

Reference Document
Elements for a Maritime
Interpretation of the
Montreux Document

CHAIR'S DOCUMENT
MARITIME WORKING GROUP



MONTREUX
DOCUMENT
FORUM

Author

This report was developed by the Chair of the Working Group on the use of private military and security companies (PMSCs) in maritime security of the Montreux Document Forum (hereafter, Maritime Working Group), Portugal. The Montreux Document Forum (MDF) seeks to support national implementation of the Montreux Document on the use of PMSCs. The Maritime Working Group serves as a forum to discuss the relevance of the Montreux Document (hereafter, the MD) to maritime security, its interaction with relevant international organizations and discusses ways to assist States in implementing the MD. This document clarifies the interpretation of the MD from a maritime perspective.

Acknowledgements

This reference document is the result of an in-depth research and consultation process, starting in 2018. The document builds on inputs from States, private military and security companies, the shipping industry, experts from academia, civil society, and international organizations. The Chair of the Maritime Working Group would thus like to express its gratitude to all parties who reviewed and commented on the different draft versions. The Chair notes that it has been particularly crucial to take into account different viewpoints to identify and understand the roles and responsibilities of States and other relevant actors.

In addition, the Chair of the Working Group would like to sincerely thank the co-Chairs and the Secretariat of the Montreux Document Forum for their support throughout the process, namely the Swiss Federal Department of Foreign Affairs (FDFA), the International Committee of the Red Cross (ICRC) and the Geneva Centre for the Security Sector Governance (DCAF).

Disclaimer

The contents of this publication may be freely used and copied for educational and other non-commercial purposes, provided that the publication is duly cited as a source. The good practices and recommendations included in this publication are not prescriptive. It is up to each user to determine, where appropriate, their feasibility, usefulness and suitability depending on the local context in each specific situation on the ground.

Contents

Introduction	5
BACKGROUND	5
OBJECTIVES	6
METHODOLOGY AND STRUCTURE	7
Part One Pertinent international legal obligations relating to private military and security companies	9
INTERPRETATIVE GUIDANCE REGARDING STATES	9
INTERPRETATIVE GUIDANCE REGARDING PMSCS AND THEIR PERSONNEL	11
Part Two Good Practices relating to maritime private military and security companies	13
DETERMINATION OF SERVICES	14
AUTHORIZATION TO PROVIDE MILITARY AND SECURITY SERVICES	15
PROCEDURE WITH REGARD TO AUTHORIZATIONS	16
CRITERIA FOR GRANTING AN AUTHORIZATION	17
TERMS OF AUTHORIZATION	22
RULES ON THE PROVISION OF SERVICES BY PMSCS AND THEIR PERSONNEL	24
MONITORING COMPLIANCE AND ENSURING ACCOUNTABILITY	27
Proposed references and their sources of information	29



MONTREUX
DOCUMENT
FORUM

Introduction

1

BACKGROUND

The Montreux Document on pertinent international obligations and good practices for States related to the operations of private military and security companies (PMSCs) in armed conflict (the Montreux Document) was developed in 2008 as a result of a joint initiative launched by Switzerland and the International Committee of the Red Cross (ICRC). The aim of the Montreux Document was twofold. Firstly, to clarify how the international legal framework applies to the activities of PMSCs (thus showing that they do not operate in a legal vacuum). Secondly, to assist States seeking to regulate private military and security services provided on land – primarily in armed conflicts but also in post-conflict situations and other comparable situations.

At the time of the launch of the Montreux Document, PMSCs in maritime contexts were a marginal issue. Today however, the protection of merchant ships from security threats like piracy and armed robbery at sea is one of the top business sectors of the PMSC industry. The shipping industry has increasingly relied on private maritime security personnel to protect vessels, cargo, and seafarers. In 2017, the cost of contracted maritime security services totaled 292.5 million USD in East Africa and 213.7 million USD in West Africa (Pigeon et al., 2018). Developments such as the hybridization of maritime security models (i.e. combining both public and private security operators) and a lack of effective oversight mechanisms have resulted in a greater difficulty in monitoring the activities of PMSC – such as the proliferation of weapons at sea and a higher potential for the use of force, in scenarios distant from State enforcement or control – against a background of unregulated armed maritime security teams and lack of awareness of existing regulations. Consequently, actions by some actors could increase violence at sea and negatively impact human rights.

In addition to the legal and practical issues¹ arising in this context, the expansion of the operational area of PMSCs at sea has triggered a debate on the applicability and pertinence of the Montreux Document in the maritime context². Looking into ways of upholding the Montreux Document as a practical and realistic contribution in promoting respect for international law and human rights, the Montreux Document Forum (MDF), co-chaired by Switzerland and the ICRC, established in 2014 a Working Group on the use of Private Military and Security Companies in Maritime Security (the Maritime Working Group)³.

-
- 1 Some of those legal and practical issues are raised by the existence of the so called “floating armories”. Due to the complex web of legal requirements pertaining to the transport and carriage of weapons, in an attempt to avoid coastal state regulations, some PMSCs resorted to the storing of firearms and personnel in international waters, in “floating armories”. In 2016, it was estimated that there were over a dozen ships serving as “floating armories”, allowing PMSCs to arm themselves, therefore avoiding regulations enforced in ports (Affi L., Elmi, A.A., Knight A.W., Mohamed S. (2016). Such resources allow their personnel to embark on the client ship without weapons, obtaining them later once the ships are outside territorial waters. This phenomenon raises significant concerns, as these “floating armories” operate in a legal gray area, without clear international or national regulations governing their possession and use.
 - 2 In particular, it has been debated how to reconcile the Montreux Document’s three-State analysis – Home, Territorial, and Contracting State – with the maritime industry’s Port, Coastal, and Flag State demarcation and consequent obligations under international law and good practices. Even though this Reference Document aims at clarifying that analysis, situations of jurisdictional overlaps and conflicts may still occur due to the jurisdictional rules contained in the law of the sea and also due to specificities deriving from the applicable maritime law.
 - 3 The Maritime Working Group does not seek to condone nor condemn the use of PMSCs in maritime security, which is generally a prerogative of Flag States, dependent on applicable national laws and consistent with International Law. Instead, it intends to provide an opportunity to bring together States, international organizations and industry in identifying good practices regarding the regulation of the maritime security industry and for an accountable protection of maritime trade. Carrying out its activities, the Maritime Working Group takes into consideration the roles of the Working Group on the International Code of Conduct Association and the International Code of Conduct Association (ICoCA). It also takes into account other initiatives and frameworks on the use of private military and security companies in maritime security and engages with relevant public and private stakeholders in order to actively cooperate and to prevent overlapping or contradicting efforts.

In its Preface, the Montreux Document states that the existing obligations and good practices recalled by it may be instructive in situations where PMSCs operate other than armed conflict, such as post-conflict situations and other, comparable situations⁴, while recalling that international humanitarian law is applicable only during armed conflicts. In addition, it was designed for all practitioners confronted with the phenomenon of PMSCs and not only for States. The maritime security operations in which PMSCs currently operate can be considered a setting in which the Montreux Document can offer useful guidance.

Bearing in mind its mission of serving as a forum to discuss the relevance of the Montreux Document to maritime security, its interaction with relevant international organizations and initiatives on maritime security and ways to assist States in implementing the MD, the Maritime Working Group has identified the developing of a reference document for a maritime-focused interpretation of the Montreux Document as an important output of its works. This is meant to assist States in regulating the PMSC industry in maritime contexts (complementing other processes specifically set out for maritime environments).

