XXXV ROUND TABLE ON CURRENT ISSUES OF INTERNATIONAL HUMANITARIAN LAW

"PRIVATE MILITARY AND SECURITY COMPANIES"

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Regulating and Monitoring the Privatization of Maritime Security

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I have dealt with the problem of PMSCs (Private Military and Security Companies) in the essay published in the book on PMSCs edited by myself and Francioni[1]

The main findings were as follows:

- After the 1856 Paris Declaration on the abolition of privateering, the control of violence at sea is in the hands of States;
- Both the 1958 Geneva Convention on the High Seas and the UN Convention on the Law of the Sea (UNCLOS) entrust the function of policing the seas to warships and to other government vessels licensed to perform such services. The conventional provisions are regarded as declaratory of customary international law;

[1] Natalino Ronzitti, " The Use of Private Contractors in the Fight against Piracy: Policy Options", in Natalino Ronzitti, Francesco Francioni , eds, *War by Contract, Human Rights, Humanitarian Law, and Private Contractors*, Oxford, OUP, 2011, 37-51.

- International law prohibits arming private vessels for pirate-hunting. To do so, a private ship should be converted into a warship according to the requirements established by Hague Convention No. VII of 1907. However, in this case, a fully commissioned officer should be in command and the crew should be under military discipline;
- The above provisions regard the law of armed conflict at sea, including the law of neutrality;
- However, the monopoly of force by States in counter-piracy operations has been reaffirmed both by the Geneva Convention on the High Seas and by UNCLOS:
- There are no specific prohibitions against the use of security guards for protecting private shipping and using force in self-defence;
- This affirmation, which opens the way for employing PMSCs against pirates, should be reconciled with the law of the sea and the possibility for PMSCs to be on board private ships in territorial waters, when the ship is innocent passage through the territorial sea, or international straits and on the high seas. An additional question is whether it is possible to dispatch an escorting vessel with PMSCs on board in order to protect transiting private shipping.
- I answered those questions in this way in the essay previously referred to :
  a) A merchant ship with armed team on board is entitled to traverse foreign territorial waters and the presence of the armed team does not constitute an infringement of the rules on innocent passage;

b) The same is true (and even more so) for transit passage through an international strait;
c) PMSCs are forbidden to arm vessels for pirate-hunting. However, they are permitted to arm a vessel for escorting merchant shipping. If attacked by pirates, they are entitled to react;
d) The rationale for using force is the law of self-defence.

I was asked by our Chairman to focus in my presentation on Human Rights and on the necessity to draft an instrument for maritime PMSCs along the model of the Montreux Code of Conduct.

UNCLOS establishes a duty of co-operation in fighting piracy on the high seas and States are the holders of rights and obligations (Article 100). The provisions on the right of visit contain duties in case of unjustified stopping of a vessel suspected of piracy. Provisions are dictated for the right to punish pirates and for the restitution of property to lawful owners. Human rights are not mentioned in UNCLOS. However, the relevant instruments apply. As far as the European Convention on Human Rights is concerned, warships flying a flag of a State party should abide by its provisions on the high seas and also in foreign territorial waters whenever entry is permitted by the coastal State, in order to fight armed robbery at sea. International humanitarian law is to be applied should warships and armed teams take action on land as, for instance, envisaged by paragraph 6 of the UN Security Council Resolution 1851 (2008).

Human rights problems might arise for the temporary custody of captured pirates on board the warship and if

they are transferred to a foreign coastal State tribunal in order to be punished.

Have the above provisions any impact on PMSCs? I see two points.

The first is the exercise of the right of self-defence if a private ship is attacked. This right should be contained within the limit of necessity and proportionality. It is thus a human right problem and has to be examined in connection with the right to life and the prohibition of inhuman and degrading treatment. Moreover, if a PMSCs team captures the assailant pirates when resisting a piratical assault, the question of handing over captured pirates to a warship or a coastal State arises, as well as the issue of the temporary custody of pirates.

The second point is connected with action on land aimed at destroying piratical sanctuaries. As already mentioned, there is a problem of observance of international humanitarian law (IHL) if PMSCs are employed by the intervening State.

In principle the Djibouti code of conduct, which is an instrument of soft law, does not deal with PMSCs, but only with the States of the Region (Indian Ocean and Gulf of Aden)[2]. Article 6, paragraph 1, addresses law enforcement or other authorized officials from warships/military aircraft leaving no room for PMSCs. Paragraph 2 of the same Article, however, takes into consideration the cooperation with States and "other stakeholders" and may be interpreted as containing an opening for PMSCs.

[2] Code of Conduct Concerning the Repression of Piracy and Armed Robbery against Ships in the Western Indian Ocean and the Gulf of Aden, 29 January 2009 (Djibouti).

The 1988 SUA Convention (Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation) and its Additional Protocol on Fixed Platforms were made for coping with maritime terrorism and having the *Achille Lauro* hijacking in mind. As can be inferred by the Preamble, the SUA Convention does not deal with piracy but rather with acts of terrorism, which differ from piracy in several respects. For instance, the requirement of two ships, which is an ingredient of piracy, is often lacking when an act of terrorism is committed and terrorism is motivated by political ends and not by *animus furandi* as piratical acts. Be that as it may a number of Security Council resolutions against piracy take note of the SUA in order to recommend the application of the criminal legislations adopted by State parties to implement that Convention and to strengthen the duty of cooperation against piracy[3].

