



The Working Group on the use of private military and security companies in maritime security (Maritime Working Group)

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### **Meeting of 6 June 2018**

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#### **Chair's Summary**

##### **1. Welcome and opening remarks by the Chair of the Working Group**

**Mr. Mateus KOWALSKI, Director of the International Law Department, Department of Legal Affairs (Ministry of Foreign Affairs of Portugal)**

The second exchange of the Maritime Working Group was attended by 13 Montreux Document Participants as well as the Secretariat and two guest speakers: Anna Petrig, Professor of Law at the University of Basel and Chris Trelawny, Special Adviser to the Secretary-General on Maritime Security and Facilitation (Sub-Division for Maritime Security and Facilitation, Maritime Safety Division) at the International Maritime Organization (IMO).

In the opening remarks, the Chair welcomed Montreux Document participants to this second Exchange of the Maritime Working Group and gave an overview of the background documents submitted to the Working Group, which included the *Agenda*, the *Plan of Action*, and the *Outreach briefing note*. The Chair noted the latter two documents were intended to be adopted by Montreux Document participants at session 8 of the Plenary meeting on 7 June 2018.

##### **2. The Montreux Document from a Maritime Perspective**

Dr. Petrig gave a presentation on how the international legal obligations and Good Practices contained in the Montreux Document can be relevant for the maritime context. In particular, the provisions related to human rights law are significantly relevant for the maritime context. For merchant ships relying on the services of PMSCs to protect their operations, the Montreux Document's international humanitarian law obligations are not pertinent for the current discussion since we are not at this time referring to an armed conflict situation. However, in the future, States may also use PMSCs in armed conflict situation at sea. It may therefore be worthwhile to consider this issue at another MDF meeting. Meanwhile, those obligations referring to international law in general or to human rights law, as well as the Good Practices of Part 2 are very relevant for the current use of PMSCs in the maritime context, i.e. to protect merchant ships.

First, Dr. Petrig outlined two main points to keep in mind:

- The Montreux Document was developed with the idea in mind that, as a general rule, States are contractors of PMSC services, hence the reference to Contracting States. In the maritime context, State-clients of PMSC services are the exception rather than the rule. The vast majority of clients are private companies (often the ship owners).
- Second, recalling that the Montreux Document refers to 4 main types of jurisdictions: Home States, Contracting States, Territorial States, and All Other States. The meaning of these concepts is not straightforward in the maritime context. For example, the Territorial State can represent the flag, the coastal or the port State. Moreover, ships pass through the waters of various States during one voyage; and, depending on the vessel's location, the jurisdiction of the flag State may be concurrent with the one of the coastal/port State.

Keeping these points in mind, how do Montreux Document international obligations and Good Practices for Contracting States apply in the maritime context?

Some international obligations refer to governmental functions (e.g. the obligation to legislate, or to investigate, prosecute or extradite); they can hardly be fulfilled by a private company. One of the core obligations reads: "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" (Obligation 4 in the Montreux Document; 10 and 19 contain similar statements). With the development of the UN Guiding Principles on Business and Human Rights, it is possible to argue that private actors, notably shipowners, are bound to respect human rights (UN Guiding Principle 13). What is more, States, including the State where the Shipowner is incorporated, must implement their international human rights obligations into national measures, thereby requiring respect of human rights by private businesses, including shipowners and PMSCs.

With respect to the Good Practices contained in Part 2 of the Montreux Document, Dr. Petrig discussed that a significant majority of those Good Practices for Contracting States could be applied to private clients of PMSCs in the maritime context, with the exception of two that require governmental authority: Good Practice 19 on providing for criminal jurisdiction and Good Practice 22 on negotiating agreements with Territorial States. For example, the Good Practices 5 to 13 on the selection of PMSCs can be applied to private entities; moreover, Dr. Petrig expressed the view that the IMO's own guidance on these matters does not conflict with Montreux Document Good Practices. For example, both the IMO guidance and the Montreux Document advise that only PMSC personnel who are well trained should be hired. The IMO guidance develops this in more depth by advising that PMSC personnel should be trained in the area of ship self-protection measures, lifesaving at sea and knowledge of maritime law provisions. The Montreux Document, as a more general guidance, advises that Contracting States should "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...Training could include general and task- and context-specific topics, preparing personnel for performance under the specific contract and in the specific environment" (Good Practice 10).

Dr. Petrig then addressed the issue of the Territorial State, specifying that at sea, the Territorial State must mean the State having jurisdiction over a given vessel. On the high seas, as a general rule, it is the flag State having exclusive jurisdiction over its vessels; however, if the vessel passes through the territorial waters or

calls port in a third State, flag State jurisdiction concurs with the jurisdiction of the coastal/port States. In situation of concurrent jurisdiction, the question is which State is obliged to fulfill specific international obligations or Good Practices of the Montreux Document, and which State may be excluded from doing so. To answer this, it is necessary to take into account those rules of the law of the sea, which allocate jurisdiction between various States.

In conclusion Dr. Petrig summed up that where some parts of the MD are very applicable to maritime contexts without further ado; while others need a bit of refining and interpretation. The Montreux Document can be helpful for States and private actors looking for guidance in this respect.

