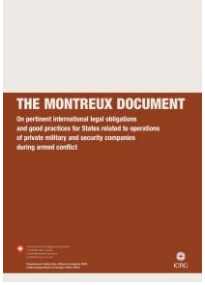

MONTREUX DOCUMENT FORUM

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

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Meeting of 12 June 2019

Chair's Summary

1. Welcome and opening remarks by the chair of the Working Group

The fourth exchange of the Maritime Working Group was attended by Montreux Document Participants, the Co-Chairs of the Montreux Document Forum, Switzerland and the ICRC, as well as the MDF Secretariat, DCAF. The meeting allowed for Montreux Document Participants to discuss the first draft of the *Reference Document – Elements for a maritime interpretation of the Montreux Document* and to learn from expert presentations situating the context of the document. The opening remarks were held by Mateus Kowalski, representing Portugal as the current Chair of the Working Group. The Chair extended a special welcome to the newest participant to the Montreux Document, Montenegro, as well as the expert speakers, Bruno Demeyere, Legal Advisor at ICRC and Anaïs Laigle, Project Officer at ICoCA.

2. Discussion on the current version of the draft of the *Reference Document - Elements for a maritime interpretation of the Montreux Document*

a) Brief presentation of the document by Mateus KOWALSKI, Director of the International Law Department, Department of Legal Affairs (Ministry of Foreign Affairs of Portugal)

Mateus Kowalski first thanked delegations for submitting responses to the *Questionnaire on the use of private contracted armed military or security personnel in maritime contexts* for the development of the Good Practices of Reference Document, and to the Secretariat of the Montreux Document Forum, for the support in compiling the Good Practices section of the Reference Document. Subsequently, the Chair proceeded to briefly characterize the structure of the Reference Document – Elements for a maritime interpretation of the Montreux Document. The structure closely follows the structure of the Montreux Document, being divided into two parts.

The first part reaffirms obligations applicable to States in the maritime context. The objective was thus to transcribe the Montreux Document Obligations into the maritime context and add new obligations particular to PMSCs in the maritime sphere. The bridge from the Montreux Document to the maritime context was

facilitated by consulting additional branches and sources of international law, particularly the international law at sea.

The second part of the Reference Document contains Good Practices. The chair explained that Good Practices of the Montreux Document applicable in the maritime context were selected and complemented by practices of maritime specific sources of international law. For the time being, the Good Practices are limited to Good Practices for Flag States, to allow for feedback from Montreux Document Participants whether the chosen approach is suitable, before possibly extending the guidelines to other States of interest, such as Coastal States and Port States.

b) Comments by invited experts:

i) Bruno DEMEYERE, Legal Advisor, ICRC

As a maritime law expert, Bruno Demeyere, had contributed to the ICRC commentary on the Second Geneva Convention, which deals with the protection of members of armed forces that are wounded, sick or ship-wrecked in case of an armed conflict at sea. Mr. Demeyere explained that his comments reflect both, International Humanitarian Law applicable at Sea and Standards pertaining to the use of Use of Force for maritime law enforcement. The expert emphasized that his remarks were open-ended and were intended to stimulate reflection and offer additional concepts.

Mr. Demeyere first addressed the applicable legal frameworks, starting with the importance of International Humanitarian Law (IHL) to the original Montreux Document. The binary distinction between situations of non-armed conflict versus armed conflict is vital, as it determines the applicable legal framework. In states of non-armed conflict, IHL is not applicable, which changes the mindset. If IHL is applicable, certain people or objects are defined as "lawful targets", meaning they can be lawfully killed, injured or destroyed, without any need to restrain the force as such. This is fundamentally different to an environment, in which IHL is not applicable. In that case, rules on the use of force are derived from Human Rights Law, and there are criteria completely different to assess the legality of any use of force. Mr. Demeyere used the example of the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials (BPUF) to the maritime environment, to further clarify difficulties of interpreting sources of international law tin the maritime context. BPUF had been drafted for law enforcement authorities on land that want to apprehend a suspected criminal to bring them to justice. In the maritime context however, a vessel often needs to be stopped before law enforcement is able to board, in order to eventually arrest individuals. Further, Mr. Demeyere underlined that even though there is case law trying to clarify the use of force in maritime contexts, i.e. the International Tribunal for the Law of the Sea, as well as a handful arbitral tribunals, a certain opacity remains, especially on the operational level. Mr. Demeyere followed that in terms of legal framework there are two main differences between the Reference Document and the MD. First, the assumption is that there is no IHL applicable, as the focus lays on security service providers that in principle are not involved in the provision of military services at sea. The second difference results from the client side. While our understanding for the land-based environment is that States constitute the main clients, in the maritime domain, private actors, such as shipping companies or transporting companies, are the main clients. This is important, as the standards for the use of force address States while private security has no inherent law enforcement authority.

