held accountable for violations committed by PMSC employees, in particular if the PMSC exercises elements of governmental authority or if it acts under the instructions or control of the State authorities. In such cases, the same rules apply to the State – i.e. not to violate international humanitarian law and human rights law – as if it had acted itself through its own military forces.

States also have obligations to uphold the law: they must ensure respect for international humanitarian law and, to the extent that it applies in armed conflicts, human rights law. Hence States must take appropriate measures to ensure that no PMSC violates international humanitarian law or engages in misconduct that affects the human rights of potential victims. This can include taking measures to ensure that PMSCs vet their personnel and provide adequate training for them. States also have an obligation to prosecute war crimes and certain serious violations of human rights law.

## **What rules apply to PMSCs and their personnel?**

All individuals have to respect international humanitarian law in any activity related to an armed conflict. PMSC personnel are no exception. If they commit serious violations of humanitarian law, such as attacks against civilians or ill-treatment of detainees, these are war crimes that must be prosecuted by States. While companies as such have no obligations under international law, their employees do.

On the other hand, international humanitarian law and human rights law also protect the personnel of these companies. The protection they are entitled to will vary depending on the type of activity they engage in. For instance, most PMSC employees are deployed as civilians in situations of armed conflict; in this case, they are protected against attack, unless and for such time as they directly participate in hostilities.

## **Is an armed PMSC employee considered to be a civilian who therefore enjoys the protection all civilians are granted under the Geneva Conventions?**

In most cases, yes, but there are cases where they cannot be considered civilians. The status of PMSC personnel depends on their exact employment and functions. Most are not employed to fight, but rather to provide support functions (equipment maintenance, logistic services, guarding diplomatic missions or other civilian sites, catering, etc.). In these cases they are considered to be civilians. This means they are protected against attack unless and for such time as they directly participate in hostilities. But it also means that if they take a direct part in hostilities, they can be prosecuted if domestic law criminalizes such conduct.

In rarer cases, PMSC employees are incorporated into the armed forces of a State or form groups or units under a command responsible to a party to an armed conflict. In such situations, they do not enjoy protection as civilians.

## **Are PMSC employees mercenaries?**

Mercenaries are defined in international humanitarian law. Article 47 of Protocol I additional to the 1949 Geneva Conventions, applicable in international armed conflicts, describes a mercenary as someone who: (1) is especially recruited in order to fight in an armed conflict; (2) in fact takes a direct part in hostilities; (3) is motivated essentially by the desire of private gain; (4) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict; (5) is not a member of the armed forces of a party to the conflict; (6) has not been sent by a State which is not a party to the armed conflict on official duty as a member of its armed forces.

That definition excludes most PMSC personnel, most of whom are not contracted to fight in military operations. Many are nationals of one of the parties to the conflict. Moreover, it is difficult to prove the motivation of private gain; presumably, not all of them are thus motivated. Lastly, while some private contractors are reportedly very highly paid, it would be very difficult to verify if they receive a substantially higher wage than soldiers.

This being said, PMSC employees do sometimes meet the conditions for definition as mercenaries. If that is the case, they are not entitled to combatant or prisoner-of-war status in an international armed conflict.

## **Who has the authority to prosecute suspected war criminals?**

The State in which a contractor is deployed will usually have authority (jurisdiction), because the crime was committed on its territory. However, PMSC employees may have immunity under a bilateral agreement, such as a status-of-forces agreement; such agreements usually cover the armed forces of one State that are present in another State, but are sometimes extended to civilians accompanying the armed forces and to PMSCs. Also, States experiencing armed conflict do not always have the practical capacity to prosecute crimes if judicial systems are weakened.

Other States can also exercise jurisdiction if one of their nationals commits a crime abroad. However, States have not always established jurisdiction under domestic law for such cases. And, even if they have established jurisdiction, the fact that the crime was committed abroad in a situation of armed conflict can pose serious practical obstacles to criminal investigations, for instance when it comes to gathering evidence.

The combination of lack of jurisdiction and of practical obstacles can lead to impunity for the perpetrators. The Montreux Document makes some practical recommendations to avoid such an outcome. For example, it recommends that jurisdictional gaps be actively avoided when agreements are concluded between States.

## **How does the Montreux Document enhance the protection of civilians in armed conflict?**

The Montreux Document raises awareness of the humanitarian concerns at play whenever PMSCs operate in an armed conflict environment. It reminds States of their obligations and offers them guidance on how PMSCs should sensibly be dealt with. Preventing violations and holding PMSCs accountable if they commit violations are at the core of the Montreux Document. But at the end of the day, the question is one of implementation. It is up to PMSCs and States alike to see to it that the protection of civilians is put into practice.

