

## Looking at the Montreux Document from a Maritime Perspective

*Anna PETRIG<sup>1</sup>*

### **Abstract**

The Montreux Document on Private Military and Security Companies was drafted with a view to apply to land-based settings. However, one of the prime markets of the private security industry today is the protection of merchant ships from criminal threats like piracy and armed robbery at sea. This warrants a discussion on the pertinence and applicability of the Montreux Document to security services provided in the maritime environment. Accordingly, this article engages a maritime perspective, exploring the implications that the maritime context and its specificities have on the underlying assumptions and concepts of the Montreux Document – most notably the three-fold structure of addressees, which are the Territorial, Contracting and Home States – as well as on selected substantive rules. It concludes that the Montreux Document is pertinent to maritime security services, but that it needs to be interpreted specifically with regard to its effective application at sea.

### **Keywords**

Montreux Document, private security, protection of merchant ships, private military and security companies (PMSC), privately contracted armed security personnel (PCASP)

### 1. Applying an instrument geared to land-based operations at sea?

The Montreux Document on Private Military and Security Companies of 17 September 2008<sup>2</sup> is the first document of international significance setting out how international law applies to private military and security companies (PMSCs). It was the result of an initiative launched jointly by Switzerland and the International Committee of the Red Cross (ICRC). It is currently supported by 53 states and three international organizations: the European Union, the Organization for Security and Co-operation in Europe and the North Atlantic Treaty Organization.<sup>3</sup>

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<sup>1</sup> Dr. iur. Anna Petrig, LL.M. (Harvard) is a post-doctoral researcher and lecturer at the University of Basel, Switzerland. This article originated in a presentation given at the second meeting of the Montreux Document Forum (MDF <[www.mdforum.ch](http://www.mdforum.ch)> accessed 7 March 2016), which took place in Geneva on 29 January 2016. The MDF provides a venue for informal consultation among Montreux Document participants. The opinions expressed in this article are the author's alone and do not necessarily reflect those of the MDF participants. The author would like to thank the (anonymous) reviewers for the valuable comments they offered during the writing of this article.

<sup>2</sup> 'The Montreux Document on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict' (17 September 2008) <[www.icrc.org/eng/assets/files/other/icrc\\_002\\_0996.pdf](http://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf)> accessed 7 March 2016 (Montreux Document).

<sup>3</sup> For details, see Montreux Document Forum (MDF), 'Participating States and International Organisations' <[www.mdforum.ch/en/participants](http://www.mdforum.ch/en/participants)> accessed 7 March 2016.



The Montreux Document pursues a restatement of the law approach. Hence, it does not endeavour to establish new rights or obligations but rather to sketch out existing law specifically with regard to the use of PMSCs.<sup>4</sup> The document contains two parts: Part One recalls existing obligations of states under international law regarding PMSCs, while Part Two contains good practices, which provide guidance and assistance to states in ensuring respect for international law when dealing with PMSCs.<sup>5</sup> The Montreux Document is geared towards private security services provided on *land*: primarily in armed conflicts<sup>6</sup> but also in post-conflict situations and other comparable situations.<sup>7</sup> Indeed, at the time of its drafting and adoption, which took place between 2006 and 2008, the prevalence of private security in the maritime context was marginal. It was only when Somali-based piracy reached its peak that merchant vessels passing through piracy-affected areas started to rely heavily on private security services.<sup>8</sup> Today, the protection of merchant ships from criminal threats like piracy and armed robbery at sea is one of the top business sectors of the private security industry.<sup>9</sup>

This expansion in terms of the operational area of PMSCs – from primarily dry land to including the oceans – triggered a debate on the applicability and pertinence of the Montreux Document in the maritime context. It is against this background that the Montreux Document Forum agreed in 2014 to establish a working group on the use of private security companies in the maritime environment. The so-called Maritime Working Group shall serve as a forum to discuss the relevance of the Montreux Document to maritime security, the interaction with relevant international organizations and initiatives on maritime security and ways to assist states in implementing the instrument in that specific context.<sup>10</sup> At the time of writing, the Maritime Working Group had not yet started its work

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4 Montreux Document (n 2) Preface (2) and (4).

5 *ibid* Preface (2).

6 *ibid* Preface (2).

7 *ibid* Preface (5) and Part Two (Introduction).

8 It is estimated that in 2014, between 35 and 40 per cent of vessels transiting the area prone to Somali-based piracy relied on PMSCs. In the Gulf of Guinea, the number of vessels embarking international PMSC teams is lower (7.5 to 12.5 per cent) because most territorial states prohibit the use of foreign PMSC on board ships entering their territorial waters; instead, merchant ships (35 to 40 per cent) rely on local armed teams, which are made up of coastal states' naval or maritime police personnel and are regularly (in 56 to 76 per cent of the cases) supplemented by an unarmed security liaison officer from an international PMSC: Oceans Beyond Piracy, 'The State of Maritime Piracy Report 2014' (2015) 5 and 42-43 <<http://oceans-beyondpiracy.org/sites/default/files/attachments/StateofMaritimePiracy2014.pdf>> accessed 7 March 2016.

9 As of 7 March 2016, out of the 98 members of the International Code of Conduct Association (ICoCA), 51 members were operating on land, 20 members were operating in the maritime environment and 27 members pursued both maritime and land-based operations (e-mail correspondence with the Geneva Centre for the Democratic Control of Armed Forces of 7 March 2016; on file with the author). It is important to note that not all signatories to The International Code of Conduct for Private Security Service Providers (9 November 2010) <[http://icoca.ch/en/the\\_icoc](http://icoca.ch/en/the_icoc)> accessed 7 March 2016 (ICoC), which is the most important self-regulatory instrument of the industry, are members of the Association. To become a member of the Association, the signatory company must have been certified by the Association, which is a public statement that the security company's policies and systems have been independently reviewed and found to be in compliance with the ICoC (see ICoCA, 'Get Involved' <[www.icoca.ch/en/get-involved](http://www.icoca.ch/en/get-involved)> accessed 7 March 2016).

10 Montreux Document Forum (MDF), 'Working Practices of the Montreux Document Forum as adopted on 16 December 2014: Annex to the Chair's Summary of the Constitutional Meeting of the Montreux Document Forum (MDF) of 16 December 2014' (17 February 2015) 7 and 13 <[www.mdforum.ch/pdf/2014-12-16-Chairs-Summary.pdf](http://www.mdforum.ch/pdf/2014-12-16-Chairs-Summary.pdf)> accessed 7 March 2016.



as a chair had yet to be named.<sup>11</sup>

The following analysis looks at the Montreux Document from a maritime perspective, thus transposing several of its underlying assumptions and concepts to the maritime setting. This shall provide a clearer idea of the pertinence of this instrument for security services provided at sea and how it arguably needs to be interpreted, refined or clarified in order to match the specificities of the maritime context.

## 2. Focusing on security rather than military services: what are the implications?

The definition of PMSCs in the Montreux Document provides a good starting point for an analysis of the instrument's relevance for maritime security services. PMSCs are defined as 'private business entities that provide military and/or security services'. It further specifies that military and security services 'include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places'.<sup>12</sup> This definition is pertinent to the maritime context, where private armed guards protect individual (merchant) ships or convoys of ships and their crews from criminal behaviour, namely acts qualifying as piracy or armed robbery at sea.