2

OBJECTIVES

By clarifying and reaffirming international law applicable to the activities of PMSCs in armed conflict, the Montreux Document can serve as a blueprint for governments seeking to effectively regulate PMSCs. In the maritime context, however, this practical potential may be challenged by the following:

- different nature of the maritime security operations of PMSCs, when compared to the land-based and mostly military operations;
- different applicable main international legal sources (in most situations, conventional and/or customary norms of international human rights law, the law of the sea, international criminal law, etc., and, when applicable, international humanitarian law);
- a not so obvious/direct equivalence between the three-State approach followed in the Montreux Document and the State and non-State actors operating at sea;
- a high number of applicable jurisdictions and consequent conflicts of jurisdiction.

These challenges motivated the Maritime Working Group to develop the Reference Document as a guidance tool that States and other relevant actors could use when interpreting and applying the Montreux Document in a maritime context, be it in armed conflict at sea or in maritime security operations.

This Reference Document is intended as a useful element for identifying and understanding the roles and responsibilities of the different States involved, within the three-State terminology in the Montreux Document. By making the Montreux Document more readable from a maritime security perspective, the Reference Document can be a resource for States seeking to use the Montreux Document specifically to support regulation of PMSCs and/or their personnel in maritime contexts, which is a plus with respect to other documents and initiatives on this topic. It can also serve as a convenient tool in outreach efforts.

This Reference Document is not intended to revise nor supplement the international rules and standards reaffirmed in the Montreux Document, neither to create a standard setting document or to propose a specific regulatory approach for the use of maritime security. The Reference Document does not mean

⁴ Paragraph 5 of the Preface of the Montreux Document reads: "The following understandings guided the development of this document: (...) 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".

to be an exhaustive exercise and should not be seen as limitative of future undertakings by the Working Group, the MDF, Montreux Document Participants or any other actors/entities – including, if need be, an intergovernmental document on pertinent international obligations and good practices for States related to the operations of PMSCs operating at sea, in the same spirit as the Montreux Document itself.

The statements and good practices compiled in the Montreux Document referring to the international law applicable to operations of PMSCs in armed conflict encompass naval warfare⁵. In this sense, the Reference Document only makes occasional references to the specificities of armed conflict at sea.

3

METHODOLOGY AND STRUCTURE

The Reference Document was developed through literature revision, informative document and jurisprudential research and a compilation of existing good practices. During the development of this interpretative tool, the Maritime Working Group consulted a number of expert sources on PMSCs in maritime contexts, international organizations (notably the International Maritime Organization), as well as different civil society organizations.

Insomuch as it is a central reference of best practices and valuable guidance for Private Maritime Security Companies and Privately Contracted Armed Security Personnel, IMO guidance is referenced throughout the Reference Document, particularly with regard to the interpretative section on Good Practices. This is without prejudice to IMO's position on the applicability of the Montreux Document and the International Code of Conduct to PMSCs operating at sea⁶.

The Reference Document may be continuously updated by Montreux Document Participants, taking into consideration relevant feedback from stakeholders (e.g. experts, industry, States, international organizations, non-governmental organizations, etc.) brought to the attention of the Maritime Working Group.

The Reference Document should be read together with the Montreux Document. In order to adequately serve its purpose as an interpretative tool, the Reference Document follows the Document's original division into two parts.

The Montreux Document follows a three-fold structure distinguishing between obligations and good practices addressed to Contracting, Territorial and Home States. The chapter **Maritime Interpretative Guidance for “Part One: Pertinent international legal obligations relating to private military and security companies”** aims at clarifying how the general obligations identified in Part One of the Montreux Document can be applicable to PMSCs operating in maritime context, while the chapter **Maritime Interpretative Guidance for “Part Two: Good Practices relating to maritime private military and security companies”** offers guidance on how the good practices relating to those obligations reaffirmed in the Montreux Document could be understood in order to be put into practice in maritime context.

5 Although PMSCs providing private security services to private commercial vessels have not necessarily been directly involved in naval warfare so far, this is a possibility that cannot be excluded.

6 The IMO's position on the applicability of the Montreux Document and the International Code of Conduct to PMSCs operating at sea is that, while both were useful reference points, they are not directly relevant – as is specifically referenced in IMO's Maritime Security Committee (MSC) MSC.1/Circ 1443.



MARITIME INTERPRETATIVE GUIDANCE FOR

Part One | Pertinent international legal obligations relating to private military and security companies

This chapter focuses on the interpretation of sections of Part One of the Montreux Document that are relevant for situations where PMSCs take part in maritime security operations (the majority of cases in which PMSCs operate in maritime context).

The interpretative guidance is divided into two sections for easier access, the first being dedicated to States and the second to PMSCs and their personnel.

1

INTERPRETATIVE GUIDANCE REGARDING STATES

The Montreux Document highlights the obligations 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).

Because PMSCs operating at sea are mostly hired by private persons (not by States) to protect merchant vessels against acts of piracy and acts of armed robbery at sea (see section 2 of this chapter), **the most relevant State actors** for the Montreux Document in the maritime context will be those that can be equated with **Territorial States** – and among those, **Flag States** will be the main addressees.

Understanding 9(d) of the Preface of the Montreux Document defines “Territorial States” as those in whose territory PMSCs operate. The Montreux Document gathers several important obligations binding Territorial States, considering that they are “*in a strong position to influence the behaviour of companies.*” and that they “*(...) have the authority, based on their territorial sovereignty, to impose restrictions on PMSCs through national law.*”. In the maritime context, this authority will derive from jurisdiction (i.e. the competence to exercise legislative, executive and judicial functions), rather than sovereignty over territory alone. PMSCs operate on board ships that navigate different maritime zones. Therefore, in applying this concept in a maritime context, the Territorial State cannot necessarily be mapped onto any single State, but rather may be equated with one of more States exercising jurisdiction over the vessel in which a PMSC is embarked. At all times, and in all maritime zones, the Flag State of a vessel will be one such State. In addition, a Coastal State or a Port State may also be equated to the Territorial State, when a vessel in which PMSCs are embarked is situated in its territorial sea, or internal or (where appropriate) archipelagic waters.

In short, depending on the maritime zone where a ship is at a certain moment and the jurisdiction over specific situations/matters, the “Territorial State” referred to in the Montreux Document can be equated to the Flag State, the Coastal State and the Port State. The jurisdiction of these States may be concurrent. It should be noted, however, that jurisdictional overlaps are not exclusive of situations where PMSCs operate at sea, as they can also occur in the context of land-based operations⁷.

⁷ For example, even in land-based operations the jurisdiction of the Contracting, the Territorial and the Home States can be concurring with regards to crimes under international law (Statements 6, 12 and 17 of the Montreux Document).

It is generally the prerogative of Flag States, dependent on applicable national laws and consistent with international law, to decide on the use of PMSCs in maritime security⁸ (see footnote 3). Indeed, according to the applicable law of the sea (namely the United Nations Convention on the Law of the Sea - UNCLOS), the **Flag State** is the (only) State of the nationality of a ship, having an obligation to effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag, as well as over the shipmaster, officers and crew. Bearing in mind the positive obligations recalled by Statements 9 to 12 of the Montreux Document and the good practices relating to those statements, it seems that the Flag State is the State that will (in most cases) be in the best position to comply with them.

Moreover, a significant part of the maritime security services provided by PMSCs take place on the high seas⁹, where the Territorial State will can be equated to the Flag State alone: it generally has the right to exercise exclusive jurisdiction over the ship on the high seas (i.e. generally the Flag State alone can enforce jurisdiction on board that ship¹⁰).

The obligation of Territorial States, as defined in the Montreux Document, to investigate and, as required by international law, or otherwise as appropriate, prosecute, extradite or surrender persons suspected of having committed crimes under international law (Statement 12 of the Montreux Document) also belongs, in principle, to the Flag State. Only in exceptional situations may States exercise their jurisdiction over a ship flying the flag of another State and may therefore also be equated to Territorial States, in particular for the purposes of Statement 12 of the Montreux Document. This is the case with respect to the Coastal State, which may exercise its criminal jurisdiction in certain cases where a crime was committed on board a ship during its passage through its territorial sea¹¹. A Port State may also be equated to Territorial State for the purposes of Statement 12 of the Montreux Document.

