

Amnesty International Public Statement on the Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to the Operations of Private Military and Security Companies during Armed Conflict

The Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to the Operations of Private Military and Security Companies during Armed Conflict (hereinafter the “Montreux Document” or “the text”) was endorsed by seventeen States¹ on 17 September 2008. The text contains many useful elements, particularly in the Good Practices section. However, there are also a number of substantive gaps, which Amnesty International believes need be addressed, particularly in relation to the international law section, if the text is to be effective.

Background

The Montreux Document is the outcome of the “Swiss Initiative” - an intergovernmental initiative launched in 2006 by the Swiss Government in cooperation with the International Committee of the Red Cross (ICRC). The Swiss Initiative’s aim was to promote respect for international humanitarian law (IHL) and human rights law (HRL) by PMSCs operating in situations of armed conflict and other situations of armed violence. Representatives of the PMSC industry as well as a limited number of civil society actors, including Amnesty International, were consulted periodically during the process.

Amnesty International has investigated and documented the human rights impacts of PMSC operations in conflict-affected areas. The roles played by PMSCs, and the fact that they have, in several cases, been contracted by States, raise specific and challenging accountability issues. Amnesty International believes that clarity on the obligations of states and the responsibilities of PMSCs is crucial to ensuring respect for and protection of human rights. Consequently Amnesty International welcomed the Swiss Initiative, and in particular the aims of the Initiative, which were to i) reaffirm and clarify the existing obligations of States, as well as of PMSCs and their

¹ 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

personnel, under international law and ii) identify Good Practices and regulatory options to assist States in promoting respect for IHL and HRL by PMSCs.

The dedicated efforts of participants in the process have produced a text with many useful elements. However, as noted above, there are also a number of substantive gaps, notably in the international law section, which will need to be filled to ensure the ultimate effectiveness of the initiative.

Comment

Amnesty International considers that the Good Practices section of the Montreux Document provides a number of detailed and useful recommendations to States. There is much in that section which, if adopted and implemented by States, would constitute real progress in preventing violations of international humanitarian and human rights law. Effective take up and implementation of the Good Practices will be a marker of States' commitment to ensuring accountability of PMSCs, and the States that contract them, and justice for the victims of abuses.

The international law section, however - while solid as far as it goes - does not elaborate with enough detail and precision the applicable international law, so limiting its utility either as guidance to States and PMSCs on their existing legal obligations or as a solid legal framework within which to implement the Good Practice guidelines. A number of key relevant propositions of international law, well established and recognized by the vast majority of States, competent expert bodies and jurists are not fully reflected in the text. The failure to include an explicit reference to the State obligation to protect and to apply the standard of "due diligence" is particularly conspicuous.²

The document might also have better reflected a key signal development, directly relevant to companies, namely the consensus adoption by the UN Human Rights Council of resolution 8/7 in June 2008, endorsing the normative framework set forth by the UN Special Representative of the Secretary-General (SRSG) on the issue of Human Rights and Transnational Corporations and other Business Enterprises, Professor John Ruggie. This framework is based on three overarching principles: the State duty to protect all human rights from abuses by, or involving, transnational corporations and other business enterprises; the corporate responsibility to respect all human rights; and the need for access to effective remedies. The generic language of "duty to protect" and "responsibility to respect" does not appear in the

² The established standard of *due diligence* provides a way to measure whether a State has acted with sufficient effort and political will to fulfil its human rights obligations. Under this obligation States must prevent, investigate and punish acts which impair any of the rights recognised under international human rights law.

Montreux Document, even though this construction constitutes the consensus formulation in relation to the standard governing business and human rights.

While the text appropriately references the responsibility of contracting States when those acts of a PMSC are considered attributable to the State, it does not specify that the State may also have responsibilities in respect of the conduct of PMSCs with which it contracts, independent of whether or not the contractual relationship creates any level of State attribution. As the UN Human Rights Committee has stressed, "there may be circumstances in which a failure to ensure ... rights as required by article 2 [of the International Covenant on Civil and Political Rights] would give rise to violations by States Parties of those rights, as a result of States Parties' permitting or failing to take appropriate measures or to exercise due diligence to prevent, punish, investigate or redress the harm caused by such acts by **private persons or entities**."³

The Montreux Document does not provide sufficient clarity in respect of several jurisdictional difficulties that may arise when multiple States have responsibilities relating to PMSC conduct. For example, while the Good Practices section encourages territorial States to negotiate jurisdictional arrangements with other States so as to avoid the creation of a jurisdictional vacuum, the territorial State is likely to be a State in conflict and may not be in a position either to negotiate with other States or to have in place a justice system to deal with accountability of PMSCs. In some situations a PMSC may take steps to displace itself from the jurisdiction obtaining, a factor complicated when the contracting State, territorial State and home States are separate States.

In cases of PMSCs operating in conflict zones, there must be clear acknowledgement of state responsibility to respect and protect human rights and to ensure respect for international humanitarian law. Such responsibility includes obligations regarding prevention, protection, investigation and prosecution - where such steps are required - and enforcement of appropriate sanctions and remedial measures. While the Montreux Document provides guidance to States and PMSCs on their existing legal obligations in several respects, it is neither as comprehensive nor specific as it might have been on all these points.

Ends/

³ See paragraph 8 of UN Human Rights Committee General Comment No 31, CCPR/C/21/Rev.1/Add.13.