Mr. Trelawny presented on the IMO perspective and the guidance developed regarding private maritime security companies. The IMO's Maritime Safety Committee (MSC) neither endorses nor condemns the use of armed personnel on board merchant ships and accepted that the carriage of armed personnel is an individual decision subject to the law of flag States. The IMO accepts that some shipowners use armed personnel on board ships, hence the development of appropriate guidance by the IMO, bearing in mind the need for extreme caution in matters relating to liability, jurisdiction, sovereignty, ships in transit and rights of innocent passage, among other issues. As a result, the IMO has issued *inter alia* guidance for shipowners, ship operators and ship masters, as well as flag States, port and coastal States on privately contracted armed security personnel (PCASP) on board ships on the High Risk Area. In 2011, the MSC and IMO Facilitation Committee circulated a questionnaire on port and coastal States' requirements related to the embarkation, disembarkation and transit of PCASP on board ships and their equipment, which was disseminated for IMO member States, in their capacity of port and coastal States, to provide information pertaining to their individual requirements regarding the use of PCASP in their territorial waters. Mr. Trelawny explained that the MSC had agreed that self-regulation by the security industry was not acceptable and that PCASP should be subject to external verification. This was the rationale for the development of ISO 28007-1:2015 – guidelines and sector-specific recommendations for private maritime security companies providing privately contracted armed security personnel on board ships.

In the ensuing discussion, one Montreux Document participant inquired about the different terminology: what is the difference between privately contracted armed security personnel and PMSCs? One participant also inquired as to rules governing the transport of firearms and security equipment, as well as the use of force at sea. Mr. Trelawny answered that on the high seas, the issue of carriage of armed personnel and their equipment was a flag State matter, governed under the relevant national laws. When it comes to transporting the equipment through coastal and port State territory, the IMO has also developed MSC Circular 1408 which offers guidance on the issue. The use of force by PCASP is predicated on self-defence and proportionality. With respect to terminology, the IMO uses three concepts that are closely related to the Montreux Document's umbrella term of "PMSC": privately contracted armed security personnel, private maritime security company (which employs the personnel) and vessel protection detail (which are usually government forces). In all three cases, the use of force can only be deployed in self-defence.

A number of representatives raised questions regarding the contracting parties, namely if there is a conflict between the shipowner's State and the Contractor's State, and whether Contracting States could be expanded to cover also land-based non-State clients of PMSCs, such as large extractive companies. Mr. Trelawny responded that in the maritime context, it is generally for the shipowner or operator, following a risk assessment, and provided that it is lawful and legal to do so under the laws of the flag State, to request permission from the flag State. One Montreux Document participant raised whether the Montreux Document Good Practices relevant to the Home States could be applied to shipowners. Dr. Petrig clarified

that Home States refer to where the PMSC is based or headquartered, not where the shipowner is based or headquartered.

### **3. Plan of action for 2018-2019: approval by the Working Group**

Recalling that the Plan of Action and Outreach Briefing note documents were distributed to all Montreux Document participants for silent procedure that ended on 30 May 2018, the Chair of the Working Group expressed his intention that the documents would be submitted for formal approval at the Plenary the following afternoon (7 June). A number of delegations had already submitted written comments and feedback. The Chair then opened the floor for discussion and final verbal comments on these documents.

A number of delegations expressed the wish to preserve the intergovernmental nature of the Working Group, in particular with respect to cooperation with other organisations, as set out in objective 1 of the Plan of Action (*Defining the Activities of the Maritime Working Group*). One delegation discussed that the document conflates objective 1 and 4 as both pertain to outreach.

Furthermore, a number of feedbacks pertained to whether the proposed Reference Document (objective 2 in the Plan of Action) would be a product of the Working Group, the MDF, or the Chair. With this in mind, a number of delegations expressed that they would not wish to have the documents subject to a lengthy and arduous negotiation.

One delegation also discussed that although objective 3 (*Launching an Open-Ended Exercise on a Compilation of Practices and Relevant Information*) is very relevant, the goal should be a neutral compilation of regulatory practices rather than a selection or identification.

The Chair clarified that the main idea of objective 1 is to define the activities of the Maritime Working Group with the goal to communicate and cooperate and to facilitate outreach. Objective 1 therefore is a general statement or terms of reference for the Plan of Action. Furthermore, the Working Group is indeed intended to be an informal intergovernmental body, gathering useful experience and expertise from outside experts. Retaining the intergovernmental nature is a priority for the Chair. Regarding the Reference Document, the Chair proposed to discuss the ownership of the Document at a later stage rather than prejudge its ownership during the current discussion. A first draft of the Reference Document would be put forth for consultation at the next Working Group meeting in the fall, with the intention that it could be adopted by the MDF by mid-2019.

### **4. AOB**

A number of States expressed that they would like to receive the updated documents electronically following the meeting.

### **5. Conclusions and next steps**

The Chair of the meeting concluded by announcing that the next formal meeting of the Working Group will take place in November 2018 (TBC). An additional discussion may be scheduled on the sidelines of the MDF Plenary meeting. The format and modalities of this will be announced.