In the event of a jurisdictional conflict among different Territorial States – conflicts which, as underlined in a previous paragraph, are not exclusive of maritime-based operations of PMSCs –, it is important that those States strive to uphold one of the main purposes of the Montreux Document, which is to prevent (or at least minimize) legal and jurisdictional gaps and manage legal and jurisdictional overlaps regarding serious breaches of international law¹².

-
- 8 This does not mean that other States cannot oppose the passage in their territorial sea of a ship carrying personnel of PMSCs in cases where the passage of that ship is considered as prejudicial to the peace, good order or security of the Coastal State. The right of innocent passage reflects customary international law. A cornerstone of the law of the sea, it is regulated under article 19 of the United Nations Convention on the Law of the Sea, which establishes the meaning and applicable limitations on innocent passage. The most pertinent example of a limitation on innocent passage in the current context is article 19(2)(b) which states that the passage of a ship engaging in any practice with weapons of any kind can be considered to be prejudicial to the peace, good order or security of the Coastal State, thus precluding the right of that ship to innocent passage. The Coastal State may, in cases such as this one, prevent the passage. Under its limited right to regulate innocent passage under article 21 of the United Nations Convention on the Law of the Sea, the Coastal State may also adopt rules affecting the operations of PMSCs, such as customs laws on arms on board.
- 9 PMSCs often operate on the high seas to protect merchant vessels from pirate attacks. Piracy is defined in Article 101 of UNCLOS as any illegal act(s) of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship and directed: on the high seas, against another ship, or against persons or property on board such ship, or against a ship; or against a ship, aircraft, persons or property in a place outside the jurisdiction of any State. Voluntary participation in the operation of a pirate ship and any act of inciting or of intentionally facilitating an act of piracy also amount to piracy. The same acts, when committed within a State's internal waters, archipelagic waters and territorial sea of a State, are referred to as "armed robbery against ships" (a notion developed under Resolution A.1025(26) (Annex, paragraph 2.2) on IMO's Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships).
- 10 Notwithstanding the prescriptive jurisdiction of other States towards their own nationals on board (i.e. the right to regulate the conduct of their nationals on board a ship flying another State's flag) and the obligations of the Home State (of the PMSC) under Statement 17 of the Montreux Document.
- 11 Article 27 of the United Nations Convention on the Law of the Sea states four cases in which the Coastal State may exercise its criminal jurisdiction in certain cases where the crime was committed on board the ship during its passage through its territorial sea: (i) if the consequences of the crime extend to the coastal State, (ii) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea, (iii) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State and (iv) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.
- 12 For example, should the personnel of a PMSC engage in an act of piracy, all States having a duty to cooperate in the repression of piracy and piracy being a crime under International Law, Statement 12 of the Montreux Document may be interpreted by Flag, Coastal and Port States in such a way that jurisdictional gaps are avoided and mechanisms of mutual legal assistance are put in place.

As said above, private persons are the main clients of PMSCs in the maritime context. Nevertheless, statements and good practices relating to **Contracting States** as defined in Understanding 9(c) in the Preface of the Montreux Document are still applicable to States hiring PMSCs to operate in sea, be it in warfare or in maritime security operations¹³.

As for **Home States**, the definition under Understanding 9(e) of the Preface of the Montreux Document is applicable in the maritime context as it is for land-based operations: depending on the case, it is the State where the PMSC is registered or incorporated or the State where it has its principal place of management. As happens with land-based operations of PMSCs, in the context of maritime security the obligations of Home States recalled under Statements 15 and 17 of the Montreux Document may result in a jurisdictional overlaps, namely with the Flag State - see footnote 6. The law of the Home State is also relevant on the basis of the nationality principle.

In the context of maritime security, Statement 21 of the Montreux Document can be interpreted as referring to the obligation of **All other States**, as required and admissible under the applicable international law, to investigate and repress maritime crimes - e.g. piracy, illicit traffic in narcotic drugs and psychotropic substances.

2

INTERPRETATIVE GUIDANCE REGARDING PMSCS AND THEIR PERSONNEL

The definition of “**PMSCs**” under Understanding 9(a) of Preface of the Montreux Document does not call for a special interpretation from a maritime point of view¹⁴. PMSCs currently operating in a maritime context are not usually engaged in naval warfare and, therefore, rarely provide military services - they mostly provide security services¹⁵. At the same time, the general definition of “**personnel of a PMSC**” under Understanding 9(b) of the Preface of the Montreux Document is entirely applicable to PMSCs operating in the maritime context¹⁶.

In a maritime context and for the purposes of Statements 22 and 23 of the Montreux Document, the “applicable national law” and the “national law of the State in which personnel of PMSCs operates” should generally be understood as the national law of the Flag State - only in exceptional circumstances will the national law of other States apply (see previous section). For example, the right of the personnel of PMSCs to use force on board a ship is restricted to lawful acts, such as in self-defense or to defend others, in accordance with the applicable rules of international law and of the national law of the Flag State and of the Home State of the PMSC. In addition to respecting the laws and regulations of the Home State and of the Flag State on the transport, carriage and use of firearms, PMSCs and their personnel must also take into account applicable laws and regulations of Coastal States (who have some prescriptive powers regarding the right to innocent passage) and those of Port States whenever the ship is at port.

¹³ Some literature has suggested that the “home” States of private entities contracting PMSCs for private maritime security could be considered as “Contracting States”. However, it is not clear that States in which the private entities contracting PMSCs are registered could be considered as “Contracting States” within the meaning of the Montreux Document.

¹⁴ The notion of “PMSCs” should not be limited to entities exclusively or even primarily engaging in operational security functions - such as “private maritime security companies” or “privately contracted armed security personnel” (PCASP) - neither to those operating at sea: it should also comprise those whose services are of a more managerial or logistic-support nature and that can often be provided on/from land or from different vessels.

¹⁵ These services include armed and unarmed protection of ships and/or of their crew and/or cargo; escorting of merchant vessels; security surveillance of places/waters, goods and/or persons; maintenance and operation of weapons systems; detention of pirates and armed robbers; training the crews on defence against piracy and armed robbery attacks; security audits.

¹⁶ Hence, for the purposes of a maritime interpretation of the Montreux Document, “personnel of a PMSC” should designate any person employed by a PMSC, directly or under a contract with it. These persons - who can be managers, employees, contractors or subcontractors - can provide their services from a land-based facility or be on board merchant vessels or other support/surveillance vessel(s).

PMSCs should only deprive a person of their liberty where lawful to do so and in accordance with the shipmaster's orders (see last paragraph in this section). While it may be necessary to use a level of force to give effect to such a deprivation of liberty, any such use of force must be lawful and, in particular, PMSCs depriving a person of their liberty must not resort to torture, enforced disappearances or other cruel, inhuman or degrading treatment or punishment.

Insomuch as the national law of the Flag State reflects and implements norms under the law of the sea and/or international human rights law applicable to their activities, the personnel of PMSCs:

- have an obligation not to (i) seize or exercise control over a ship by force or threat thereof or any other form of intimidation, (ii) perform an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship, (iii) destroy a ship or cause damage to a ship or its cargo which is likely to endanger the safe navigation of that ship, (iv) injure or kill any person in connection with the commission or attempted commission of the previous acts;
- have an obligation not to hamper the boarding of personnel of a warship, when this right of visit is exercised in compliance with the law of the sea, including, for example, when there is reasonable ground for suspecting that the ship is engaged in piracy or is engaged in the slave trade;
- have the obligation not to hamper the hot pursuit of its ship by the authorities of a Coastal State, when the latter has good reason to believe that the ship has violated the laws and regulations of that State and when it is exercised in compliance with international law, including the law of the sea.

