PIRACY AND ARMED ROBBERY AGAINST SHIPS

Privately contracted armed security personnel

Submitted by Italy

### SUMMARY

**Executive summary:** This document provides the Report of the informal expert working group on guidelines for the use of privately contracted armed security personnel (PCASP) on board ships, held in Rome on 26 March and 15-16 October 2013, under the auspices of the United Nations Interregional Crime and Justice Research Institute (UNICRI).

**Strategic direction:** 6.1

**High-level action:** 6.1.1

**Planned output:** No related provisions

**Action to be taken:** Paragraph 4

**Related documents:** MSC.1/Circ.1405/Rev.2, MSC.1/Circ.1406/Rev.2, MSC.1/Circ.1408/Rev.1 and MSC.1/Circ.1443

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1. As agreed at the twelfth meeting of Working Group 2 on Legal Issues of Piracy Off the Coast of Somalia, convened in Copenhagen on 10 and 11 April 2013, the United Nations Interregional Crime and Justice Research Institute (UNICRI) with the support of the Italian Government, established an expert Working Group on the use of Privately Contracted Armed Security Personnel (PCASP), with the objective of developing a set of guidelines and standards regarding the use of PCASP on board merchant vessels, for the use of private sector companies as well as Member States.

2. Italy wishes to bring to the attention of the Committee the result of the work carried out from the informal expert Working Group convened in Rome on 26 March and 15-16 October 2013, which is presented in the annex and that would be of interest to both Member States and private actors, however nothing in the set of non-binding guidelines would affect in any way current legal obligations that States currently have pursuant to customary or conventional law.
A copy of the group's report is attached.

**Action requested of the Committee**

The Committee is requested to note the information provided.
Report of the
Informal Expert Working Group on Guidelines for the Use of Privately Contracted
Armed Security Personnel (PCASP) on Board Ships

Rome, 26 March and 15-16 October 2013
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I. Introduction and Observations

1. The informal expert-working group on the use of privately contracted armed security personnel (PCASP) convened in Rome on 26 March and 15-16 October 2013. It had before it various draft proposals regarding PCASPs. The informal working group agreed that the terminology used in the document should follow agreed language contained in applicable international instruments.

2. The informal working group noted that a number of documents adopted by the International Maritime Organization (IMO) and other entities offered considerable guidance on the issue of privately contracted armed security personnel (PCASP). These included, but are not limited to: ISO PAS 28007, IMO MSC Circulars 1405.Rev 2, 1406.Rev 2, 1408.Rev 1, and IMO Circular 1443 which minimum standards some Governments had already started to adopt.

3. The informal expert working group discussed its objectives, working method and the status of the document, which it would elaborate. The understanding was that the document would be of interest to both States and private actors. The document would however, not have the legal standing of a treaty, which are limited to agreements between States, governed by the Vienna Convention on the Law of Treaties, particularly article 2(1)(a).

4. The informal expert working group considered that nothing in the set of guidelines it would elaborate would affect in any way current legal obligations that States currently have pursuant to customary or conventional law.

5. The informal expert working group considered that the non-binding working document might serve the following purposes:

   - (i) Complement the work already initiated and address gaps in current guidelines for affected States and privately contracted armed security personnel (PCASP) and address issues, which might not yet have received serious consideration in any international body. These could include guidelines regarding the use of force, minimum standards for PCASP personnel, and duties following the use of force.

   - (ii) Provide guidance/guidelines to assist States and PCASP in ascertaining and fulfilling their obligations
- (iii) Serve as a set of guidelines for States and private parties, which would reaffirm certain legal obligations and provide a set of best practices for all parties to employ with respect to PCASP.

6. The informal expert working group noted that the use of privately contracted armed security personnel (PCASP) by ship owners due to piracy off the coast of Somalia, was of an exceptional nature. PCASP should not operate in isolation. As a general principle, PCASP should maintain appropriate links of communications with relevant law enforcement agencies and naval operators in the area where they are engaged.

7. The informal expert working group considered that international humanitarian law was not the most relevant set of principles applicable to the issues of piracy affecting the freedom of navigation. Measures to combat piracy were different from armed conflict that is subject to the law of war. It is understood that human rights should be applied.

8. Some of the members of the informal expert group considered that there might be lacunae, which may need to be addressed, concerning fixed platforms and the involvement of transnational organized crime in territorial waters. This was reflected in reported attacks on ships and fixed platforms. There was general agreement that the deliberation of the informal expert working group should focus on the repression of piracy on the high seas and not cover fixed platforms and armed robbery against ships and other crimes at sea committed in areas under the jurisdiction of the coastal State.

9. The informal expert working group considered that the guidelines would not apply to i) Military Vessel Protection Detachments (VPD) embarked under the direct responsibility of a sending State; ii) Personnel contracted by States that are State sponsored; iii) States party to an international armed conflict, iv) PCASP contracted by the owner and operator of a fixed platform on the continental shelf or within the exclusive economic zone of a coastal State and falling under the exclusive jurisdiction of the said State.