However, for present purposes, it is important to bear in mind that the focus is on the provision of *security* rather than military services. It is about protecting (merchant) ships in areas where – due to, *inter alia*, armed conflict, a post-conflict situation or another comparable situation – security is not sufficiently ensured by the competent state(s)<sup>13</sup> and where ships rely on private persons or entities<sup>14</sup> to fill the resulting security gaps. Thus, in the maritime context, the 'M' in the abbreviation PMSCs would generally stand for *maritime* rather than for *military*; as a result, this is how the acronym is used in the paper at hand. The fact that such services are not provided in a conduct of hostilities context, but rather in situations where the law enforcement activities of the competent state(s) are insufficient to guarantee safe passage in a given maritime area, has implications on the pertinence of the different bodies of law referenced by the Montreux Document.

As regards the references in Part One of the Montreux Document recalling obligations of states under international law, they are relevant insofar as they pertain to general international law or hu-

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11 Montreux Document Forum (MDF), 'Working Groups' <<http://mdforum.ch/en/working-groups>> accessed 7 March 2016.

12 Montreux Document (n 2) Preface (9.a).

13 The definition of 'complex environment' (ie the area where PMSC services are provided) in the ICoC (n 9) Section B, quite accurately reflects the idea that PMSCs are filling a security gap left by the competent state authorities: 'Complex Environments – any areas experiencing or recovering from unrest or instability, whether due to natural disasters or armed conflicts, where the rule of law has been substantially undermined, and in which the *capacity of the state authority to handle the situation is diminished, limited, or non-existent*' (emphasis added).

14 In this article, the focus is on private security personnel *embarked* on the ship to be protected; however, it also occurs that PMSCs *escort* the ship to be protected with their own vessels.



man rights law specifically,<sup>15</sup> while the references to international humanitarian law<sup>16</sup> are, as a general rule, not pertinent to the provision of security services at sea.<sup>17</sup> The good practices contained in Part Two are not only geared towards situations of armed conflicts, they also provide, in the words of the Montreux Document, ‘useful guidance for States in their relationship with PMSCs operating outside armed conflicts.’<sup>18</sup> Hence, most good practices are – unless referring explicitly to international humanitarian law<sup>19</sup> – of great significance in the provision of private security at sea to protect ships from criminal threats.

### 3. The three-fold structure of addressees from a maritime perspective

The Montreux Document follows a three-fold structure distinguishing between obligations and good practices addressed to Contracting States, Territorial States and Home States.<sup>20</sup> This section discusses what meaning these three key concepts could have when viewed through a law of the sea lens. Thereby, it is necessary to be aware of at least two features of private security provided at sea.

First, the number of jurisdictions involved in situations where ships rely on private security is generally higher as compared to a classical land-based setting, such as the hiring of a private security company by a state to protect its embassy in a third state. As an example: a merchant ship flying the flag of Panama and owned by a Greek company contracts a PMSC incorporated in Switzerland whose personnel (nationals of different states) embarks at an Italian port. After navigating the Suez Canal, the ship passes through the territorial seas of various states, continues its journey on the high seas where the armed guards on board successfully ward off a violent act against the ship, before it enters the territorial waters of Kenya to call port at Mombasa where the armed guards are disembarked. A second feature is that not only is there more jurisdictions involved than would be in a land-based context, but there are also important non-state actors involved, notably ship-owners, ship

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15 See, eg, Montreux Document (n 2) Part One (Statements 4, 6, 7, 8, 10, 12, 15 and 17).

16 See, eg, *ibid* Part One (Statements 2, 3, 9, 13 and 14).

17 See Robin Geiss and Anna Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (OUP 2011) 131-35 on the inapplicability of international humanitarian law to counter-piracy operations off the coast of Somalia and in the Indian Ocean. These findings are, as a general rule, also valid for counter-piracy operations led or to be led in other maritime areas where piracy or armed robbery at sea occurs. See also Montreux Document (n 2) 39, stating that ‘fighting piracy is best understood as a matter of law enforcement (and not of armed conflict)’.

18 *ibid* Part Two (Introduction).

19 Most good practices do not refer to international humanitarian law in an isolated fashion but rather mention this body of law together with relevant national law and human rights law. The reference to violations of international humanitarian law in the Montreux Document (n 2) Good Practices (6.a, 32.a and 60) are nevertheless pertinent because they relate to the past conduct of PMSCs and their personnel, which is relevant for the assessment of whether to grant authorization.

20 While these three categories of states are the main addressees of the Montreux Document, it is important to note that the instrument also restates the obligations of ‘all other States’ [*ibid* Statements (18-21)]; this category notably encompasses the state of nationality of PMSC personnel. Furthermore, it sets out the obligations of PMSCs and their personnel [*ibid* Statements (22-26)].



charterers and shipmasters. The following section provides some thoughts on what these features of maritime-based security operations imply for the three-fold structure – Territorial, Contracting and Home States – on which the Montreux Document rests.

### 3.1 Implications for the concept of ‘Territorial State’

The notion of ‘Territorial State’ is defined in the Montreux Document as the state ‘on whose territory PMSCs operate’.<sup>21</sup> This definition raises various issues, which are discussed in the following.

#### 3.1.1 Territory: jurisdiction rather than a portion of land

First of all, clarification is needed as regards the word ‘territory’ in the Montreux Document’s definition of a Territorial State. The notion could, on the one hand, be understood as a geographical concept, referring to a portion of land. However, such a reading of ‘territory’ does not fit the situation where PMSCs operate on board ships: the view expressed by the Permanent Court of International Justice in the *Lotus* case in 1927 that ‘[v]essels on the high seas form part of the territory of the nation whose flag they fly’<sup>22</sup> is no longer current doctrine. Hence, ships nowadays are not considered to be floating parts of a state’s territory.<sup>23</sup> In a legal context, the word ‘territory’ could, on the other hand, also denote jurisdiction, i.e. the competence to exercise legislative, executive and judicial functions.<sup>24</sup> This seems a more appropriate interpretation in the maritime context. As Brownlie encapsulates it: ‘[a]bstract discussion as to whether ships ... are ‘territory’ lacks reality, since in a legal context the word denotes a particular sphere of legal competence and not a geographical concept.’<sup>25</sup> Hence, it is submitted that the word ‘territory’ in the definition of a Territorial State in the Montreux Document does not refer to a portion of land but must be understood as jurisdiction.<sup>26</sup> The Territorial State is thus the state under whose jurisdiction a PMSC operates.

#### 3.1.2 Who has jurisdiction: the flag, coastal or port state?

If, in the present context, territory means jurisdiction, the following question thus arises: which state has jurisdiction over a given vessel with shipboard private security? The notion of ‘Territorial State’, i.e. the state under whose jurisdiction a PMSC operates, can refer to different categories of

21 *ibid* Preface (9.d).

22 *The Case of the S.S. ‘Lotus’ (France v Turkey)* [1927] Series A No 10 PCIJ Rep 4 at 9.

23 Rainer Lagoni, ‘Merchant Ships’ (last updated January 2011) in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law: online edition* (OUP) para 42.

24 Dolliver Nelson, ‘Maritime Jurisdiction’ (last updated January 2010) in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law: online edition* (OUP) para 1.

25 Ian Brownlie, *Principles of Public International Law* (7th edn, OUP 2008) 113.

26 Montreux Document (n 2) Part One (Statement 13): ‘In situations of occupation, the obligations of Territorial States are limited to areas in which they are able to exercise effective control.’ This statement supports such a reading of the notion of ‘territory’.



states in the maritime context.