Statement 27 of the Montreux Document recalls that **superiors of PMSC personnel** are persons who have PMSC personnel under their effective authority and control. This enumeration of superiors of PMSC personnel being an exemplificative one ("*such as*") and the shipmaster being the main responsible for the safety of the ship and the people and cargo in it, it can be interpreted that, in a maritime security context, the shipmaster is a superior of PMSC personnel in the meaning of Paragraph 27. Since the shipmaster holds the final and highest level of control of the ship and its crew and passengers, it is he or she who decides if a certain situation classifies as a security issue for the ship and whether the PMSC personnel is to act upon it. A shipmaster may also be criminally liable for any crimes committed by PMSC personnel, although this will depend strongly on the type of crime, the context and specific circumstances, as applicable law may provide for crimes additional to those under international law. With regards to crimes under international law and notably with respect to the use of force and treatment of persons deprived of their liberty in maritime security operations, a shipmaster who has not exercised due control over PMSC personnel may be liable for crimes under international law.

MARITIME INTERPRETATIVE GUIDANCE FOR

Part Two | Good Practices relating to maritime private military and security companies

This section aims at supporting the interpretation of the Good Practices of the Montreux Document in the Maritime Context. To this end, it is based on the seven thematic pillars of the Montreux Document Good Practices, emphasizing the most relevant ones in the given context.

The Good Practices are intended as a useful blueprint for the regulation of PMSCs. 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 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.

As stated before, it is generally the prerogative of Flag States (dependent on applicable national laws and consistent with international law) to decide on the use of PMSCs in maritime security in the first place. Therefore, many of the Good Practices stated in the Montreux Document will be especially relevant to Flag States, with which the concept of “Territorial State” is likely to be equated most often. Nevertheless, the following interpretation of the Good Practices can be instructive for all States, without prejudice to the rights and obligations of the Flag State (which are the most relevant State actors for the Montreux Document in the maritime context, see the Maritime Interpretative Guidance for Part I).

The seven thematic pillars of Good Practices, based on the Montreux Document, are listed below:

- 1 Determination of Services** | This chapter addresses Good Practices for how States can determine which services may or may not be contracted to PMSCs.
- 2 Authorization to provide military and security services** | The second section focuses on the requirements of PMSCs obtaining a license to operate.
- 3 Procedure with regard to authorizations** | This section discusses the setup of institutions in charge of granting authorizations to PMSCs.
- 4 Criteria for granting an authorization** | The fourth chapter sets out 0.1875 in Good Practices for what conditions States should consider when granting licenses of authorizations to PMSCs.
- 5 Terms of authorization** | The good practices in this section expand on operating requirements States should set for PMSCs to guarantee lawful conduct, when authorizations were granted.
- 6 Rules on the Provision of Services by PMSCs and their personnel** | The good practices in this chapter aim to support States in setting out specific guidelines on the provision of security and military services.
- 7 Monitoring compliance and ensuring accountability** | This chapter underlines Good Practices to strengthen monitoring and accountability of maritime PMSCs.

1

DETERMINATION OF SERVICES¹⁷

States should, to the extent that they have jurisdiction to prescribe, regulate the carriage of armed security personnel and their weapons and they should, in conjunction with shipowners, private security companies, and ship operators, identify whether and under which conditions armed private security on vessels will be authorized. Further, they should consider that carriage of armed personnel on board merchant ships may lead to an escalation of violence.

WHY IS THIS IMPORTANT?

In an increasing number of cases, shipowners are considering the use of Privately Contracted Armed Maritime Security (PCASP), here Private Military and Security Companies (PMSC), to augment shipboard security arrangements when transiting areas where it is considered there is a higher risk of piracy and within which self-protective measures are most likely to be required¹⁸

The provision of security services, inherently, includes a possible need to use force, without which security cannot be ensured. However, using force bears the risk of abuses and misconduct and has the potential to impact heavily on the human rights of affected persons. The use of privately contracted armed security personnel on board ships may therefore lead to an escalation of violence. Determining the conditions under which the carriage of armed security personnel is allowed, and notably the types of equipment and weapons, will mitigate the risk of an escalation of violence and minimize the threats of casualties if an escalation occurs. The available equipment and weapons must also be in accordance with applicable and relevant international human rights law and international humanitarian law.

¹⁷ See Montreux Document Good Practice 24.

¹⁸ This may include areas other than those defined by international organizations or authorities such as the IMO. In the context of the IMO, a High Risk Area is an area where it is considered there is a higher risk of piracy and within which self-protective measures are most likely to be required. See IMO, Circular Letter No.3606; Art. 2.1.

2

AUTHORIZATION TO PROVIDE MILITARY AND SECURITY SERVICES¹⁹

States should require PMSCs to obtain an authorization to provide military and security services on ships flying their flag, including by requiring PMSCs²⁰:

- + to have relevant licenses from competent authorities (Home, Flag and Coastal States) before embarking. This includes approval to provide security services and relevant licenses to transport, carry, operate and store firearms and security related equipment;
- + that PMSC staff are registered and obtain a license to carry out military or security services for PMSCs.

WHY IS THIS IMPORTANT?

According to UNCLOS, States must fulfil their obligation of exercising their jurisdiction and control in administrative, technical, labor conditions and social matters over ships flying their flag and the shipmaster, officers and crew of those ships. This includes ensuring that PMSCs operating on board vessels flying its flag comply with the necessary requirements of national law and also encompasses a due diligence obligation to monitor the activities of those PMSCs.

Vessels will pass through areas under the jurisdictions of Port or Coastal States. It is therefore vital for a Flag State to make sure ships sailing under its flag fulfil the requirements set out by these States.

¹⁹ See Montreux Document Good Practice 25.

²⁰ IMO, MSC.1/Circ.1406/Rev.3, para. 4. ISO PAS 28007, para. 4.2-4.5. IMO, MSC.1/Circ.1406/Rev.3, para. 2.2.

3

PROCEDURE WITH REGARD TO AUTHORIZATIONS²¹

States should establish or designate a central authority competent for granting authorizations to maritime PMSCs.²²

States should allocate adequate resources and trained personnel to handle authorizations of maritime PMSCs properly.²³ The contextual difference of the maritime sphere demands that national regulatory authorities and their personnel are trained in specificities of the maritime context to guarantee effective authorization processes.

States should assess, in determining whether to grant an authorization, the capacity of the PMSC to carry out its activities in conformity with applicable and relevant national law and international law (including international human rights law and international humanitarian law), taking into account inherent risk associated with the services to be performed, for instance by:²⁴

- + Receiving information on PMSC's structure; and execute background checks on PMSC and its personnel:
 - company structure and place of registration;
 - company ownership;
 - financial position and bank references;
 - extent of insurance cover (in particular covering third-party risks);
 - senior management experience, general and specific to the task;
 - quality management indicators.
- + Obtaining references from clients for whom PMSC has previously provided similar services.²⁵

WHY IS THIS IMPORTANT?

The designation of an appropriate authority that thoroughly assesses the granting of authorization of PMSCs enables States to ensure professionalization of the industry and may prevent and mitigate risks of unlawful conduct.

Under the UNCLOS, States are required to regulate administrative, technical and social matters over ships flying their flag²⁶. Procedures with regard to authorizations for PMSCs set a solid framework for this objective.

²¹ See Montreux Document Good Practice 26 to 28.

²² See IMO, MSC.1/Circ.1406/Rev.3, para. 5.2.

²³ Montreux Document, Good Practice 27 applicable to maritime context.

²⁴ Montreux Document, Good practice 28 applicable in maritime context. Also see MSC.1/Circ.1443, para.3.2 and MSC.1/Circ.1405/Rev.2; para. 4.2.