Building on the discussion of the applicable legal frameworks, the next section of the presentation focused on applicable jurisdictions. Mr. Demeyere recalled that the Montreux Document, adopted 10 years ago, addresses three categories of States: Contracting, Home, and Territorial States. In the maritime sphere however, in general

(except for activities in the territorial sea or internal waters), the Territorial State will have no meaningful role to play. A Coastal State is entitled to exercise jurisdiction over certain activities, including those of vessels flagged in another state. Yet under the law of the sea, once vessels move further away from territorial seas and the exclusive economic zone of Coastal States to the high seas, gradually the authority of the Coastal State to regulate declines. In the exclusive economic zones, the authority of coastal states to regulate by large focuses on management and conversation of natural resources.

In this regard, the key role of the Flag State is of specific importance. The core principle is that on the high seas, the Flag State only has the authority and obligation to regulate activities on board of a vessel displaying its flag. In principle, therefore all the other States are called non-Flag States, with very little authority to enforce legislation on board of vessels on the high seas. Exceptions include cases of piracy, as well as actions nationals of a non-Flag State on board of a vessel. There is thus a possibility of concurrent jurisdiction between the jurisdiction of the Flag State and the jurisdiction of the national state of personnel. The legal advisor illustrated this with the example of a recent case, brought by Panama against Italy, the Norstar case where, paragraph 2.2.4. of the judgement read that "any act, which subjects activities of a foreign ship on the high seas to the jurisdiction of states other than the flag state, constitutes a breach of the freedom of navigation." This judgement might complicate efforts trying to impose certain possibilities for non-flag states to regulate activities of PMSCs. UNCLOS has one directive mechanism embedded in the whole notion of the Flag State's right and responsibility to regulate activities on board of vessels, namely art. 94, Paragraph 6. It states that a State with clear ground to believe that proper jurisdiction and control with respect to a ship has not been exercised may report this to the Flag State, and then the Flag State shall investigate the matter and if appropriate take any action to address the situation. Limiting oversight functions to flag States exclusively means that there may be insufficient corrective mechanisms involved.

A specific case occurs when a vessel enters a harbour. By definition, this needs to be consensual, including the consent of the non-Flag State to certain equipment as well as activities, and the extent to which these are used. Yet, UNCLOS Art. 27 and 28, which deal with the rights of the Coastal State to apply its jurisdiction over activities on board of vessel, declare that the application of jurisdiction is possible in criminal matters, but limited by innocent passage. In sum, there is very little to almost none scope for the Coastal State to apply its jurisdiction to violations that would have occurred on board of the vessel.

Before concluding, Bruno Demeyere mentioned it could be of interest to MDPs and the development of the Reference Document that there is been a British NGO called Human Rights at Sea, involved in a drafting exercise, the aim of which is to draft a Geneva declaration on the Human Rights at sea. There was a second drafting session in the Spring in Geneva. The next (as the first draft) draft will be published online open for comments.

To conclude, Mr. Demeyere posed the question whether the Flag States' regulatory frameworks are suitable to regulate the activities involved, given the heavy weight the law of the sea puts on Flag States. As the MD awards significant responsibilities to Contracting States, this induces challenges for the interpretation in a context in which the contracting entity is not a State, but a private actor. One idea that could be explored is the possibility for a Home State of a contracting entity to require them to enter a contract provided the service provider complies with certain standards of quality.

ii) Anaïs LAIGLE, Project Officer, International Code of Conduct Association

Anaïs Laigle first thanked the Chair for the opportunity to share ICoCA's view on the Reference Document and explained the objective of her presentation, to provide inputs from a practical point of view. Ms. Laigle

thanked the chair for the development of the document and emphasized the richness of the Good Practices. Subsequently, the ICoCA representative shared comments on different chapters of the documents.

