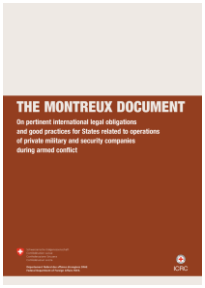


MONTREUX DOCUMENT FORUM

03.03.2016

# Second Meeting of the Montreux Document Forum (MDF)
# 29 January 2016, Geneva

---

## Chairs' Summary

### 1. Introduction

This plenary meeting was the first meeting of the Montreux Document Forum (MDF) since its Constitutional Meeting in December 2014. It sought to provide a space for an informal exchange among Montreux Document participants based on interest expressed in December 2014. The meeting was chaired by Switzerland (represented by Ambassador Jürg Lindenmann, Vice Director of the Directorate of International Law at the Swiss Federal Department of Foreign Affairs) and the International Committee of the Red Cross (ICRC, represented by Dr. Helen Durham, Director of International Law and Policy) as initial co-chairs of the MDF, in accordance with the Working Practices of the Forum that were adopted during the Constitutional Meeting.

The present summary proposed by the Co-Chairs provides a brief account of the meeting, as well as the general orientations and indications for the way forward. It is the sole responsibility of the Co-Chairs and does not purport to reflect the consensual view of participants.

The second meeting of the MDF was divided into three main parts. The first part of the meeting consisted of two reports to the plenary on relevant developments since December 2014. The first was on the work that has been undertaken by the Working Group on the International Code of Conduct Association (ICoCA Working Group) and the second on the Regional Conference on private military and security companies (PMSCs) that was held in November 2015 in Addis Ababa for States from Anglophone Africa. A second part was devoted to a thematic discussion on the use of PMSCs in maritime security. The last part of the meeting had the aim of allowing an exchange on specific aspects pertaining to the implementation of the Montreux Document and good practices.

Prior to the meeting, delegations received copies of the agenda, questions for discussion and a background paper developed by the ICRC based on the request of Montreux Document participants on the meaning of the term "applicable national law" under the Montreux Document. As stated by the Co-Chairs at the beginning of the meeting, copies of relevant documents such as the Working Practices of the MDF and summaries of past meetings are available on the bilingual website of the MDF at http://www.mdforum.ch/. During the opening of the meeting, participants welcomed Madagascar, which became the 53rd State to officially support the Montreux Document on 5 November 2015.

## 2. Report of the Chair of the Working Group on the International Code of Conduct Association

The ICoCA Working Group was established during the MDF Constitutional Meeting in December 2014 following the interest expressed by several Montreux Document participants during discussions throughout the year. According to Paragraph 12 of the Working Practices of the MDF, the mandate of the Working Group is "to provide advice to the Association on national and international policy and regulatory matters". More specifically, the Working Group may provide advice on legal obligations and good practices contained in the Montreux Document and on how they are interpreted and implemented by Montreux Document participants. The Working Group may provide advice to the ICoCA through the Chair of the Working Group, either based on a request from the ICoCA or on its own initiative.

Mr. Jonas Westerlund of Sweden (Deputy Head of Security Department at the Swedish Ministry of Foreign Affairs and Chair of the ICoCA Working Group), presented the work undertaken by the ICoCA Working Group. As the Chair reported, the Working Group met in December 2014, June 2015, and January 2016. During the second meeting of the Working Group of 2 June 2015, Montreux Document participants considered the draft "Chair's proposal on the Interaction with the ICoCA", which had been circulated by the Chair for their approval. The final document was adopted by silent procedure on 24 July 2015. It states that participation within the ICoCA Working Group is without prejudice to membership of the ICoCA and does not imply an endorsement by Montreux Document participants of the International Code of Conduct for Private Security Service Providers (ICoC).

During these meetings, participants received updates on the latest developments within the ICoCA, in particular on its work on the elaboration of certification, monitoring, reporting and complaints procedures, and engaged in an interactive dialogue with the ICoCA. Participants also shared their experiences on the status of national regulatory procedures and processes for the regulation of PMSCs.