On one hand, there is the situation where the ship is travelling on the high seas – that is, in an area under no state jurisdiction.<sup>27</sup> To prevent a jurisdictional void that ‘would lead to chaos’<sup>28</sup> on the high seas, the principles of nationality of ships and the jurisdiction of the flag state over ships flying its flag have been introduced. According to the second sentence of Article 91(1) UNCLOS, ships have the nationality of the state whose flag they are entitled to fly.<sup>29</sup> Among other functions, the nationality of a ship indicates which state is permitted and obliged<sup>30</sup> under international law to exercise jurisdiction over the vessel.<sup>31</sup> Hence, when a ship protected by private armed guards is travelling on the *high seas*, the Territorial State in the sense of the Montreux Document – i.e. the state on whose territory the PMSC operates (or the state having jurisdiction over the ship on which the PMSC operates) – is the flag state, which enjoys exclusive jurisdiction subject to certain exceptions.<sup>32</sup>

While flag states have prescriptive and enforcement jurisdiction over the ship flying its flag irrespective of its location, the jurisdiction may be concurrent with that of the coastal or port state as soon as the ship enters the internal or territorial waters of a third state or calls into port there.<sup>33</sup> Hence, as

27 Douglas Guilfoyle, ‘The High Seas’ in Donald Rothwell and others (eds), *The Oxford Handbook on the Law of the Sea* (OUP 2015) 203; Doris König, ‘Flags of Ships’ (last updated April 2009) in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law: online edition* (OUP) para 1.

28 ILC, ‘Articles concerning the Law of the Sea with commentaries’ in ‘Report of the International Law Commission covering the work of its eighth session’ (23 April-4 July 1956) UN Doc A/3159 279.

29 See also the almost identically worded Art 6(2) of the 1958 Convention on the High Seas (adopted 29 April 1958, entered into force 30 September 1962) 450 UNTS 11. A few states are party to this instrument alone (eg the United States) but most are party to both it and the UNCLOS, which had 167 state parties as of February 2016. Therefore, this paper concentrates on the UNCLOS; references to the 1958 Convention on the High Seas remain incidental.

30 Art 94 United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397 (UNCLOS).

31 On flag state rights and duties, see Richard Barnes, ‘Flag States’ in Donald Rothwell and others (eds), *The Oxford Handbook on the Law of the Sea* (OUP 2015) 313-15; König (n 27) paras 16-17.

32 Barnes (n 31) 312; Guilfoyle, ‘The High Seas’ (n 27) 209, stresses that the term ‘exclusive jurisdiction’ used in Art 92(1) UNCLOS may be misleading: the flag state has exclusive *enforcement* jurisdiction (subject to exceptions based on consent, treaty law and custom) over ships on the high seas flying its flag. However, this does not prevent other states from exercising their *prescriptive* jurisdiction and to regulate the conduct of their nationals on board a foreign ship. Hence, the state of nationality of PMSC *personnel*, which falls under the category of ‘all other States’ of the Montreux Document [see (n 20)], retains the power to regulate conduct of PMSC personnel operating on board ships flying the flag of a state that is different from the state of nationality of the private security personnel. Also, the Home State, ie the state of incorporation of the *company* may have concurrent jurisdiction with the flag state; see below (3.3).

33 Barnes (n 31) 311; König (n 27) para 30. Bevan Marten, ‘Port State Jurisdiction, International Conventions, and Extraterritoriality: An Expansive Interpretation’ in Henrik Ringbom (ed), *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea* (Brill Nijhoff 2015) 112, suggests that even if – from a geographical point of view – a state exercising port state jurisdiction is also a coastal state, the two forms of jurisdiction must be discussed as separate concepts for at least three reasons. First, port state jurisdiction only relates to vessels located within the state’s territorial jurisdiction, while coastal state jurisdiction may extend to maritime zones not under territorial jurisdiction. Second, while UNCLOS governs coastal state jurisdiction in detail, the treaty is more or less silent on port state jurisdiction. Third, while port state jurisdiction is a result of a ship’s voluntary submission to the state’s jurisdiction, coastal state jurisdiction is closely associated with the concept of freedom of navigation and innocent passage.



soon as a ship with private security personnel on board enters waters under the jurisdiction of the port or coastal state, these states are also Territorial States in the meaning of the Montreux Document and can exercise jurisdiction over the ship. And this situation of concurrent jurisdiction, which is no different from jurisdictional overlaps in a land-based context, leads to the question: which state(s) – the flag, coastal and/or port state – are competent or obliged to fulfil the international obligations and good practices set forth by the Montreux Document?

### 3.1.3 The law of the sea allocates jurisdiction in various cases

The law of the sea (similar to general international law) lacks a rule stipulating that two or more national legal orders cannot apply in the same space at the same time to the same facts. However, the law of the sea contains various rules working towards the exclusion of jurisdiction in a given subject matter, which would otherwise be available.<sup>34</sup> Concretely, the law of the sea divides the waters into different maritime jurisdictional zones, such as territorial waters, the contiguous zone, the Exclusive Economic Zone and the high seas. And for each of these zones, it distributes powers between the flag, coastal and port states – a regime that carefully balances the different interests involved. States are bound to comply with these rules allocating jurisdiction.<sup>35</sup> Yet, in practice, states tend to assert maritime jurisdictional claims, which are inconsistent with the distribution of authority in the law of the sea.<sup>36</sup> Such excessive jurisdictional claims are on the rise in the realm of private shipboard security: various coastal states tend to regulate the use of PMSC on board merchant vessels passing through their territorial waters beyond what is permitted under international law.<sup>37</sup>

Notwithstanding excessive jurisdictional claims, which not only occur at sea but also on land, the law of the sea rules allocating jurisdiction to either the flag, port and/or coastal state must be taken into account when deciding which category of states the Montreux Document refers to when assigning obligations to the Territorial State or when setting out good practices for the Territorial State. This issue is illustrated in the following by using two examples.

#### 3.1.3.1 Regulating the possession and use of firearms by PMSC personnel

According to the Montreux Document, it is good practice for the Territorial State to enact rules on the possession of weapons by PMSCs and their personnel.<sup>38</sup> The question thus arises whether the flag, coastal and/or port state – all Territorial States in the eyes of the Montreux Document – have the power to regulate the mentioned issue under the law of the sea.

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34 Guilfoyle, 'The High Seas' (n 27) 210.

35 James Kraska, 'Excessive Coastal State Jurisdiction: Shipboard Armed Security Personnel' in Henrik Ringbom (ed), *Jurisdiction over Ships: Post-UNCLOS Developments in the Law of the Sea* (Brill Nijhoff 2015) 168-69: most of these rules, which are contained in the UNLCOS, entered into customary international law and thus bind all states.

36 *ibid* 167-68.

37 *ibid*; see also below (3.1.3.1).

38 Montreux Document (n 2) Good Practice (44).



As per Article 94(1) UNCLOS, every flag state is required to ‘effectively exercise its jurisdiction and control in administrative, technical and social matters.’<sup>39</sup> Since flag state jurisdiction is exclusive (subject to limited exceptions) this rather ambiguous wording must be interpreted in a broad fashion – otherwise regulatory gaps will result. Hence, the notion of ‘jurisdictions and control’ refers to all types of jurisdiction, i.e. enforcement and adjudicative jurisdiction but also prescriptive jurisdiction (to which the mentioned good practices allude).<sup>40</sup> Furthermore, the wording ‘administrative, technical and social matters’ is to be construed broadly to include any matter affecting vessel operations.<sup>41</sup> Article 94(2) and (3) UNCLOS lists – in an indicative rather than exhaustive manner<sup>42</sup> – subject matter with regard to which the flag state shall take measures to ensure safety. Among them figure ‘equipment’ and ‘manning of ships’<sup>43</sup> – arguably, regulation of the possession and use of firearms by private security personnel on board merchant ships are covered by these notions. Lastly, even though Article 94 UNCLOS, the key provision on flag state duties, is located in the part of the UNCLOS pertaining to the high seas, its application is not limited spatially. Hence, the duty to effectively exercise prescriptive jurisdiction over national ships applies regardless of the maritime area in which the vessel is located.<sup>44</sup> In light of this interpretation, the flag state is not only allowed but obliged to enact rules pertaining to the possession and use of arms on board ships flying its flag, which apply irrespective of the actual locus of the ship.