10. The members of the informal expert group on the use of privately contracted armed security personnel (PCASP) participating in their individual capacity included, Cristiano Aliperta (Admiral), Alexis Blane (Attorney), Chiara Bologna (UNICRI), Fabio Caffio (Admiral), David Hammond (Barrister-at-law), Hartmut Hesse (Former Special Representative of the Secretary General for Maritime Security and Anti-piracy Programme, IMO), Paola Imperiale (Ambassador), Jonathan Lucas (Director, UNICRI), Stefano

11. As indicated in the Chairman’s Conclusions on the Twelfth Meeting of Working Group 2 on Legal Issues of Piracy Off the Coast of Somalia (WG2), convened in Copenhagen on 10 and 11 April 2013, UNICRI had convened an informal meeting in Rome in March to develop guidelines and best practices on issues related to the use of PCASP. UNICRI would provide a report to the Working Group at its next meeting. The Chairman’s Conclusions (section ‘Remaining Issues’ paragraph 9) also noted that there was a need to “Further explore the legal issues in regard to the use of PCASPs by collecting a set of practical examples of situations involving PCASPs on board private vessels, and taking into consideration the guidelines that will be presented by UNICRI”. The informal expert-working group on the use of privately contracted armed security personnel on board ships was convened in response to this request.

12. The report of the informal expert working group on guidelines for the use of privately contracted armed security personnel (PCASP) on board ships, brought to the attention of the Working Group on Legal Issues of Piracy Off the Coast of Somalia (WG2), reflects the outcome of the two meetings held in Rome on 26 March and 15-16 October, 2013. The draft guidelines contained in the report were the outcome of deliberations involving different stakeholders with participants taking part in their individual capacity. The WG2 is invited to review this draft report and the set of guidelines, and provide guidance with regards to its further development.

Conscious of the need to ensure that the commercial employment of privately contracted armed security personnel (PCASP) on board ships is undertaken in full compliance with of the rule of law, human rights law, national and international laws and applicable policies,

Noting that the United Nations Security Council, in its Resolution 2077 (2012) indicated that it continued “to be gravely concerned by the ongoing threat that piracy and armed robbery at sea against vessels pose to the prompt, safe, and effective delivery of humanitarian aid to Somalia and the region, to the safety of seafarers and other persons, to international navigation and the safety of commercial maritime routes, and to other vulnerable ships, including fishing activities in conformity with international law, and also gravely concerned by the extended range of the piracy threat into the western Indian Ocean and adjacent sea areas and the increase in pirate capacities,”

Recalling that international law, as reflected in the 1982 United Nations Convention on the Law of the Sea, provides the legal framework, within which all activities in the ocean and seas must be carried out,

Having in mind the rule of law, the principles of human rights law including those enshrined in the United Nations Universal Declaration of Human Rights, 1948 and the International Covenant on Civil and Political Rights,

Commending the International Maritime Organization’s (IMO) Revised Interim Guidance to Ship Owners, ship operators, and Shipmasters, Flag State, Port and Coastal States, the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area (MSC. 1/Circs. 1405/Rev.2 and 1406/Rev.2 and 1408/Rev.1, as may be amended), the Draft Interim Guidance to Private Maritime Security Companies (PMSC) providing Privately
Contracted Armed Security Personnel (PCASP) aboard Vessels Transiting the High Risk Area off the East Coast of Africa (MSC.1/Circ.1443 as may be amended), and taking into consideration such documents in the elaboration of the guidelines,


Commending the work undertaken in the development of the 100 Series Rules as an international model set of maritime rules for the use of force (RUF) by privately contracted armed security personnel (PCASP) in support of private maritime security company governance,

Noting that the Security Council of the United Nations, in its Resolution 2077 (2012) expressed its appreciation for “the efforts made by the International Maritime Organization (IMO) and the shipping industry to develop and update guidance, best management practices, and recommendations to assist ships to prevent and suppress piracy attacks off the coast of Somalia, including in the Gulf of Aden, and the Indian Ocean area, and recognizing the work of the IMO, and the Contact Group on Piracy off the Coast of Somalia (CGPCS); in this regard, notes the efforts of the International Organization for Standardization (IOS), which has developed industry standards of training and certification for private maritime security companies (PMSCs) when providing privately contracted armed security personnel on board ships in high-risk areas.”

Strongly emphasizing that nothing in the present guidelines should be considered as modifying or otherwise affecting the rights and responsibilities of States and other actors under applicable international law.
1. Definitions

For the purpose of this document the following terms will have the meaning outlined in this article:

**Private maritime security companies (PMSC):** Private companies employed to provide maritime security personnel, both armed and unarmed, on board ships for protection against piracy.

**Privately contracted armed security personnel (PCASP):** armed employees of PMSC.

**Piracy:** Piracy as defined in article 101 of the United Nations Convention on the Law of the Sea, restating customary international law, consists of any of the following acts:

(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;

(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

**Pirate ship or aircraft:** Pursuant to article 103 of the United Nations Convention of the Law of the Sea, a ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in article 101. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.