## 3. Report by DCAF on the Regional Conference on PMSCs of November 2015 in Addis Ababa

The Geneva Centre for the Democratic Control of Armed Forces (DCAF) reported on the Regional Conference on PMSCs that was held in November 2015 in Addis Ababa for States from Anglophone Africa. Gathering 16 States from the region, the Regional Conference was attended by over 80 participants including also representatives of international and regional organizations, industry, civil society and academia. This Conference was the sixth in a series of regional conferences that have been organized, since 2011, by Switzerland and the ICRC, together with DCAF and local implementing partners, to encourage debates on the regulation of PMSCs and to promote and increase support for the Montreux Document. The five previous conferences were held in Chile, Mongolia, Australia, the Philippines and Senegal.

During the Addis Ababa Regional Conference, there was recognition that national regulation remains central to any regulatory scheme and that regional cooperation, information sharing and technical assistance on the regulation of PMSCs is instrumental for achieving better implementation at the national level. It became evident during the conference that there is significant interest in the Montreux Document in the region and that some States, which have not yet expressed their support, already use it as a reference in their relations with PMSCs. The potential role of regional organizations in the promotion of the Montreux Document was

mentioned, as well as the importance of taking into account the regional context. It was also voiced during the Regional Conference that more information and research is needed on the PMSC industry, particularly on regional and national experiences. The difficulty of creating interest and ownership in the Montreux Document among non-Montreux Document participants was raised by some as a challenge to increased support for the Montreux Document and a greater number of Montreux Document participants.

DCAF also described that follow up to the Conference is a priority for 2016. The report of the conference proceedings will be published in the first half of 2016. Additionally, further engagement and bilateral support, as well as dialogue with regional organizations will be a key focus for follow up activities.

Following the presentation, one participant asked about the possibilities to obtain support on issues related to the implementation of the Montreux Document, in particular in the form of trainings.

Other participants of the MDF Plenary asked about the needed follow-up to translate interest into endorsement of the Montreux Document, and to raise awareness of the Montreux Document in other regions of the world. It was suggested by the Co-Chairs that Montreux Document participants could continue to actively help promote further support for the Montreux Document as part of their bilateral contacts with States and international organizations who are not yet participants of the Montreux Document.

## 4. Thematic discussion on Private Maritime Security

As stated by the Co-Chairs, during the elaboration of the Montreux Document, the reliance on PMSCs in maritime security operations was just starting to become a phenomenon and was not a main focus of discussions. The issue of the pertinence and applicability of the Montreux Document to maritime security was identified as an issue of relevance during the Montreux+5 Conference held in December 2013. In the discussions leading to the establishment of the MDF, Montreux Document participants once again mentioned maritime security as an area of particular interest, and agreed to create a dedicated Working Group on the use of PMSCs in maritime security. Furthermore, during the MDF Constitutional Meeting, participants expressed an interest in discussing the relevance and possible contribution of the Montreux Document for maritime issues and to involve the International Maritime Organization (IMO) in discussions.

During the second MDF plenary, two panelists specializing in maritime security were invited to inform and stimulate an exchange among Montreux Document participants on the use of PMSCs for maritime security, on existing initiatives and/or standards to regulate their use, as well as on the possible contribution of the Montreux Document for maritime issues.[1]

The first panelist, Dr. Stuart Maslen, explained that over the past years, there has been a significant increase in the number of piracy attacks on commercial vessels, especially off the coast of Eastern Africa and Southeast Asia. He explained that, in general, counterpiracy operations and similar measures cannot be considered an armed conflict and therefore cannot be undertaken within the realm of international humanitarian law (IHL). Instead, they should be undertaken in accordance with international law enforcement standards. Mr. Maslen then

[1] The IMO was invited to participate in the MDF meeting but was not present on 29 January 2016.

focused on the issue of the use of force by PMSCs, in particular with respect to counterpiracy operations, and the international regulatory framework governing the use of force at sea.