To what extent does the law of the sea allow the port or coastal state – states that, next to the flag state, qualify equally as Territorial States in the meaning of the Montreux Document – to also regulate the issue? In other words, are port or coastal states allowed or even obliged to enact rules on the possession and use of firearms as the good practices suggest for Territorial States, or are they actually prohibited from doing so? According to the law of the sea, each state, whether coastal or landlocked, enjoys the right of innocent passage through the territorial sea of a third state.<sup>45</sup> The term ‘passage’ includes traversing a territorial sea without entering internal waters or proceeding to or from internal waters.<sup>46</sup> The passage is qualified as ‘innocent’ as long as it is not prejudicial to the peace, good order or security of the coastal state.<sup>47</sup> It is assumed for present purposes that mere presence of arms or armed guards on board a private ship, as well as the use of force and firearms in self-defence, are

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39 See also Art 5(1) Convention on the High Seas.

40 Barnes (n 31) 314.

41 *ibid* 314.

42 *ibid*; this accrues from the words ‘in particular’ and ‘*inter alia*’ in Art 94(2) and (3) UNCLOS.

43 Art 94(3)(a) and (b) UNCLOS.

44 Barnes (n 31) 314.

45 Art 17 UNCLOS.

46 Art 18(1) UNCLOS; Kari Hakapää, ‘Innocent Passage’ (last updated May 2013) in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law: online edition* (OUP) para 6; Haijiang Yang, *Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea* (Springer 2006) 148-52.

47 Art 19(1) UNCLOS.





innocent activities in the meaning of Article 19 UNCLOS.<sup>48</sup> Given that innocent passage is a cornerstone of the law of sea since it ensures freedom of navigation, Article 21 UNCLOS limits the coastal state's competence to enact rules pertaining to innocent passage in two ways.

First, Article 21(2) UNCLOS prohibits the coastal state from regulating innocent passage in one aspect, which is the 'design, construction, manning or equipment of foreign ships'<sup>49</sup> unless these domestic rules are giving effect to generally accepted international rules or standards.<sup>50</sup> Such *generally accepted* regulations, however, do not exist regarding the possession and use of firearms by private security personnel on board merchant ships.<sup>51</sup> Of the four areas (design, construction, manning and equipment) where coastal states are divested of legislative power, the subject of armed security personnel on board merchant ships is arguably covered by the notion of 'manning of ships'. The rationale behind prohibiting the coastal state from enacting rules on the manning of ships (unless they give effect to generally accepted international standards) is to 'protect the integrity of global maritime navigation'.<sup>52</sup> If every coastal state were free to enact its own manning standards, the resulting plethora of (potentially conflicting) coastal state regulations would hamper the freedom of navigation.<sup>53</sup> From this rationale follows that the prohibition to legislate mainly relates to manning standards, to which a ship cannot adjust during a voyage<sup>54</sup> and which would, *de facto*, deprive a ship of its right of innocent passage. Private armed guards can, at least theoretically, be disembarked for a certain passage and arms be stored and sealed on board the ship while passing through foreign territorial waters or even on a ship remaining on the high seas that functions as an arms depot.<sup>55</sup> Hence, having armed guards on board the ship is arguably not an unchangeable circumstance, and regulation by the coastal state is thus not excluded *per se* under Article 21(2) UNCLOS.<sup>56</sup>

We now turn to the second limitation of the coastal state's competence to regulate innocent passage. If we assume that the coastal state is not prohibited as such from regulating PMSC personnel on board foreign-flagged ships passing through its territorial sea under paragraph 2 of Article 21 UNCLOS, it can only do so with regard to the subject matter exhaustively listed in paragraph 1 of

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48 For a detailed analysis, see Anna Petrig, 'The Use of Force and Firearms by Private Maritime Security Companies against Suspected Pirates' (2013) 62(3) ICLQ 667, 679-83; Kraska (n 35) 180, reaches the same conclusion.

49 Yoshifumi Tanaka, 'Navigational Rights and Freedoms' in Donald Rothwell and others (eds), *The Oxford Handbook on the Law of the Sea* (OUP 2015) 543; König (n 27) para 37.

50 Art 21(2) UNCLOS.

51 Doris König and Tim Salomon, 'Private Sicherheitsdienste auf Handelsschiffen - Rechtliche Implikationen' (März 2011) 13 <[www.maritimesecurity.eu/fileadmin/content/news\\_events/workingpaper/PiraT\\_Arbeitspapier\\_Nr2\\_2011\\_Koenig-Salomon.pdf](http://www.maritimesecurity.eu/fileadmin/content/news_events/workingpaper/PiraT_Arbeitspapier_Nr2_2011_Koenig-Salomon.pdf)> accessed 1 February 2016.

52 Satya Nandan and Shabtai Rosenne (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary - Volume II: Articles 1 to 85; Annexes I and II; Final Act, Annex II* (Martinus Nijhoff 1993) 201, para 21.11(f).

53 Nelson (n 24) para 11; Erwin Beckert and Gerhard Breuer, *Öffentliches Seerecht* (de Gruyter 1991) 116, para 313.

54 König and Salomon (n 51) 13; König (n 27) para 37.

55 On so-called floating armouries, see Petrig, 'The Use of Force and Firearms by Private Maritime Security Companies against Suspected Pirates' (n 48) 686-87.

56 König and Salomon (n 51) 13.



the provision and its regulation must be in conformity with the UNCLOS and other rules of international law.<sup>57</sup> While several subject matters listed in Article 21(2) UNCLOS clearly do not pertain to the issue of armed guards on board merchant ships,<sup>58</sup> the ‘safety of navigation and the regulation of maritime traffic’<sup>59</sup> and ‘the prevention of infringements of the customs ... laws and regulations of the coastal State’<sup>60</sup> seem potentially relevant. The use of armed guards arguably does not fall within the ambit of ‘safety of navigation and regulation of maritime traffic’. The term ‘safety of navigation’, which also appears in other provisions of the UNCLOS,<sup>61</sup> refers, *inter alia*, to the construction, equipment, labour conditions and seaworthiness of the ships<sup>62</sup> and thus hardly relates to PMSC personnel on board merchant vessels.<sup>63</sup> The coastal state further possesses the competence to legislate regarding innocent passage and ‘the prevention of infringement of the customs ... laws and regulations of the coastal State.’<sup>64</sup> Legislation ensuring that arms on board private ships passing through territorial waters are in line with customs laws and regulations thus seems to be allowed.<sup>65</sup>

In sum, the law of the sea sets narrow boundaries on the power of a coastal state to enact rules relating to the possession of arms on board merchant ships passing through its territorial waters – arguably, the competence is limited to issuing rules pertaining to customs matters.<sup>66</sup> Hence, while a flag state is *obliged* under the law of the sea to enact rules on the possession and use of arms by private security personnel embarked on ships flying its flag (as Good Practice 44 of the Montreux Document suggests), a coastal state is *not permitted* to regulate these issues generally and broadly, but only with regard to customs matters. Meanwhile, the law of the sea does not contain a limitation on prescriptive jurisdiction similar to Article 21 UNCLOS for port states. And this is not an oversight but rather reflective of the fact that a port state should have a lot of leeway on how to regulate vessels visiting its

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57 See the introductory sentence of Art 21(1) UNCLOS.

