



ICRC

Statement of the International Committee of the Red Cross (ICRC)

"Are Private Security Contractors Performing Inherently Governmental Functions?" Before the Commission on Wartime Contracting

June 2010

Chairman Shays, Chairman Thibault and Members of the Commission, thank you for the opportunity to share the views of the International Committee of the Red Cross (ICRC) on the subject of private military and security companies (PMSCs) in armed conflict. The views expressed here summarize the key contributions of 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."

Since the end of the Cold War, PMSCs have risen to a new prominence in military operations, taking on functions that historically were carried out by State authorities. As the role of PMSCs in armed conflicts has expanded, so too has the need for clarification of the legal obligations that apply to them and to the States with which they interact.

The Montreux Document seeks to meet this need. The Document is the outcome of a joint initiative of the Swiss Government and the ICRC in which 17 States participated, drawing on the knowledge of industry representatives, academic experts and non-governmental organizations. The United States was a key participant in this process, and to date 34 States have subscribed to the Document.

In addition to explaining the responsibilities of PMSCs and their personnel, the Document recalls the existing international humanitarian and human rights law obligations of States in their relations with PMSCs, and it recommends good practices to assist States in complying with these obligations.

By reaffirming the obligation of all States to ensure respect for humanitarian law by PMSCs, the Montreux Document refutes the misconception that private contractors operate in a legal vacuum in times of armed conflict. States contracting the services of a PMSC, States on whose territory a PMSC operates, and States where a PMSC is registered or incorporated all have specific responsibilities to prevent and suppress humanitarian law violations.

The good practices described in the Document include developing procedures and criteria for the selection of PMSCs (such as verifying the track record of companies and examining the procedures they use to vet their staff) as well as monitoring compliance and ensuring accountability.

The examination by the Commission of whether PMSCs are performing inherently governmental functions reflects the first good practice laid out in the Montreux Document, which recommends that contracting States -- in determining which services may be contracted out -- take into account factors such as whether a particular service could cause PMSC personnel to become involved in direct participation in hostilities.

In addition to services which could be construed to constitute direct participation in hostilities, it should be recalled that under the Geneva Conventions, certain activities are the clear responsibility of the State authorities, and must not be contracted out. For example, article 39 of the Third Geneva Convention requires that every prisoner of war camp shall be put under the immediate authority of a responsible commissioned officer belonging to the armed forces of the detaining power. Similarly, article 99 of the Fourth Geneva Convention stipulates that every place of internment shall be put under the authority of a responsible officer, chosen from the regular armed forces or the regular civil administration of the detaining power.

As a humanitarian organization, the aim of the ICRC is to ensure the protection of those not or no longer taking a direct part in hostilities, including civilians and persons deprived of their liberty. As you continue your deliberations on the expanding role of PMSCs, we ask that these humanitarian protections be a prominent part of your analysis and eventually your recommendations.

We appreciated having a chance to previously brief Commission staff and now to have the opportunity to submit this statement for the record. We again recommend to you the Montreux Document as a substantive effort to provide greater clarity on international legal obligations and recommended good practices for States related to operations of PMSCs during armed conflict. We remain available for consultation to the Commission as it continues its work.

Thank you for your time, attention and efforts to fulfill your mandate on the difficult subject of wartime contracting.