The second panelist, Dr. Anna Petrig, discussed some of the Montreux Document's concepts as they pertain to maritime settings. Ms. Petrig considered that the notion of PMSCs as defined in the Montreux Document is pertinent for the maritime context as it is a broad definition, while specifying that the focus in the maritime context is on security services rather than on the provision of military services. In addition, although private maritime security services take place in the context of law enforcement (rather than under IHL), the Montreux Document contains statements and good practices derived from international law that remain pertinent. Furthermore, as asserted in the Document's preface (para. 5), its good practices may also be instructive for situations outside armed conflict. Therefore, she expressed the view that while the Montreux Document is mainly geared towards land-based operations, nothing precludes its application to the maritime context. She also expressed the view that the Document's three-fold structure which addresses Territorial, Contracting and Home States, is flexible enough to cover private security services provided at sea.

However, Ms. Petrig noted that the interpretation of some terms contained in the Montreux Document was potentially in need of clarification, given that the law of the sea contains specific rules pertaining to the division of competencies between various categories of States, notably between the flag State and the port/coastal State. She noted, in this regard, that flag States and coastal/port States are both Territorial States in the sense of the Montreux Document. In order to clarify the obligations of flag or coastal/port States and good practices relating to the use and possession of weapons by PMSCs and their personnel and criminal liability for offences allegedly committed by PMSC personnel, the notion of Territorial State in the Montreux Document would have to be clarified.

Participants shared their experiences on regulating maritime security and raised considerations related to the number of overlapping jurisdictions involved in maritime contexts, which is often higher compared to land-based operations. Participants also referred to the need to take into account the work undertaken by specialized international organizations which have developed a specific framework composed of international rules and standards for maritime security (notably the IMO). Participants expressed interest in examining the potential interaction and complementarity of the Montreux Document with existing maritime instruments and whether, and how, the Montreux Document could be used as an assistive tool to provide guidance in the process of regulating PMSCs operating in maritime settings.

At this time, no participants have expressed an interest in chairing the Working Group on PMSCs in maritime security; however, participants were of the view that there is room for continued exchange on this issue within the MDF. An interest was expressed to involve the IMO in further discussions. It was agreed that Switzerland and the ICRC would continue their contact with interested States to identify a suitable Chair or Co-chairs for the Working Group in order to determine the next steps.

**5. Determination of services, procedures and criteria for the selection of PMSCs/granting an authorization to PMSCs**

According to the Co-Chairs, this agenda item aimed at enabling Montreux Document participants to exchange on the implementation of the first set of good practices provided in the Montreux Document [cf. part I, II and III of the Good Practices for each type of State], i.e. the

determination of services which may or may not be outsourced to PMSCs, the procedures and criteria for the selection and contracting of PMSCs, as well as for authorizing PMSCs to provide military and security services.

On opening the discussion, the Co-Chairs recalled that the Montreux Document contains good practices on the determination of services which may or may not be outsourced to PMSCs. It recommends that States delimit these activities to ensure respect for IHL and international human rights law (IHRL) and refers to certain activities that may not be outsourced. The Document also contains good practices related to the selection, contracting and authorization of PMSCs by States. It provides guidance on the procedures that should be established by Montreux Document participants and also recommends criteria to incorporate in these procedures in order to ensure respect for national and international law by PMSCs.

Regarding the determination of services, several Montreux Document participants noted that they have enacted domestic legislation and regulatory frameworks to limit the involvement of PMSCs in combat-related activities that could cause PMSC personnel to become involved in direct participation in hostilities, as well as to prohibit services that may be connected to the commission of serious human rights violations. One Montreux Document participant mentioned that weapons producers fall under the scope of application of its national law.

Regarding the procedures for the selection of PMSCs and for granting an authorization for the provision of military and security services, several Montreux Document participants included in their legislations the requirement that all PMSCs become members of the ICoCA or signatories of the ICoC, as an instrument that can help to promote respect for IHL and IHRL as well as for national laws by companies. Montreux Document participants mentioned different criteria that they incorporated in the procedures for the selection of and granting an authorization for PMSCs in order to ensure that these respect national and international law. Notably, they mentioned provisions in their policies that take into account whether PMSC personnel undergo appropriate and adequate training. With regard to subcontracting, some Montreux Document participants mentioned that they require the primary company to ensure that the subcontracted company delivers the services in line with the constraints to which the primary company is itself subject.