58 Art 21(1)(b)-(g) UNCLOS; they are therefore not considered in any more detail in the following.

59 Art 21(1)(a) UNCLOS.

60 Art 21(1)(h) UNCLOS.

61 See Arts 22(1)(a), 39(3)(a), 42(1)(a), 60(3) and 225 UNCLOS.

62 See, eg, Art 34 of the ILC’s Articles Concerning the Law of the Sea and the related commentary, which deals with ‘safety of navigation’ and provides an idea on how the term is understood: ILC (n 28) 280.

63 Reaching the same conclusion: König and Salomon (n 51) 13.

64 Art 21(1)(h) UNCLOS.

65 This finding pertains to *prescriptive* jurisdiction only; another issue is the *enforcement* of customs rules. While enforcement jurisdiction over vessels bound for or leaving a port [on port state jurisdiction and customs matters, see Erik Molenaar, ‘Port State Jurisdiction’ (last updated April 2014) in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law: online edition* (OUP) para 1] seems rather uncontested, its existence is disputed as regards vessels simply transiting territorial waters or located in the contiguous zone [see, eg, Talia Einhorn, ‘Customs Law, International’ (last updated June 2014) in Rüdiger Wolfrum (ed), *Max Planck Encyclopedia of Public International Law: online edition* (OUP) para 12, affirming enforcement jurisdiction in these zones].

66 This finding contrasts with the practice of various coastal states to broadly regulate the use of arms and armed guards on board merchant ships – even though the law of the sea suggests the power to legislate to be much more limited: see Petrig, ‘The Use of Force and Firearms by Private Maritime Security Companies against Suspected Pirates’ (n 48) 685-86.



ports. Such legislation does not hamper the right to innocent passage.<sup>67</sup> In sum, this division of competencies between flag, port and coastal states anchored in the law of the sea would have to be taken into account when discussing the applicability of the Montreux Document in the maritime context.

### 3.1.3.2 Ensuring criminal accountability for offences committed by PMSC personnel

A second example suggesting that the concept of ‘Territorial State’ has to be refined for the maritime context – i.e. that a differentiation between obligations and good practices of the flag, coastal and port states is necessary – provides the issue of ensuring criminal accountability for offences committed by a PMSC or its personnel.

Good Practice 49 of the Montreux Document recommends that Territorial States ‘provide for criminal jurisdiction in their national legislation over crimes under international law and their national law committed by PMSCs and their personnel’. Furthermore, Territorial States are under an obligation to investigate misconduct by PMSCs and their personnel<sup>68</sup> and to investigate and prosecute crimes under international law.<sup>69</sup> This leads to the question: what are the conditions under which the flag, coastal or port state is competent to establish and exercise criminal jurisdiction over offences committed by a PMSC or its personnel on board the merchant ship it is protecting? The law of the sea contains various rules aimed at resolving positive jurisdictional conflicts in the area of criminal law between the flag state and the port or coastal state. Two specific jurisdictional rules limiting the coastal and port states’ competence to enforce their criminal laws in favour of the flag state’s criminal jurisdiction deserve mention.

First, Article 27 UNCLOS limits the *coastal* state’s competence to enforce violations of its domestic criminal law.<sup>70</sup> While the coastal state has criminal jurisdiction over ships bound for or leaving its internal waters,<sup>71</sup> its criminal jurisdiction should not be exercised ‘on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship *during its passage*’.<sup>72</sup> However, the provision lists four exceptions where the coastal state can enforce its criminal law, including ‘if the consequences of the crime extend to the coastal State’<sup>73</sup> and ‘if the crime is of a kind to disturb the peace of the country

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67 Marten (n 33) 111-12.

68 Montreux Document (n 2) Part One (Statement 10).

69 *ibid* Part One (Statement 12).

70 According to König (n 27) para 37, it follows from Art 27 UNCLOS, pertaining to the criminal jurisdiction of the coastal state over foreign ships, that the coastal state’s criminal law extends to the territorial sea. The applicability of the coastal state’s (criminal) law also follows from the fact that the sovereignty of the coastal state extends, beyond its land territory and internal waters, to the territorial sea: Art 2(1) UNCLOS.

71 Douglas Guilfoyle, *Shipping Interdiction and the Law of the Sea* (CUP 2009) 11.

72 See the introductory sentence of Art 27(1) UNCLOS (emphasis added). On criminal offences committed *before* the ship entered the territorial seas, see Art 27(5) UNCLOS; there, the powers of the coastal state are even more limited: Tanaka (n 49) 544.

73 Art 27(1)(a) UNCLOS.



or the good order of the territorial sea<sup>74,75</sup> Even if the possession of arms or armed guards on board a merchant ship were a criminal offence under the coastal state's criminal law, it seems not to be one where the consequences extend to the coastal state if the ship were simply passing through its territorial sea without making a port call. Hence, the exercise of criminal enforcement jurisdiction can arguably not be based on Article 27(1)(a) UNCLOS. It seems more promising to argue that the use of armed PMSC personnel disturbs the 'good order of the territorial sea'.<sup>76</sup> It could be contended that arms on board ships passing through the territorial sea enhance the risk that other ships are harmed by mistake or intentionally. However, it is doubtful whether the mere possession of arms – as opposed to their use beyond self-defence, and assuming mere possession is an offence under the coastal state's criminal law – is already likely to disturb the good order of the coastal state.<sup>77</sup> Such a reading is in line with the finding that mere possession of arms or the presence of armed guards can hardly be considered prejudicial to the coastal state's good order under Article 19 UNCLOS, which defines innocent and non-innocent passage.<sup>78</sup> In sum, the question of whether the coastal state has jurisdiction to enforce its criminal law in cases where PMSCs or their personnel allegedly violated it during their passage can only be answered on a case-by-case basis – yet it is clear that the law of sea limits its power to do so.

As soon as a merchant ship calls at a port, it is subject to the territorial jurisdiction of the *port state*.<sup>79</sup> As a result, the port state's criminal law applies and – subject to the limitations to which we turn now – the port state is competent to enforce its law against ships lying in its ports and persons on board. Ships are considered to be pretty much self-contained entities to which a comprehensive body of law and enforcement system applies (that of the flag state) even if they are in a foreign port. Hence, port states generally only enforce their criminal law if their interests are at stake; matters solely relating to the 'internal economy' of the ship are left to the flag state to deal with so long as they do not disturb

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74 Art 27(1)(b) UNCLOS.

75 The exception of Art 27(1)(d) UNCLOS seems not relevant here, and Art 27(1)(c) UNCLOS simply reflects the general rule that the flag state can consent to the exercise of enforcement jurisdiction by another state on board the ship flying its flag. Art 97 UNCLOS, pertaining to the penal jurisdiction in matters of collision or any other incident of navigation, is not discussed here; the fact patterns covered by the provision (collision and incidents of navigation) will generally not be fulfilled by the criminal behaviour of PMSCs and/or their personnel. The application of that provision was discussed in relation to the *Enrica Lexie* case, where two Italian marines, who were part of a Vessel Protection Detachment protecting a merchant ship, mistakenly killed two Indian fishermen. Causing death by deliberately discharging a firearm from one vessel into another was not considered to be an 'incident of navigation' by India: Guilfoyle, 'The High Seas' (n 27) 219; Hari Sankar, 'Jurisdictional and Immunity Issues in the Story of Enrica Lexie: A Case of Shoot & Scoot turns around!' [2013] EJIL: Talk! <[www.ejiltalk.org/jurisdictional-and-immunity-issues-in-the-story-of-enrica-lexie-a-case-of-shoot-scoot-turns-around/](http://www.ejiltalk.org/jurisdictional-and-immunity-issues-in-the-story-of-enrica-lexie-a-case-of-shoot-scoot-turns-around/)> accessed 7 March 2016.