²⁵ IMO, MSC.1/Circ.1405/Rev.2; para. 4.3.4.

²⁶ UNCLOS, Art. 94 (1).

4

CRITERIA FOR GRANTING AN AUTHORIZATION²⁷

States should require shipowners, private security companies and ship operators to implement use of force policies for all PMSC personnel, in line with the Flag State's national legislation and international good practices contained in the Montreux Document.²⁸

States should respect that as soon as merchant ships or fishing vessels enter the territorial waters or ports of another State, they are also subject to that State's legislation with respect to certain aspects concerning the right to innocent passage²⁹. Especially the importation of firearms by PMSCs is subject to Coastal and Port State's regulations. Further, carrying firearms may pose greater danger if there is dangerous cargo, such as flammable material or natural resources on board the ship. Customs legislation over arms on board may also be enforced in the contiguous zone of a State.

Flag States should clarify for shipmaster, seafarers, shipowners, operators and companies the national policies on licenses, training, and firearms stockpile management relevant to armed security personnel³⁰.

States must require that the conduct of maritime PMSCs and of any PMSC subcontracted is in conformity with applicable and relevant national law (Coastal, Port and Flag State) and international law (including international human rights law and international humanitarian law), which includes ensuring that³¹:

- + Maritime PMSCs are responsible for the conduct of their subcontractors and are liable within the legal framework for their conduct;
- + Maritime PMSCs have identified and incorporated all relevant regulatory and legal provisions, as well as any applicable codes and conventions. This should be included in contract negotiations with clients to keep in mind differing jurisdictions and requirements by Home, Flag, Coastal and Port State;
- + PMSCs' internal corporate governance structure and top management can demonstrate the organization's capability to offer services in line with applicable and relevant international and national law and regulatory requirements, i.e. via training documentations and internal ethics policies. The company's security management policy should also comply with applicable and relevant international and national laws, codes and regulatory requirements. The PMSC should also provide evidence of having conducted human rights impact risk assessments;
- + Maritime PMSCs provide evidence on how top management outlines and documents the company's capacity to deliver services in conformity with applicable and relevant international and national law and regulatory requirements.

²⁷ See Montreux Document Good Practice 30 to 39.

²⁸ DCAF - The Geneva Centre for Security Sector Governance, *Regulating the Use of Force by Private Security Providers: A Guidance Tool for States, Basic Principles and Requirements for State Regulatory Frameworks on the Use of Force by Private Security Providers*, 2019.

²⁹ IMO, MSC.1/Circ.1333/Rev.1; para. 4. UNCLOS Art 21(1).

³⁰ IMO, MSC.1/Circ.1406/Rev.3, para. 7. IMO, MSC.1/Circ.1333/Rev.1; para. 7. UNCLOS Art 94.

³¹ Montreux Document, Good Practice 30 and 31. UNCLOS Art. 94 (4) c. ISO 28007, para. 4.2.1.; para. 4.2.4.; para. 4.3.3.

States should take into account within available means, the past conduct of maritime PMSCs and their personnel, which includes ensuring the PMSCs and their personnel have³²:

- + no proven record of involvement in serious crime (including but not limited to organized crime, drug trafficking, piracy, violent crime, violations of international humanitarian law, illegal carrying of weapons and artillery, human trafficking, unauthorized entry, sailing or fishing in unauthorized areas, bribery and corruption, gender based violence, sexual exploitation and abuse, domestic violence) and, insofar as the PMSC or its personnel had participated in past unlawful behavior, has properly dealt with such conduct, including by effectively collaborating with the authorities, taking punitive actions against those involved, and where appropriate and dependable with findings of wrongdoing, offering appropriate reparation to individuals injured by their conduct;
- + 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 dishonorably discharged from armed or security forces.

PMSCs should make provisions for financial resources for risks arising from its operations and activities, consistent with contractual requirements. Maritime PMSCs should guarantee their compliance with relevant legal and regulatory obligations. PMSCs should document their financial stability by financial accounts, bank references, as well as information related to company structure and ownership. Further, companies should demonstrate sufficient insurance to cover risks and associated liability.³³

States should consider whether the PMSC maintains precise and updated personnel and property records, specifically, regarding weapons and ammunition, available for inspection on demand by any State that can be equated to the Territorial State and other authorities, including ensuring that³⁴:

- + PMSCs keep records of the vetting process of all personnel;
- + PMSCs maintain records of employees, as well as of initial and refresher continuation training;
- + PMSCs keep suitable documented information as evidence of capability to manage security operations at sea and specifically the protection of persons aboard the ship against unlawful attack;
- + PMSCs have operational planning and control processes in place which permit its personnel to conform with all applicable laws and standards and to react to operational challenges.

³² Montreux Document Good Practice 32, IMO, MSC.1/Circ.1405/Rev.2; para. 4.3.4; para. 4.5.

³³ ISO 28007, para. 4.1.10.; para. 4.1.11; para. 4.3.1. also, Montreux Document, Good Practice 33.

³⁴ See Montreux Document Good Practice 34. ISO 28007, para. 4.1.6 (h); para. 4.3.2(k) and (2); para. 4.4.5; para. 4.4.2; para. 5.1.

States should ensure that PMSCs personnel are sufficiently trained, both prior to any deployment and on an ongoing basis, to respect relevant national law and international law (including international human rights law and international humanitarian law); and to establish goals to facilitate uniformity and standardization of training requirements. Specifically, States should ensure that personnel of PMSCs receive the following training³⁵:

- + shipboard familiarization training, including communication protocols;
- + medical training to a recognized international standard;
- + appropriate training and/or briefing with specific reference to the ship type, where that ship will be operating, as well as on international standards on safe management of ship operations³⁶;
- + training on international human rights law and principles and international humanitarian law, where applicable;
- + training on the obligations, processes and policies on reporting human rights abuses, human trafficking, and sexual exploitation and abuse (SEA) and know the obligation of companies and their staff to comply with national authorities in the case of criminal investigations. Specialized training should also be provided specifically for managers that underlines the specific roles managers play, in terms of due diligence, with regard to human rights abuses, human trafficking, SEA, and other forms of sexual and gender-based violence (SGBV);
- + command and control relationships between the PMSC personnel and the shipmaster, as well as the recognition of the individual inherent right to self-defense. Training should address communications protocols and procedures, including a clear chain of command and understanding of the role of the shipmaster as the final arbiter.

In cases where States authorize the personnel of PMSCs to carry firearms, States should require that:

- + personnel have been trained to operate the specific firearms and other security equipment used on vessels they are deployed on;
- + personnel have been trained in compliance with international and national legal requirements on the use and storage of firearms and ammunition;
- + the company acquires and maintains legal authorizations for the possession of firearms and ammunition required by applicable national and international law;
- + maritime PMSCs conform with any home or Flag State or local requirements including through end user certifications and secure the necessary written authority from the Flag State and where appropriate the Coastal State for holding stocks of firearms and ammunition on the high seas or offshore.³⁷

35 IMO, MSC.1/Circ.1405/Rev.2, 4.6. Montreux Document Good Practice 35. BPUF, Art. 19-20. IMO, MSC.1/Circ.1443, para. 4.2.; IMO, MSC.1/Circ.1405/Rev.2, para. 4.7. ISO 28007, para. 4.1.7; para. 4.4.2 (e) and (c). UNCLOS, Art. 94 (4) a. UNCLOS, Art. 94 (3) and (4).

36 Specifically, the provisions of the International Ship and Port Facility Security (ISPS) Code, International Safety Management (ISM) Code and BMP.