It became evident during the discussions that several Montreux Document participants had either recently up-dated their national legislation and policies or were in the midst of doing so. Montreux Document participants were of the view that the exchange of experiences should continue within the MDF in order to help them to identify possible solutions to common challenges related to the implementation of the rules and good practices of the Montreux Document. In order to ensure that the MDF fulfills its function as a hub for sharing of experiences and information on the regulation of PMSCs, Montreux Document participants were encouraged to share their national legislation, regulations and directives with the Co-Chairs of the MDF for inclusion on the MDF website.

Switzerland, the ICRC and DCAF expressed their commitment to assisting States in the implementation of their international legal obligations and the rules and good practices set out in the Montreux Document. The ICRC reiterated that its Advisory Service network of legal advisers remains available to provide, upon States' request, the necessary legal and technical assistance in this regard.

## 6. The issue of third country nationals and the legal interpretation of "applicable national law" under the Montreux Document

Point six of the agenda was intended to allow a discussion on the issue of third country nationals who are employed by PMSCs to work elsewhere in the world. This issue was considered during the Constitutional Meeting of the MDF as of particular concern and relevance. In connection with this, participants recalled that the Montreux Document requires PMSCs and their personnel to observe "applicable national law", and noted that it would be important to continue reflections on these issues.

The ICRC delivered a presentation on a background paper exploring the meaning of the term "applicable national law" under the Montreux Document. This background paper was written by the ICRC upon the request of Montreux Document participants during the Constitutional Meeting of the MDF. Serving as a basis for discussions among Montreux Document participants, the background paper represents an attempt to gain an initial understanding of the meaning of "applicable national law" in the context of the Montreux Document. It submits that the term "applicable national law" includes primarily the law of the Territorial State, the law of the Home State and of the States of nationality of PMSC personnel; and/or the national law of any State that criminalizes certain international crimes based on the principle of universal jurisdiction.

Montreux Document participants generally concurred with the analysis in the background paper and considered that enforcement is an inherent and exclusive right derived from national sovereignty and restricted to a State's own territory. One participant noted that it is not aware of any regulation in international law that obliges a State to enforce the national legislation of another State which prohibits its citizens to work for PMSCs abroad. In the absence of this, some Montreux Document participants considered that further exchange of experiences on how States' resolve this issue in practice could be of interest.

## 7. Practical support: Introduction by DCAF of the Legislative Guidance tool to assist States in regulating PMSCs

Delegations received a presentation by DCAF on the development of a Legislative Guidance tool to provide practical support and assist States and international organizations in regulating PMSCs.

It was agreed that DCAF would circulate the draft of the Legislative Guidance tool to Montreux Document participants for comments by the end of March 2016. The Legislative Guidance tool could potentially be translated into languages other than English if an interest is manifested. Some Montreux Document participants expressed an interest in developing other tools that may assist them in the implementation of the Montreux Document, such as a contract template or contract guidance and that consultations with Montreux Document participants would be beneficial to better understand the most appropriate and relevant format that could speak to a global audience.

## 8. Next steps

In closing the meeting, the following next steps were outlined by the Co-Chairs:

- Prior to the meeting, Madagascar indicated its willingness to serve as a member of the Group of Friends of the Co-Chairs. Thus, the Co-Chairs will submit the membership of Madagascar to a silent procedure for election by Montreux Document participants. In order to ensure a geographically balanced representation, States from regions not yet represented within the Group of Friends are encouraged to communicate their interest to the Swiss mission in Geneva.

- With regard to the identification of a Chair for the Working Group on the use of PMSCs in maritime security, Switzerland and the ICRC will continue their contact with interested Montreux Document participants with a view to identifying a suitable Chair or Co-chairs for the Working Group for election via a silent procedure.

- Montreux Document participants interested in becoming members of the Group of Friends and/or Chairs of the Working Groups can indicate their interest to the Swiss Mission in Geneva at any stage.

- The next plenary meeting of the MDF will most likely take place in the first trimester of 2017, and *ad hoc* meetings can be held, if necessary, including via video- or teleconference. It was submitted that future plenary meetings could include sessions open to all States and international organizations on specific issues to be identified by Montreux Document participants, as well as potentially to members of civil society as appropriate.