## **Does the Montreux Document legitimize the activities of PMSCs?**

No. States disagree about the legitimacy of PMSCs and their activities, but PMSCs are present in conflicts and will likely remain so. For the Swiss Government and the ICRC, it was therefore important to tackle the issue and to recall international legal obligations without rejecting or welcoming the use of PMSCs. Like all other armed actors present on the battlefield, PMSCs are governed by international rules, whether their presence and activities are legitimate or not. The Montreux Document follows this humanitarian approach. It does not take a stance on the question of PMSC legitimacy. It does not encourage the use of PMSCs nor does it constitute a bar for States who want to outlaw PMSCs.

## **How did the Montreux Document come about?**

The Montreux Document is the fruit of a joint initiative by the Swiss Government and the ICRC on the subject of PMSCs. It sprang from a desire to bring together the governments most affected by PMSCs in order to discuss the international legal framework that governs their activities. It also sought to draw up practical measures (good practices) that States could take to promote respect for international humanitarian law and human rights law by PMSCs.

Seventeen governments have been involved in the development of the document: 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, the Ukraine and the United States of America. It is these States that helped draft the document. While the process was for governments, it has benefited since the beginning from the valuable input of industry representatives, academic experts and NGOs. In addition to the governmental meetings, the Initiative held four expert meetings with high-level experts from all sectors in order to obtain the most detailed legal provisions and practical recommendations, based on concrete experience and lessons learnt.

## **Why were only 17 States involved in developing the Montreux Document?**

PMSCs are not present in all countries to the same extent. The Swiss Initiative aimed to be practical and benefit from the input of those States most affected by the phenomenon or which had experience in dealing with it.

The Initiative also sees itself as a first step towards providing greater clarity and practical advice. The process was therefore meant to be light and produce a result in a reasonable time, considering that there was no existing instrument that compiled all the pertinent legal obligations relevant to PMSCs.

## **Can others be part of the Montreux Document?**

Yes. Other States and international organizations are invited to communicate their support for the document to the Swiss Federal Department of Foreign Affairs, as set out in the preface to the Montreux Document. In doing so, they do not commit themselves to new legal obligations. They declare their political support for the Montreux Document's main thrust: that international legal obligations have a bearing on PMSCs and must be complied with.

### **Why is the Montreux Document not an international treaty?**

The Swiss Government and the ICRC felt it important to produce a meaningful and practical instrument in a relatively short period of time. An international treaty would have taken many years to negotiate. Also, considering the very divisive nature of the issue and the strong political positions involved, a humanitarian, apolitical approach was more likely to have tangible and practical results.

### **What are the next steps for the Montreux Document?**

Now that the Montreux Document exists, the focus is on its dissemination and practical implementation. As the circle of participating States broadens, it is hoped that the document will establish itself as a reference for all dealings – national or international – with PMSCs in the context of armed conflicts and related situations. It is also hoped that the Montreux Document will form the basis for self-regulatory efforts by the PMSC industry.

# How can the Montreux Document be useful for you?

The Montreux Document conveniently compiles and articulates the relevant obligations under international humanitarian law and human rights law in one text. It is designed for practitioners who are confronted with the phenomenon of PMSCs.

## **Government officials**

The Montreux Document can help your government review the conformity of domestic legislation and practice with international humanitarian and human rights law. The good practices described in the document represent a blueprint for possible (further) regulatory action with a view to strengthening both branches of the law.

## **Officials of international organizations**

Does your organization itself occasionally or regularly rely on the services of PMSCs? If so, the Montreux Document may help it formulate internal policies in line with international humanitarian law and human rights law.

## **Members of parliament**

The Montreux Document provides you with guidelines to assess the adequacy of your national legal and policy framework. The good practices described in the document represent a blueprint for possible (further) regulatory action encouraging greater respect for humanitarian law and human rights by PMSCs, particularly by extending public oversight over the activities of such companies.

## **NGOs**

You can make practical use of the Montreux Document in two ways. Firstly, by triggering an assessment and discussion of whether or not your organization itself relies on PMSCs in field operations. If yes, the Montreux Document will help you formulate internal policy with regard to PMSCs. Secondly, the Montreux Document can be a useful *minimum* yardstick against which to assess national or international policies and regulations. You may want to recommend the Montreux Document to players in the field, to governments, members of parliament, companies, other NGOs, at universities, etc.

## **Companies**

As a PMSC or a company that contracts PMSCs, you can adopt the standards listed and thus affirm your commitment to the principles of international humanitarian law and human rights law through responsible conduct in the field. The Montreux Document may also provide a useful basis for genuine efforts at self-regulation within the industry, which you could support.

## **PMSC employees**

You can take note of the recommendations in the Montreux Document. Ask your company whether it is committed to the Montreux Document.







ICRC