37 ISO 28007, para. 4.2.5 (a)-(g). Montreux Document Good Practice 36. ICoCA, Art. 59.

States should take into account the maritime PMSC's internal organization and regulations on the use of force, such as³⁸:

- + that PMSCs have procedures on the use of force, agreed upon with the shipmaster and the customer and respect international and Flag State law. If possible, the use of force should be completely avoided, a graduated deterrent approach applied, any force be strictly necessary and proportionate, and deadly force only be used in self-defense. Written, audio-visual reports (if possible) should be produced of any use of force;
- + that personnel have been trained and qualified to international standards regarding the lawful use of force.

States should ensure that PMSCs have monitoring and supervisory measures as well as internal accountability mechanisms, such as³⁹:

- + incident monitoring and reporting procedures in place, including mandatory recording of such incidents to the logbook of the shipmaster and a regular reporting of such incidents to the Flag State. These procedures should apply in case of any attack and response to an attack, where personnel have used a firearm, where there has been damage or injury to personnel or equipment or any other noteworthy occurrence which should be reported. The incident reporting should also provide for preservation of evidence;
- + mechanism to address and document complaints and grievances from internal and external parties⁴⁰. The company should establish an efficient investigative process of the grievance which includes means of regular communication with the complainant and procedures to cooperate with any official external investigation;
- + a code of business ethics and Code of Conduct (such as the ICoC, see footnote 38). States must also require PMSCs to have policies in place for the prevention of sexual exploitation and abuse;
- + companies have performance evaluation mechanisms to ensure the above listed requirements are in place and implemented.

38 See Montreux Document Good Practice 37 BPUF, Art. 1, 6 and 9. ISO 28007, para. 4.1.7.; para. 5.5 - 5.9; para. 6. See also CAF - The Geneva Centre for Security Sector Governance, *Regulating the Use of Force by Private Security Providers: A Guidance Tool for States, Basic Principles and Requirements for State Regulatory Frameworks on the Use of Force by Private Security Providers*, 2019.

39 Another important framework is the International Code of Conduct (ICoC) for Private Security Service Providers, which articulates the responsibilities of private security companies and personnel to protect human rights and sets out international principles and standards for private security services. The ICoC requires PMSCs to: 1) prohibit the engagement of personnel in SEA or other forms of GBV; 2) prohibit their personnel to benefit from GBV; 3) remain vigilant of all instances of SEA or GBV; and 4) report instances of SEA or GBV to competent authorities when requested by the victim. Moreover, the ICoC Association (ICoCA) has also published specific guidelines on preventing SEA for private security companies (ICoCA, PSEA Guidelines, 2019).

40 See, for example, ICoCA's manual on "Developing and operating fair and accessible company grievance mechanisms that offer effective remedies".

States should ensure that companies have appropriate policies in place that consider the welfare of its employees. These can include robust and auditable health, safety and environmental policies, which comprise hostile environment training, protective equipment, medical and psychological training; and guidelines on how to address misconduct and human rights abuses against PMSC personnel.⁴¹ As part of this, PMSCs must implement policies and procedures to prevent and address discrimination and harassment against personnel, including policies for complaints against all forms of workplace discrimination and harassment, including sexual and gender based harassment. States should ensure that PMSCs assure non-discriminatory working conditions for PMSC personnel, which should address working hours and other adequate policies responsive to the diverse needs of men and women.

WHY IS THIS IMPORTANT?

In the maritime context, PMSC operations bear unique threats to human rights and to the health and safety of employees and third parties, including physical, ergonomic, psychological and social elements. Moreover, the high levels of stress and fatigue characteristic of that context can induce work-related accidents, injuries and diseases⁴² Solid regulation and practices regarding health and safety of PMSC personnel are vital to address these challenging working environments, and also to specifically mitigate the aggravated impact that threats to their health and safety may have in a maritime context (for example, in the event of regional or global security, environmental or sanitary crises).

UNCLOS Article 94 (3) sets out that States must take measures to ensure safety at sea with regard inter alia to (i) the construction, equipment and seaworthiness of ships, (ii) the manning of ships, labor conditions and the training of crews, taking into account the applicable international instruments, and (iii) the use of signals, the maintenance of communications and the prevention of collisions.

⁴¹ SO 28007, para. 4.1.6. (e) para. 5.8. Montreux Document Good Practice 38.

⁴² See ILO, Guidelines for implementing the occupational safety and health provisions of the Maritime Labour Convention, 2006, International Labour Office, Sectoral Policies Department and International Labour Standards Department, Geneva, ILO, 2015.

5

TERMS OF AUTHORIZATION⁴³

States should ensure the conduct of maritime PMSCs and their personnel is conforming with relevant national and international law, (including international humanitarian law and international human rights law). Policies regarding the authorization must include quality criteria for maritime PMSCs referred to in this guidance, including:⁴⁴

- past conduct;
- financial and economic capacity;
- extent of insurance coverage;
- personnel and property records;
- evidence of sound transport, embarkation and disembarkation of firearms;
- training;
- lawful acquisitions;
- participation in multi-stakeholder initiatives, such as the International Code of Conduct Association.⁴⁵

States should require PMSCs to maintain insurance cover for themselves, their personnel and third-party liability cover and that the terms of engagement for PMSCs do not prejudice or potentially prejudice the shipowner's insurance cover.⁴⁶

States should require shipowners to consult with their insurers prior to embarkation, as to whether the deployment of PMSCs impacts their insurance cover, particularly as it relates to armed engagements and liability insurance held by the PMSC.

PMSC should demonstrate that they hold and will uphold for the duration of the contract:

- + public and employer's liability insurance cover to an appropriate level and as required by the shipowner;
- + personal accident, medical expenses, hospitalization and repatriation insurance. insurance of their personnel to carry and use firearms on such voyages for accident, injury and damage arising from the use of firearms and liability for any claim that might arise from the carriage and/or negligent or intentional misuse of firearms. Shipowners, charterers and underwriters must assess all provisions in their charters and policies and ensure acceptable attention is paid to the questions raised.

⁴³ See Montreux Document Good Practice 40 to 42.

⁴⁴ IMO, MSC.1/Circ.1405/Rev.2; para. 4.3.4; para. 5. ISO PAS 28007, para. 4.1.- 4.4. IMO, MSC.1/Circ.1443. IMO, MSC.1/Circ.1406/Rev.2, para. 5.

⁴⁵ See the International Code of Conduct (ICoC) for Private Security Service Providers, available at icoca.ch/en/the_icoc.

⁴⁶ IMO, MSC.1/Circ.1405/Rev.2, para. 5.

States should ensure that the composition and equipment of the proposed PMSC team is discussed and approved as necessary by the shipowner contracting with the PMSC. The following factors require specific attention:⁴⁷

- + **size of the PMSC team** - The appropriate size of the team depends on several factors, such as the length of the estimated time period of the transit, the threat assessment, the specific tasks of the PMSC personnel, and the nature of the ship. This assessment should indicate the minimum number of persons that should form the security team;
- + **ship safety certificate** - the number of PMSC personnel deployed must not exceed that specified in the ship's safety certificate. In case the ship safety certificate requirements cannot be fulfilled because of additional security personnel, the flag Administration should be consulted;
- + **composition** - there must be a suitable hierarchy of the PMSC team, dependent on experience and skill. The leader of the team needs to be competent in ship vulnerability and risk assessments and be able to instruct on ship protection measures. One of the PMSC personnel should be qualified as the team medic;
- + **equipment requirements** - The length of the time period of the transit, the latest threat assessment, and the agreed upon services of the PMSC team influence the equipment requirements;
- + **firearms** - The appropriate firearms package employed is to be identified in conformity with the applicable Flag State national legislation relating to the type, carriage and use of firearms by personnel of PMSCs. Similar applicable national legislation of Coastal States and Port States - i.e. relevant states with jurisdiction during parts of the transit - also applies.

WHY IS THIS IMPORTANT?