76 Art 27(1)(b) UNCLOS.

77 König and Salomon (n 51) 14.

78 Petrig, 'The Use of Force and Firearms by Private Maritime Security Companies against Suspected Pirates' (n 48) 679-83.

79 König (n 27) para 31.



the peace, security or good order of the port.<sup>80</sup> States have different views on the ‘internal economy of the ship’ as opposed to an ‘activity that affects the interests of the port State’ and thus different enforcement policies, which may evolve over time.<sup>81</sup> Certainly, the use of firearms by private guards beyond the rails of the ship or from the ship against external targets would be subject to port jurisdiction.<sup>82</sup> It could even be argued that the mere presence of armed guards on board merchant ships in contravention of port state legislation is not an ‘internal affair’ for the ship. The port state has a considerable and legitimate interest to minimize risks at its ports, which is enhanced by the fact that foreign-flagged ships have arms and security-related materials on board.<sup>83</sup> This may especially hold true in small ports where the firepower of PMSCs is potentially superior to that of local law enforcement authorities. Furthermore, the potential violation of import regulations through the transportation of weapons into the territory of the port state<sup>84</sup> or the violation of its customs laws<sup>85</sup> may affect the interests of that state and thus justify the enforcement of its criminal law. For many centuries, port state jurisdiction was mainly exercised in the areas of immigration, sanitation, customs and national security. However, it has gained in recognition ‘as a remedy for the failure of flag states to exercise effective jurisdiction and control over their ships.’<sup>86</sup> Against the background that many flag states have not yet comprehensively regulated the use of PMSC personnel and the possession of arms on board merchant ships or do not effectively enforce such regulations, port states may take it upon themselves to fill this jurisdictional gap. Thus, in the future, port state jurisdiction could play an incrementally important role in this field.

To conclude, the law of the sea sets various limits on the competence of coastal and port states to enforce violations of their respective criminal law in favour of the flag state. In the meantime, the Montreux Document rests on the assumption that the Territorial State (understood as the state on whose land territory the PMSC operates) has full-fledged criminal enforcement jurisdiction over offences allegedly committed within its land borders. Hence, clarification is necessary as regards the Territorial State’s obligations and good practices under the Montreux Document, which pertain to ensuring criminal accountability.

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80 Marten (n 33) 115-17; Barnes (n 31) 311-12. See König (n 27) para 33, and Molenaar, ‘Port State Jurisdiction’ (n 65) para 12, on the doctrinal dispute of whether port states do not extend their criminal enforcement jurisdiction over ‘internal affairs’ over the vessel by comity or whether customary international law requires them to refrain from exercising their jurisdiction; despite differing views, state practice is quite consistent and coastal states generally regard internal affairs of the ship to fall within the competence of the flag state.

81 Molenaar, ‘Port State Jurisdiction’ (n 65) para 12.

82 König and Salomon (n 51) 17; Michael Mineau, ‘Pirates, Blackwater and Maritime Security: The Rise of Private Navies in Response to Modern Piracy’ [2010] *The Journal of International Business & Law* 63, 75.

83 König and Salomon (n 51) 17-18.

84 *ibid.*

85 The ports of a state are – similar to land borders – points of entry for goods and thus the logical points for customs controls; port state enforcement jurisdiction thus traditionally covers customs matters: Erik Molenaar, ‘Port and Coastal States’ in Donald Rothwell and others (eds), *The Oxford Handbook on the Law of the Sea* (OUP 2015) 282; Molenaar, ‘Port State Jurisdiction’ (n 65) para 34.

86 Molenaar, ‘Port State Jurisdiction’ (n 65) para 34.



These two examples demonstrate that the law of the sea contains various rules allocating jurisdiction between the flag, coastal and port states in specific situations where these jurisdictions compete. Hence, it seems necessary to re-read the Montreux Document's obligations and good practices addressed to the Territorial State from a law of the sea perspective and to clarify which are meant to apply to the flag, coastal and/or port state – to the extent that the law of the sea allows such a clear statement.

### 3.2 Implications for the concept of 'Contracting State'

Next to the Territorial State, the Contracting States are also addressees of the international obligations and good practices of the Montreux Document. Contracting States are defined by the instrument as 'States that directly contract for the services of PMSCs.'<sup>87</sup> Hence, the underlying assumption is that a *state* relies on the services of the PMSC. However, in the maritime setting, this is the exception rather than the rule. States and international organizations notably relied on private armed guards to protect ships delivering humanitarian aid to Somalia.<sup>88</sup> However, the standard rule is that *private* persons or entities – most notably ship-owners and sometimes ship charterers<sup>89</sup> – hire PMSCs to protect their commercial vessels. What does it imply that the contracting entity is of a private rather than public nature, i.e. is usually not a state as is the underlying assumption of the 'Contracting State' concept of the Montreux Document?

Part One of the Montreux Document restates international legal obligations of the Contracting States. Looking at the substance, they are mainly about the obligation to enact and apply rules, i.e. about prescriptive and adjudicative jurisdiction. Concretely, Contracting States are required to give effect to their international human rights obligations, notably by adopting legislative measures (e.g. criminal norms or tort law provisions) and by preventing, investigating and providing effective remedies for misconduct by PMSCs and their personnel.<sup>90</sup> Furthermore, Contracting States must investigate and prosecute (or extradite) PMSC personnel suspected of having committed an international crime.<sup>91</sup> Moreover, a Contracting State must provide reparations for violations of human rights law caused by the wrongful conduct of a PMSC or its personnel, provided such conduct is attributable to the state under customary international law pertaining to state responsibility.<sup>92</sup> These are func-

87 Montreux Document (n 2) Preface (9.c).

88 Yet the World Food Programme was escorted by EUNAVFOR Operation Atalanta, see description of the mandate in Art 1(1) of the Council Joint Action 2008/851/CFSP of 10 November 2008 on a European Union military operation to contribute to the deterrence, prevention and repression of acts of piracy and armed robbery off the Somali coast (as amended, most recently by Council Decision 2014/827/CFSP of 21 November 2014) [2008] OJ L301/33.

89 The Baltic and International Maritime Council (BIMCO) has a strong preference that the ship-owner and not the ship charterer concludes the contract with the PMSC, even if the latter arranges and pays for the services: BIMCO, 'GUARDCON - Standard Contract for the Employment of Security Guard Vessels: Explanatory Notes' 3 <[www.bimco.org/~media/Chartering/Document\\_Samples/Sundry\\_Other\\_Forms/Explanatory\\_Notes\\_GUARDCON.ashx](http://www.bimco.org/~media/Chartering/Document_Samples/Sundry_Other_Forms/Explanatory_Notes_GUARDCON.ashx)> accessed 7 March 2016.

90 Montreux Document (n 2) Part One (Statement 4).

91 *ibid* Part One (Statement 6).

92 *ibid* Part One (Statement 8).



tions that are incumbent on *states*. However, as mentioned, in the situation where PMSCs protect merchant ships, it is generally not a state contracting the services but a private entity, such as the ship-owner or the ship charterer. And private persons cannot fulfil the public functions of legislating and enforcing such legislation – in the strict sense of the terms – as the Montreux Document requires from Contracting States. Hence, for the provision of private security services in the maritime context, the concept of ‘Contracting State’ must be customized. There are essentially two (complementary) ways for doing so – each is sketched out briefly in the following and while they warrant further scrutiny, such discussion is beyond the scope of this article.