There is no international convention regulating PMSCs. There is an instrument of soft law, i.e. the Montreux Code of Conduct, which addresses this important issue. The Montreux document is not tailored for the employment of PMSCs at sea[4]. The same is true for the International Code of Conduct for Security Companies (ICoC) adopted on 9 November 2010 under the auspices of the Swiss government, even though a broad reading of this document may lead to a different conclusion. The draft convention on PMSCs currently being negotiated within the Human Rights Council does not seem to be an

[3] See for instance S/Res/ 2020 (2011).

[4] Montreux Document on Pertinent International Obligations and Good Practices for States Related to Operations of Private Military and Security Companies during Armed Conflict, Montreux, 17 September 2009.

instrument applicable to PMSCs providing security services at sea.

The use of armed personnel on board private shipping to fight piracy is gaining currency among shipping companies. Some flags employ private guards, other employ military personnel. Spain only allows private guards, while France trawlers stationed in the Seychelles have military people (*fusilliers de marine*) on board. The Italian law allows both: the use of military teams and private guards (*guardie giurate*)[5].

At the beginning, the International Maritime Organization (IMO) was against the employment of armed personnel on board ships and was of the opinion that non-lethal defences were preferable (for instance, barbed wire along the external side of the ship, powerful hydrants, water cannons, a citadel where the crew might seek refuge pending the intervention of a warship in the vicinity). The IPTA (International Parcel Tanker Association), gathering ship owners, has requested the IMO safety Committee to enact provisions concerning the employment of armed guards on board commercial shipping. The IMO has enacted two circulars, clarifying, however, that it does not officially endorse the practice of having armed personnel on board (Circulars 1405/Rev. 1, 1406/Rev. 1 and 1408, of 16 September 2011). States and ship owners are invited to set out proper rules if they deem necessary the employment of Privately Contracted Armed Security Personnel (PCASP), according to the jargon used for armed guards on board instead of the acronym PMSCs. The latest IMO Circulars

[5] See Article 5 of the Law 2 August 2011, No. 130.

are 1405 /rev. 2 (25 May 2012) and 1443 (25 May 2012). The latter enacts an "Interim Guidance to Private Maritime Security Companies Providing Privately Contracted Personnel on Board Ships in the High Risk Area". BIMCO (Baltic and International Maritime Council) has published a Model contract for the employment of security guards (Guardcon), which includes a "Guidance on the Rules for the Use of Force (RUF) by Privately Contracted Armed Security Personnel (PCASP) in Defence of a Merchant Vessel (MV)" released in 2012[6]. There is, therefore, enough material for drafting a code of conduct along the lines of the Montreux document, including a commentary and a collection of best practices. A number of issues need to be clarified such as uniform rules on self-defence, the master's responsibility, rules of engagement, stowing of weapons, status of armed guards at ports of call and custody of captured pirates during navigation and their hand over to a coastal State. The issue of self-defence deserves to be accurately assessed. We should refer to law governing police action at sea rather than to the right of self-defence as embodied in Article 51 of the UN Charter. In this connection one very important point to be clarified is whether self-defence may be resorted to only for protecting persons from attacks or also to protect property, for instance, the ship and the cargo on board. There is a need to compare domestic legislations in order to find a common approach. The use of lethal force should be avoided and should be used only as a last resort. This is said, for instance, in the BIMCO

[6] See: https:// www.bimco.org/20132/03/28_GUARDCON aspx

document that contains detailed provisions on the issue. Reference should also be made to a number of relevant instruments, including law of the sea conventions (for instance, Article 22 of the 1995 UN Fish Stocks Agreement), soft law documents (for instance, the ICoC) and the Law of the Sea Tribunal case-Law.

Another important issue is the status of military personnel embarked on private shipping. As mentioned earlier, France employs military personnel on board of fishing boats and the Italian law allows embarking both military teams and private contractors. Does military personnel enjoy functional immunity/immunity *ratione materiae* - which I would deem to be the case -, since they have law enforcement officers status (according to Italian law) and are performing a task in the interest of the international community? The issue is pending before the Supreme Court of India in connection with the incident of the *Enrica Lexie* transiting off the coast of Kerala[7]. Also the responsibility of States licensing private armed guards should be clarified. There is an obligation of due diligence incumbent on the licensing State even when the armed team is only made up of private persons who are not State organs?

Last but not least, a forum should be chosen to draft a Montreux-like document for armed guards on private shipping. Is IMO the best forum or should the lead be taken by a State (as the Swiss Government did with the

[7] Functional immunity belongs to State organs. The question might arise in connection with the determination of State organ, whose conduct is attributed to the State. Article 4 of the Draft Articles on responsibility of States for internationally wrongful acts, adopted by the International Law Commission (ILC) in 2001 and widely regarded as declaratory of customary international law, after having attributed to the State the conduct of its organs (paragraph 1), affirms in paragraph 2 that "An organ includes any person or entity which has that status in accordance with the internal law of the State". It is thus undisputed that the status of organ is determined by the internal law of the State.

Montreux document) or should this issue be debated within the United Nations?