Terms of authorization are vital as they specifically lay out the expected conduct of the PMSCs and their personnel. The terms of authorization thus support States' control mechanisms of the PMSC industry. States can revoke licenses of PMSCs violating the terms of authorization, thereby strengthening the adherence of PMSCs and their personnel to national and international law in their activities.

⁴⁷ IMO, MSC.1/Circ.1405/Rev.2, para. 5.6.

6

RULES ON THE PROVISION OF SERVICES BY PMSCS AND THEIR PERSONNEL⁴⁸

States should have in place appropriate rules so that PMSCs who operate in support of public security services do not neglect law enforcement efforts neither carry out their activities in a manner leading to conducting law enforcement selectively or in any other way eroding the security situation in the area.

States should have in place appropriate rules on the use of force and firearms by maritime PMSCs and their personnel, they should make sure the use of force by the PMSCs is⁴⁹:

- + conformant with regulations of Port and Coastal State laws regarding the storage of weapons and Security Equipment and use by personnel of PMSCs;
- + rooted in the principle of self-defense and defense of others, in cases where the PMSC is defending the crew of the vessel. This right pertains to citizens and is therefore not linked to specific activities of the PMSC. This means that PMSCs do not have any broader rights than citizens under this principle, and that the scope of action under self-defense is not limited by the assignment of the PMSC;
- + conformant with the principle that use of force in defense of vessels should only be allowed insofar as it concerns entities for which the PMSC is contracted by the owner to secure or defend (an 'unlawful attack against a protected interest'). The use of force in this situation should be governed by national law, as well as within the parameters of applicable international human rights law;
- + conformant with the use of force only being informed by legality, necessity, proportionality, precaution and accountability;
- + conformant with international humanitarian law if the use of force occurs in the context of naval warfare;
- + elaborated in a detailed and graduated response plan, employed according to a use of force continuum. This is a practical result of the proportionality principle;
- + clearly defining the roles of the shipmaster and the Team Leader of the PMSC personnel, bearing in mind that the shipmaster has ultimate control and authority on board the ship;
- + the use of force rules should clarify that any incident should be immediately reported to appropriate authorities; furthermore, the use of firearms must be reported to the Flag State. The rules on the use of force should thus include necessary reporting.

⁴⁹ DCAF - The Geneva Centre for Security Sector Governance, *Regulating the Use of Force by Private Security Providers: A Guidance Tool for States, Basic Principles and Requirements for State Regulatory Frameworks on the Use of Force by Private Security Providers*, 2019.

States should have in place appropriate rules on the possession of weapons and ammunition by maritime PMSCs and their personnel. States should consider⁵⁰:

- + Evidence on compliance with the relevant Flag, Coastal and Port State legislation and relationships governing the transport and provision of firearms, ammunition and security equipment to the point of embarkation and disembarkation or ports/places at which the vessel may call as part of its intended voyage whilst the PMSC team is on board. PMSC should be capable of proving that actual inventory carried matches all documented declarations;
 - + possession of appropriate storage containers for firearms, ammunition and security equipment at the point of transfer to the ship;
 - + development of documented standards and procedures for a complete inventory of all firearms, ammunition and security equipment available upon arrival aboard the vessel;
 - + appropriate control procedures for separate and secure onboard stowage and deployment of firearms, ammunition and security equipment;
 - + identified areas where firearms may or may not be carried, along with the weapon State (e.g. unloaded & magazine off, magazine on and safety catch on and no round chambered) and situations in which a change in that State should be confirmed;
 - + detailed instructions and guidelines for when firearms can be loaded and prepared for usage should be confirmed, trained and documented during certain periods as listed in the PMSC contract, to guarantee the highest of safety and operational capabilities for use of firearms aboard the vessel;
 - + that the inventory should be reconciled on disembarkation of all firearms and ammunition from the vessel.
-

50 BPUF, Art. 2. IMO, MSC.1/Circ.1405/Rev. 2; para. 5.12.

States should require, if consistent with vessel protection requirements and security of the assigned mission, that the personnel of the maritime PMSC is personally identifiable whenever they are carrying out activities in discharge of their responsibilities under a contract. Identification should ensure that for the security of ship's crew and passengers, the security personnel should at all times use uniforms and markings to identify their role as security personnel; such identification should be distinguishable from others on board the ship.⁵¹

WHY IS THIS IMPORTANT?

Strong rules on the use of force, the possession of weapons and force protection requirements fosters a graduated response by PMSCs in the case of threats, and therewith strengthen safeguards for the safety at sea. Such use of force guidelines can thus significantly decrease security and human rights risks, which occur when force is used.

The lawful use of force by private security providers and the limitations that should be taken into account are fundamentally different from those of law enforcement officers. Private security providers do not have any broader public security or law enforcement function and instead are solely responsible for the performance of their contract. Therefore, applying law enforcement standards by analogy to the use of force by private security providers may result in risks to human rights compliance. Specific rules and regulations to guide the actions of private security providers and ensure public oversight and accountability structures for their use of force are therefore necessary.

⁵¹ See also BPUF Art. 1. ISO/PAS 28007:2012(E); 5.5.2.

7

MONITORING COMPLIANCE AND ENSURING ACCOUNTABILITY⁵²

States should develop national monitoring and oversight capacities, including:

- + Establishing or designating an adequately resourced monitoring authority to strengthen monitoring and accountability of PMSCs.⁵³
- + Ensuring that the persons on board a ship where a PMSC operates is informed about the rules of conduct by which PMSC must abide, as well as available complaints mechanisms.
- + Investigating reports of wrongdoing.
- + Administratively regulating PMSCs in case of wrongful conduct.

To guarantee supervision of PMSCs, States should enable oversight by parliamentary committees through annual reports or notification of particular contracts to such bodies.⁵⁴

WHY IS THIS IMPORTANT?

Considering the potential for harm from PMSC activities on the high seas where Flag State oversight may be weak, it is essential that national legislation establishes accessible mechanisms to provide effective remedies to victims, preferably in a victim-centered and victim-led remedy process where rule of Law is upheld. States have an obligation to ensure, within their power, respect for relevant and applicable international human rights and international humanitarian law, including by taking appropriate measures to prevent any abuses and violations by or against personnel of PMSCs. Further, States are responsible to implement their obligations, including by taking appropriate measures to prevent, investigate and provide effective remedies in case of misconduct of PMSCs and their personnel.

There are many factors that may impede the efficiency of effective monitoring and remedial mechanisms. The willingness of national judicial systems, potentially linked to questions of transparency and corruption, as well as overly long or costly procedures can make it difficult for victims or discourage them from obtaining effective remedies. By ensuring PMSC regulatory authorities have the knowledge, capacities, and powers to effectively monitor the industry, this contributes to more effective oversight upstream. These regulations thus significantly strengthen the implementation power of regulations.

⁵² See Montreux Document Good Practices 46 to 52.

⁵³ IMO, MSC.1/Circ.1406/rev.3; para. 5.2.5. lays out for states to establish a policy, which ensures accountability for compliance with the regulations elaborated above. However, in the scope of this compilation of good practices, we did not identify similarly detailed good practices in the maritime sphere for monitoring and accountability measures, discussed in Montreux Document Good Practice 46 to 50. See also UNCLOS Art. 94 (3).

⁵⁴ See Montreux Document Good Practice 4, 29, 59.

States should cooperate with each other, given the complexity of jurisdictions in maritime contexts:⁵⁵

- + States should cooperate with other States in case of inquiries to casualties or other incident of navigation;
- + All States should cooperate in the repression of piracy on the high seas and in other places outside the jurisdiction of any State;
- + All States should cooperate in the suppression of illicit traffic in narcotic drugs and psychotropic substances engaged in by ships on the high seas contrary to international conventions;
- + States should cooperate with contracting States both to consider the impact of agreements on national laws and regulations, address issues of jurisdiction, and to investigate as well as and investigating and regulatory authorities of Contracting and Home States in matters of common concern regarding PMSCs;
- + States should provide mutual legal assistance in investigations, prosecutions and judicial proceedings related to the mitigation of piracy.