First, as regards the various international obligations restated by the Montreux Document, the notion of ‘Contracting State’ could be interpreted as meaning the state with which the private entity hiring the PMSC has a close jurisdictional link, i.e. a genuine connection based on territory or nationality<sup>93</sup> – both recognized bases under international law to confer prescriptive and adjudicative jurisdiction.<sup>94</sup> Thus, for example, it could be argued that the state of nationality of the private entity hiring the PMSC (in many cases, this will be the state where the ship-owner is incorporated, registered or where it has its principal place of management) has an obligation to criminalize certain omissions by that private entity. For example, it should criminalize the failure of the ship-owner (or other private hiring party) to diligently choose the PMSC, to prevent and inquire into abuses committed by the PMSC or its personnel and to report misconduct to the competent state authorities. By adopting such legislation, the state gives effect to its human rights obligations, as required by the Montreux Document.<sup>95</sup> Even if such a reading is considered to be an overly-expansive conception of ‘Contracting State’, the state of nationality of the ship-owner (or other private contracting entity) is seemingly still covered by the category of ‘all other States.’<sup>96</sup> And these ‘other States’ are notably also required to ‘implement their obligations under international human rights law, including by adopting such legislative and other measures as may be necessary to give effect to these obligations.’<sup>97</sup>

A second (and complementary) avenue to customize the concept of ‘Contracting State’ to suit the maritime context would be to look at it from a ‘corporate responsibility to respect human rights’<sup>98</sup> perspective, i.e. to argue that business entities contracting PMSCs are themselves bound to respect

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93 In some cases, there will be identity between this state and the flag state (on flag state duties, see above 3.1.2); in others, however, these will be two different states.

94 Cedric Ryngaert, *Jurisdiction in International Law* (OUP 2008) 42 *et seq* and 83 *et seq* (as regards criminal jurisdiction); Brownlie (n 25) 301 *et seq* and 303 *et seq*.

95 Montreux Document (n 2) Part One (Statement 4).

96 See *ibid* Part One (Statements 18-21) and (n 20).

97 *ibid* Part One (Statements 19 and 21).

98 This term is borrowed from Part II entitled ‘The corporate responsibility to respect human rights’ of the ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ annexed to the ‘Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and other Business Enterprises, John Ruggie’ (21 March 2011) UN Doc A/HRC/17/31; endorsed by the Human Rights Council, ‘Resolution 17/4 on Human Rights and Transnational Corporations and Other Business Enterprises’ (6 July 2011) UN Doc A/HRC/RES/17/4 (Guiding Principles on Business and Human Rights).



human rights. Indeed, this idea that has gained ground in recent years, especially since the endorsement of the Guiding Principles on Business and Human Rights by the Human Rights Council.<sup>99</sup> According to these principles, '[b]usiness enterprises should respect human rights', which means that 'they should avoid infringing on the human rights of others' and should 'address adverse human rights impacts with which they are involved'<sup>100</sup> – notably by taking 'adequate measures for their prevention, mitigation and, where appropriate, remediation.'<sup>101</sup> In particular, they should have policies and processes in place in order to meet their responsibility to respect human rights.<sup>102</sup> It is important to note that the responsibility of business enterprises (such as ship-owners) to respect human rights not only requires that they avoid causing or contributing to an adverse impact on human rights through their own activities, but that they also '[s]eek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationship, even if they have not contributed to those impacts.'<sup>103</sup> Hence, it encompasses the situation where a ship-owner maintains a business relationship with a PMSC conducting itself in a way that has an adverse impact on human rights. Overall, in terms of the enactment and enforcement of rules, there is considerable overlap between the obligations flowing from the concept of corporate responsibility to protect human rights (as set out in the Guiding Principles on Business and Human Rights) and the obligations of the Contracting State under the Montreux Document.<sup>104</sup> Thus, it seems worthwhile to explore the idea that the concept of 'Contracting State' under the Montreux Document could actually mean 'Contracting Business Enterprises' – at least where the contracting entity is a moral rather than natural person.<sup>105</sup> As mentioned, 'Contracting State' could also refer to the state with which the contracting private entity has a close jurisdictional link. Indeed, corporate responsibility to respect human rights does not operate at the exclusion of the state's obligations nor does it diminish these obligations.<sup>106</sup>

As regards the good practices, the Montreux Document is more flexible. In the introductory paragraph to the section on good practices for Contracting States, it is stated that '[i]n many instances, the good practices for Contracting States may also indicate good practice for other clients of PMSCs, such as international organizations, NGOs and companies'.<sup>107</sup> This covers the maritime situation where private persons and entities contract PMSCs. While some of the good practices can be fol-

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99 See *ibid* Principle 11.

100 *ibid*.

101 *ibid* Principle 11 (Commentary).

102 *ibid* Principle 15.

103 *ibid* Principle 13.

104 Needless to say, the nature of rules enacted by private entities and the enforcement of these rules differ considerably from rules enacted by state authorities and enforced by the state apparatus.

105 The Montreux Document is primarily addressed to states; however, it also restates international obligations of natural and moral persons; see, eg, Montreux Document (n 2) Part One (Statements 22 *et seq*). Hence, the second avenue proposed here on how the concept of 'Contracting State' could be interpreted in the maritime context is not outside the instrument's scope.

106 Guiding Principles on Business and Human Rights (n 98) Principle 11 (Commentary).

107 Montreux Document (n 2) 16.





lowed by private entities without further ado,<sup>108</sup> others must arguably be customized if applied to a private entity, such as the ship-owner.<sup>109</sup> Thereby, the idea that both states *and* business entities have certain obligations under human rights law should be the starting point of any reading of the good practices.

### 3.3 Implications for the concept of 'Home State'

As mentioned, the Montreux Document addresses three categories of states: in addition to the Territorial and Contracting States, there are also Home States. They are defined as the 'States of nationality of a PMSC, i.e. where a PMSC is registered or incorporated'. And if 'the State where the PMSC is incorporated is not the one where it has its principal place of management, then the State where the PMSC has its principal place of management' is considered to be the Home State.<sup>110</sup>

The concept of 'Home State' can, *prima facie*, be transposed to the maritime context without further ado. No different from the land-based context, the jurisdiction of the Home State may be concurrent with that of the Territorial State, i.e. the flag, port or coastal state. It is well-accepted that despite being termed 'exclusive', flag state jurisdiction does not operate at the exclusion of all other assertions of jurisdiction. Thus, state practice suggests that the *prescriptive* jurisdiction of flag states does not prevent other states from regulating the conduct of their nationals (be they natural or moral persons) on the high seas, even when on board a foreign-flagged ship.<sup>111</sup> Hence, Home States in the eyes of the Montreux Document have to regulate PMSCs incorporated under their jurisdiction.<sup>112</sup> However, on the high seas, the flag state has (subject to a limited set of exceptions based on consent, treaty law and custom) exclusive *enforcement* jurisdiction over ships flying its flag. This complicates, for example, investigative measures, such as fact finding, for the Home State. However, this is no different to land-based settings where PMSCs incorporated in one state operate in another state with exclusive enforcement jurisdiction on its land territory.<sup>113</sup>

To conclude, the three-fold structure of addressees under the Montreux Document – Territorial, Contracting and Home States – seems to be flexible enough to also cover security services provided at sea. However, the concepts of 'Territorial State' and 'Contracting State' need to be interpreted from

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108 Eg those relating to the criteria for the selection of PMSCs: *ibid* Part Two (Good Practices 5 *et seq.*).

