



The Montreux Document in a nutshell

The Montreux Document is an intergovernmental document intended to promote respect for international humanitarian law and human rights law, especially when PMSCs are present in armed conflicts. It 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 especially during armed conflict.

The Montreux Document is not a new international treaty and it does not create any new legal obligations. Regardless of their support for the initiative, states are already subject to the international legal obligations contained in the Montreux Document. Most of the rules and good practices assembled in the Montreux Document derive from well-established principles of international humanitarian law and human rights law. Other branches of international law, such as the laws of state responsibility and international criminal law, also serve as a basis. The Document clarifies the misconception that private military and security companies operate in a legal vacuum by recalling, compiling, and reminding the reader of the applicable international legal obligations. The Montreux Document enhances the protection afforded to people affected by armed conflicts 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 Montreux Document is intended to have a practical bearing on the interaction between states and PMSCs. The Montreux Document describes good practices in implementing existing international legal obligations. These good practices are designed to help governments to establish effective oversight and control over PMSCs. The good practices cover a number of practical areas, including: authorisation systems, contract provisions, and licensing requirements, as well as suggesting a number of effective methods for states to oversee the PMSCs they come into contact with.

All 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.

As support for the Montreux Document is continuously growing, the focus is now turning to its dissemination and practical implementation. Since its adoption, the Montreux Document has served as a basis for the International Code of Conduct for Private Security Service Providers which binds member companies.

What the Montreux Document is

The Montreux Document is an intergovernmental document intended to promote respect for international humanitarian law and human rights law, especially when PMSCs are present in armed conflicts. It is not legally binding as such. However, the rules it contains are well-established in international law and are binding to States by virtue of international treaties or international customary law.

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.mdforum.ch/participants

When the Montreux Document applies

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). It also contains statements on pertinent international human rights law and international criminal law which are applicable at all times. Furthermore, most of the good practices identified, including those derived from international humanitarian law, are ideally put into place during peacetime. The Montreux Document and its good practices provide useful guidance to set meaningful regulatory standards for, and to support effective oversight over a rapidly expanding industry in any situation and thus helps to prevent actions or misconduct that may contribute to violations of national and international laws.

What the Montreux Document 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 the Montreux Document is useful

The Montreux Document is useful because it enhances the protection afforded to people affected by armed conflicts but also by post-conflict and by other comparable situations. 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.



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.