WHY IS THIS IMPORTANT?

Several factors specific to the maritime environment can hinder the capacity of a single State to regulate PMSCs. The complex maritime environment can induce a certain overlap of jurisdictions. Furthermore, national oversights can be limited, and contracting entities are often non-State actors. Flag States may also comprise little capacity to monitor PMSCs onboard of ships. These circumstances demand for the design of most suitable monitoring and evaluation systems, built on cooperation between States. For this reason, complementary oversight processes from national regulatory authorities, other States, and non-State actors will strengthen the prevention of human rights abuses. Additionally, cooperation agreements can also assist States to share relevant information related to the PMSCs' background - such as the vetting processes of a company, and relevant information on instances of past conduct of a PMSC or their personnel, or information acquired during any existing investigations and prosecutions.

55 UNCLLOS, Art. 94 (7); Art. 101 (8); Art. 105; Art. 117-119. See also UNCTAD (2014), Maritime Piracy, Part II: An Overview of the International Legal Framework and of Multilateral Cooperation to Combat Piracy.

Proposed references

RELEVANT TREATIES AND CONVENTIONS

In addition to the Geneva Conventions (specifically mentioned in the Montreux Document) and universal instruments on international human rights law, the following treaties and conventions were considered in the drafting of this Reference Document:

- + United Nations Convention on the Law of the Sea, Montego Bay (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397;
- + Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, Rome (adopted 10 March 1988, entered into force 1 March 1992) 1678 UNTS 201;
- + Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 85;
- + International Convention for the Safety of Life At Sea, London (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 3, including the International Code for the Security of Ships and of Port Facilities;
- + International Covenant on Civil and Political Rights [adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force 23 March 1976] 999 UNTS 171;
- + International Covenant on Economic, Social and Cultural Rights [adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force 3 January 1976] 993 UNTS 3.

RELEVANT DECISIONS FROM INTERNATIONAL COURTS

- + S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7) Publication: Publications of the Permanent Court of International Justice, Series A - No. 10; Collection of Judgments, A.W. Sijthoff's Publishing Company, Leyden, 1927;
- + International Tribunal for the Law of the Sea, Saiga; The M/V "Saiga" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea).

RELEVANT SECURITY COUNCIL RESOLUTIONS

All available at: www.securitycouncilreport.org/un_documents_type/security-council-resolutions/?c-type=Piracy&cbtype=piracy [Accessed 16th August 2019]

- + Resolutions on piracy in Somalia, in particular Resolution 1816 (2008) of 2nd June 2008, Resolution 1838 (2008) of 7th October 2008, Resolution 1846 (2008) of 2nd December 2008 and Resolution 1851 (2008) of 16th December 2008 - both of them renewed by successive resolutions -, Resolution 2015 (2011) of 24th October 2011;
- + Resolutions on piracy and armed robbery on the seas of the Gulf of Guinea - Resolution 2018 (2011) of 31st October 2011 and Resolution 2039 (2012) of 29th February 2012.

Other sources of information

RELEVANT SOURCES OF INFORMATION

Affi L., Elmi, A.A., Knight A.W., Mohamed S. (2016), Countering piracy through private security in the Horn of Africa: prospects and pitfalls, *Third World Quarterly*, Vol. 37 Nr. 5, p934-950;

Carbone, A. (2016), The Use of Private Maritime Security Companies in a Highly Uncertain Regulatory Environment, *ELSA Malta Law Review Edition V*. Available at: www.elsa.org.mt/wp-content/uploads/2016/04/Article-3-THE-USE-OF-PRIVATE-MARITIME-SECURITY-COMPANIES-IN-A-HIGHLY-UNCERTAIN-REGULATORY-ENVIRONMENT.pdf [Accessed 29th April, 2019];

Coito, J. (2013), Pirates vs. Private Security: Commercial Shipping, the Montreux Document, and the Battle for the Gulf of Aden, *California Law Review*, 101(1), p.173-226;

Dubner, B. and Pastorius C. (2013), On the Effectiveness of Private Security Guards on Board Merchant Ships off the Coast of Somalia - Where Is the Piracy; What Are the Legal Ramifications, *North Carolina Journal of International Law and Commercial Regulation*, 39 (4), p1029-1066;

Dutton, Y. (2010), Bringing Pirates to Justice: A Case for Including Piracy within the Jurisdiction of the International Criminal Court, *Chicago Journal of International Law*, 11(1), p197-241;

Hohenstein, J. (2007), Private security companies at sea: unseen and unregulated, International Bar Association, Maritime and Aviation Law Section, Maritime and Transportation Law Committee, Session: Piracy and Crimes at Sea including Pollution Liability. Available at: www.hklaw.com/files/Publication/01d2d9a5-b99c-4f4e-bbef-1a32f018ef7c/Presentation/PublicationAttachment/e929a6d0-8519-4053-a3e8-ceeea174d8a2/46410.PDF [Accessed 23th November 2018];

International Committee of the Red Cross - ICRC (2017), Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 2nd edition, 2017. Available at: ihl-databases.icrc.org/ihl/full/GCII-commentary [Accessed 13th August 2019];

Marin J., Mudric, M. and Mikac R. (2017), Private Maritime Security Contractors and Use of Lethal Force in Maritime Domain, *The Future of the Law of the Sea - Bridging Gaps Between National, Individual and Common Interests*, Springer Open, p191-212;

Murdoch, A. and Guilfoyle, D. (2013), Capture and disruption operations: the use of force in counter-piracy off Somalia. In D. Guilfoyle (Ed.), *Modern Piracy: Legal Challenges and Responses* (pp. 147 - 171). Cheltenham, UK: Edward Elgar Publishing;

McLaughlin, R. (1999), Coastal State Use of Force in the EEZ under the Law of The Sea Convention 1982, *University of Tasmania Law Review*, Vol. 18, No. 1, p11-21;

Mineau, M. (2010), Pirates, Blackwater and Maritime Security: The Rise of Private Navies in Response to Modern Piracy, *The Journal of International Business & Law*, 9(1), p63-78;

Petrig, A. (2016), 'Looking at the Montreux Document from a Maritime Perspective', *Maritime Safety and Security Law Journal*, 2, p1-20;

Pizor, B. (2012), Lending an 'Invisible Hand' to the Navy: Armed Guards as a Free Market Assistance to Defeating Piracy, *Case Western Reserve Journal of International Law*, 45(1), p545-578;

Priddy, A. and Casey-Maslen, S. (2012), Counter-piracy Operations by Private Maritime Security Contractors, *Journal of International Criminal Justice*, 10, p839-856;

Priddy, A. (2012), Counterpiracy under International Law, *Academic Briefing of the Geneva Academy*, No. 1;

Ryngaert, C. (2008), Litigating Abuses Committed by Private Military Companies, *The European Journal of International Law*, 19(5), p1035 - 1053;

Treves, T. (2009), Piracy, Law of the Sea, and Use of Force: Developments off the Coast of Somalia, *European Journal of International Law*, 20(2), p399-414;

United Nations Conference on Trade and Development - UNCTAD (2014), Maritime Piracy, Part II: An Overview of the International Legal Framework and of Multilateral Cooperation to Combat Piracy (report), *Studies in Transport Law and Policy*, No. 2;

Wilpon, A. (2017), Floating Armories: A Legal Grey Area in Arms Trade and the Law of the Sea, *Georgetown Journal of International Law*, 48(3), p873-894



MONTREUX
DOCUMENT
FORUM

For more information: www.montreuxdocument.org