109 Eg those relating to monitoring and ensuring accountability: *ibid* Part Two (Good Practices 19 *et seq.*).

110 Montreux Document (n 2) Preface (9e).

111 Guilfoyle, 'The High Seas' (n 27) 209; see also (n 32).

112 In this vein, Switzerland adopted the Federal Act on Private Security Services Provided Abroad on 27 September 2013, which entered into force on 1 September 2015 (Classified Compilation of Swiss Law, No 935.41); an unofficial English translation of the Act is available on the website of the Swiss Government, <[www.admin.ch/opc/en/classified-compilation/20122320/index.html](http://www.admin.ch/opc/en/classified-compilation/20122320/index.html)> accessed 5 February 2016. As regards PMSC *personnel*, the jurisdiction of the state of nationality of PMSC personnel (which falls within the category of 'other States' of the Montreux Document) has concurrent jurisdiction with the flag state.

113 Anna Petrig, 'Private Sicherheitsunternehmen: Die Schweiz verleiht dem Internationalen Verhaltenskodex grössere Durchsetzbarkeit auf nationaler und internationaler Ebene' Jusletter of 20 January 2014, 7.



a maritime perspective specifically, which will eventually result in subcategories, such as the flag, port and coastal states. Such a 'maritime interpretation' of the Montreux Document needs to take into account the rules of the law of the sea, which allocate competencies between different jurisdictions, most notably the flag, coastal and port states.

#### 4. Conclusion

The Montreux Document was clearly drafted with a view to apply to private security services provided on dry land. However, this does not imply that it is unsuitable for situations where private security personnel protect ships. It is for exactly this reason that the commentary section of the Montreux Document states that even though the instrument was written primarily with a view to apply in armed conflict environments, 'it is also meant to provide practical guidance in other contexts.'<sup>114</sup> Yet, in order to be fully effective, it seems necessary to analyse and discuss the specificities of the maritime context and their implications for the reading of the Montreux Document. But is such an interpretative exercise opportune in light of the proliferation of soft and hard law<sup>115</sup> regulating the use of (armed) security personnel on board merchant ships?<sup>116</sup> Does the Montreux Document add something extra or novel to current discussion and regulation?

Numerous reasons exist for suggesting that a maritime-specific interpretation of the Montreux Document is useful. First of all, the authority of the existing legal instruments on private security at sea varies considerably. The Montreux Document certainly features among the instruments boasting rather high leverage and influence, notably due to its development and adoption in an intergovernmental context and the restatement of the law approach that it follows.<sup>117</sup> Furthermore, the Montreux Document is of general applicability and not tailored to a specific criminal phenomenon occurring in a given geographical area. In contrast, the four sets of guidance issued by the International Maritime Organization cover the use of privately contracted armed security personnel on board ships

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114 Montreux Document (n 2) 39.

115 For an overview on soft law instruments specifically applying to private security services at sea, see Petrig, 'The Use of Force and Firearms by Private Maritime Security Companies against Suspected Pirates' (n 48) 672-74. As regards hard law, many flag states have recently adopted legislation on the use of PMSCs on board ships, including Germany, Belgium, Greece, Italy and France (on the latter, see article by Philippe Grimaud, 'Pirates, but not of the Caribbean: the French Private Ship Protection Act', in this issue).

116 Some participants to the Montreux+5 Conference (which took place in 2013 on the occasion of the fifth anniversary of the Montreux Document and gathered representatives of over 60 states, members of international organizations, academia, civil society and private companies) opined that 'standards developed in other fora – in particular the IMO contact group – sufficiently address the issue' of private security services provided in the maritime sector: Montreux +5 Conference, 'Chair's Conclusions' (Geneva, 13 December 2013) 2 <[www.mdforum.ch/pdf/2013-12-13-Montreux-5-Conference-Chairs-Conclusions\\_en.pdf](http://www.mdforum.ch/pdf/2013-12-13-Montreux-5-Conference-Chairs-Conclusions_en.pdf)> accessed 7 March 2016.

117 See text belonging to (n 3).



passing through the so-called 'High Risk Area', i.e. the area where Somali-based pirates are active.<sup>118</sup> Having generally applicable guidance for the provision of private security – on dry land and at sea and to protect against any (criminal) threat – seems necessary given the fact that it is virtually impossible to foresee the future markets of PMSCs. The Montreux Document – with the necessary clarification as to its applicability in the maritime environment in general – appears to be a suitable instrument to take a prospective rather than reactive regulatory approach.<sup>119</sup> What is more, the Montreux Document covers subject matter that is not regulated to the same extent by other guidance.<sup>120</sup> More importantly, it clearly takes a human rights-based approach – few legal instruments reference human rights obligations so explicitly and prominently.<sup>121</sup>

What seems necessary is a thorough analysis of the various existing instruments, identifying their scopes of application and subject matter covered. Such an assessment will allow for better identification and consideration of the intersections in terms of scope and substance between the Montreux Document and other legal instruments. In cases of overlap, some level of coordination seems advisable, such as by referring to or borrowing rules from other instruments, provided these rules reflect existing international law and fit into the restatement of the law approach followed by the Montreux Document. Such coordination prevents further fragmentation of the rules governing private security and contributes to a degree of consolidation of the law in the area, which is necessary in light of the perspective of those tasked with applying the rules, be they state authorities or private persons.

Last but not least, there are many unanswered questions as to how the law of the sea actually informs the use of PMSCs and armed personnel on board ships. Discussing the pertinence of the Montreux Document to the maritime context, and the implications this specific operational context has on its underlying assumptions, concepts and rules, certainly contributes to further clarification of existing international law and how it applies to activities of PMSCs – *nota bene* one of the aims pursued by the Montreux Document process.

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118 IMO, 'Revised Interim Guidance to Shipowners, Ship Operators, and Shipmasters on the Use of Privately Contracted Armed Security Personnel On Board Ships in the High Risk Area' (25 May 2012) IMO Doc SC.1/Circ.1405/Rev.2; IMO, 'Revised Interim Recommendations for Flag States Regarding the Use of Privately Contracted Armed Security Personnel On Board Ships in the High Risk Area' (12 June 2015) IMO Doc MSC.1/Circ.1406/Rev.3; IMO, 'Revised Interim Recommendations for Port and Coastal States Regarding the Use of Privately Contracted Armed Security Personnel On Board Ships in the High Risk Area' (25 May 2012) SC.1/Circ.1408/Rev.1; IMO 'Interim Guidance to Private Maritime and Security Companies Providing Privately Contracted Armed Security Personnel On Board Ships in the High Risk Area' (25 May 2012) IMO Doc MSC.1/Circ.1443.

119 See Sarah Percy, 'Regulating the Private Security Industry: A Story of Regulating the Last War' (2012) 94 IRRC 941, on the need for a prospective rather than reactive regulatory approach.

120 Thus, eg, the issue of ensuring criminal accountability is not addressed in the June 2015 'Revised Interim Recommendations for Flag States Regarding the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area' (n 117) while it is in the Montreux Document, see above (3.1.3.2).

121 See David Hammond and Anna Petrig, 'Independent International Guidance on Deprivation of Liberty at Sea by Shipmasters, Crew and/or Privately Contracted Armed Security Personnel' (2015) <[www.marsafenet.org/marsafenet/wp-content/uploads/2015/06/Marsafenet-HRAS\\_DoL-International-Guidance.pdf](http://www.marsafenet.org/marsafenet/wp-content/uploads/2015/06/Marsafenet-HRAS_DoL-International-Guidance.pdf)> accessed 7 March 2016, which takes a clear human rights-based approach and covers the issue of deprivation of liberty by PMSC personnel on which other soft law guidance is generally mute.