For the introduction of the Document, Anaïs Laigle thematized the focus on proliferation of weapons and floating armories, stating that this may be too narrow. ICoCA is not sure that these issues in combination with the use of force reflect the main areas of concern in terms of human rights in private maritime security. The expert therefore suggested to either add more issues or make more generic statements about difficulties. For the definition of PMSCs contained in the document, the representative of the International Code of Conduct Association suggested to provide some examples for the excerpt of the definition that determines PMSCs shall include enterprises taking over logistical and managerial functions. This would clarify what is meant by the definition. In addition, Ms. Laigle suggested to extend the obligation for States to cooperate to the fullest possible extent in the repression of piracy with incidences of banditry.
Regarding the second part of the Document, the representative of ICoCA expressed that the section on monitoring and accountability could be expanded, specifically regarding issues such as mutual legal assistance or protection of detained seafarers. Additionally, she emphasized that even though there was a strong focus on floating armouries in the introduction, there remains a potential to further clarify the topic in the text. Finally, she noted that the document could expand further on scenarios where security services are provided by the Coastal state which sends their military/law enforcement personnel onto the ships. Further minor inputs will be provided directly to the Chair of the Working Group.

c) Discussion amongst Participants

After the expert presentations, the Chair opened up the floor for discussions. The Chair especially welcomed feedback on the document, in terms of what Good Practices and experiences would be relevant, comments on the structure of the document, as well as on more substantive issues, e.g. the capacity of Coastal States to regulate PMSCs, keeping in mind possible conflicts of jurisdiction; Good Practices for issues of monitoring and accountability mechanisms; what should be the outcome of the document.

One participant voiced that it would be helpful to get a better sense of the purpose, the goal of the Reference Document in order to know how best to structure it. The participant further voiced the personal view of inclining more towards the format of an interpretative guidance of the Montreux Document, rather than to revise or supplement the Document itself, as the latter would be quite an ambitious endeavour. Deducted therefrom, the participant stated that for the structure of the document it could make sense to first identify what States addressed in the Montreux Document are particularly relevant from a maritime perspective, and then elaborate on these according to the law of the sea. That might result in a document focusing more on Flag States, making other States less relevant. In addition, the participant mentioned that certain content of the Reference Document is only indirectly linked to the regulation of private security, e.g. provisions on the suppression of piracy or environmental obligations. Several delegations confirmed the view of the Reference Document as an interpretative guidance and agreed with the proposed process of starting with the relevant MD actors and then interpret them from a maritime context.
One participant addressed the ICRC and asked for an elaboration on the classification of armed conflicts. Bruno Demeyere explained that there are many different alternatives of classifying conflicts. In a given conflict, all actors involved are likely to have their own assessment for their own purposes. The legal expert further explained that when looking at the specifics of the maritime domain, the starting point for the ICRC is that the criteria for armed conflict ought to be the same, regardless of the domain of warfare. Independent of whether the situation is maritime, air, space, cyber, land, the ICRC applies the same assessment criteria. In the maritime domain, the overarching assumption is that conflicts are usually of international nature. The maritime context

is further different in terms of time frame. Whereas people often picture armed conflicts to last for months if not years, on the sea armed conflicts in the past at times lasted for as short as 30 minutes, e.g. if a warship shoots down a foreign military aircraft. Even though these incidents are short, IHL can apply. The fight against piracy on the other hand, for the understanding of the ICRC, is not an armed conflict, which influences the standards on the use of force. On the question whether further clarification of use of force in the maritime context would add to the reference document, the ICRC answered that since the Montreux Document does not go into detail in this regard, it might not be necessary.
A further participant voiced that it would be helpful to add sources to the obligations part of the Reference Document. The Chair concluded noting that participants approved focusing on the interpretation of the Montreux Document, rather than mirroring the Montreux Document, which was well received by the Chair, and will be included in the next draft version.

3. Any Other Business

The Chair mentioned that there is a meeting of the Contact Group on Piracy of the Coast of Somalia in Mauritius in the upcoming week, which includes the meeting of the legal subgroup "Piracy Legal Forum", co-chaired by Mauritius and Portugal. The Chair introduced the idea to present the Maritime Working Group at this occasion to raise awareness of the work done in the WG. As there was no objection, the Chair stated that he will report back to the Working Group on his presentation.

4. Conclusion and next steps

As a way forward, the Chair asked for the comments of the participants by 19th of July, so the Chair and the Secretariat can consolidate these in a new draft. The second draft shall be sent to the participants two weeks before the next meeting in September. The progress made will be presented to the plenary in a closed meeting format, and the substance of the Document discussed more thoroughly in the Working Group meeting. After the plenary, the Chair envisions to begin discussions with other actors, CSO, IOs and private actors. The Chair plans to have a third Draft in the beginning of 2020 and finalize the document to be adopted by plenary in 2020.