**Ship:** A vessel of any type whatsoever not permanently attached to the seabed, including dynamically sup-ported craft, submersibles, or any other floating craft.
2. Guidelines for the consideration of flag State-authorizing PCASPs on board ships flying its flag

1. Flag states are responsible for implementing their obligations under human rights law including by adopting such legislative and other measures as may be necessary to give effect to these obligations.
2. Flag states should undertake to prevent violations of flag state, national and international law, including but not limited to human rights law where applicable.
3. Flag states should, within their power, ensure respect for the rule of law, human rights law, in particular to the lawful use of force in self-defence by privately contracted armed security personnel. They should in particular:
   a) Ensure that private maritime security companies authorized to provide maritime security services give adequate guarantees to the flag state to promote the training of their personnel in the implementation of applicable legislation, rules and regulations, particularly regarding the use of force;
   b) Ensure that foreign private maritime security companies authorized to provide privately contracted armed security personnel under flag state laws have links with the State of incorporation sufficient to ensure that such incorporation is not chosen in order to shield the company from its liability;
   c) Not participate, encourage or assist in, and take appropriate measures to prevent, any violation of the rule of law and human rights law in reference to the use of force by privately contracted armed security personnel;
   d) Take appropriate measures to record and report violations of human rights committed by privately contracted armed security personnel and to establish mechanisms to record and report such violations should they occur;
   e) Ensure they have in place appropriate standards in relation to lawful use of force by privately contracted armed security personnel. In so doing, States may find it appropriate to make reference to an international model set of maritime rules for the use of force.
   f) Enact proper regulations in order to ensure that the relationship between the master and the privately contracted security personnel properly reflects the relevant requirements of the International Convention for the Safety of Life at Sea (SOLAS).
4. Flag states should enact legislation necessary to provide effective sanctions for persons committing, or ordering to be committed, violations of applicable international and national law.

5. Flag states should investigate, and, as appropriate, prosecute persons suspected of having committed crimes under international law, in accordance with applicable international law.

6. Flag states should prevent any abuse or misuse of State licenses regulating the use of arms by privately contracted armed security personnel.

3. Guidelines for the consideration of coastal States

1. Coastal States are responsible to implement their obligations under universal human rights law, including by adopting such legislative and other measures as may be necessary to give effect to these obligations.

2. Coastal States are encouraged, within their power, to disseminate relevant information to all interested parties, relating to ships embarking privately contracted armed security personnel (PCASP) operating off their coast.

3. Coastal States should consider receiving a person suspected of having committed an act of piracy irrespective of the fact that the ship has privately contracted armed security personnel (PCASP) embarked on board.

4. Costal States should be aware of any obligations to either extradite, surrender or prosecute persons suspected of having committed violations of human rights that constitute criminal offences and other crimes under international law, such as torture or hostage taking, in accordance with applicable international law.

4. Guidelines for the consideration of the State of incorporation

1. States of incorporation are encouraged, within their powers, when licensing or authorizing a private maritime security company (PMSC) incorporated under their national law for the provision of privately contracted armed security personnel (PCASP) to Ship owners and operators to ensure due respect for international human rights law and the rule of law in reference to the use of force and, in particular:
a) As a minimum, encourage the use of and reference to, an agreed model set of rules for the use of force (RUF) to support compliance with human rights law, national and flag state laws regulating the use of force in self defence;
b) Encourage dissemination, as widely as possible, of relevant human rights law and relevant principles related to the legitimate use of force in self defence;
c) Take measures to prevent violations of human rights and the rule of law in reference to the use of force committed by privately contracted armed security personnel (PCASP) through all appropriate means.
d) Ensure that private maritime security companies (PMSCs) have a genuine link with the state of incorporation.

2. States of incorporation are responsible to implement their obligations under international human rights law by adopting such legislation, including, but not limited to, penal and commercial legislation, and other measures, as may be necessary, to give effect to these obligations and provide effective remedies for human right violations by private maritime companies (PMSCs) authorized to provide privately contracted armed security personnel (PCASP) to ship owners and operators and their personnel.

3. States of incorporation should be aware of any obligation to either extradite, surrender or prosecute persons suspected of having committed violations of human rights that constitute criminal offences and other crimes under international law, such as torture or hostage taking, in accordance with applicable international law.

5. Guidelines regarding jurisdiction

1. States have the right to exercise jurisdiction over the activities of privately contracted armed security personnel (PCASPs) on board ships in accordance with international law, as reflected in United Nations Convention on the Law of the Sea (UNCLOS).

2. Flag States and States of incorporation are encouraged to establish their jurisdiction in order to allow tort and contractual actions in respect of violations arising out of employment of privately contracted armed security personnel (PCASP) and private maritime security companies (PMSCs) by the ship owners, taking into account paragraph 1 above.
6. Guidelines regarding the use of force and applicable laws

1. Private maritime security companies (PMSCs), as part of their corporate responsibility, must ensure that privately contracted armed security personnel (PCASP) act lawfully at all times through established policy and procedures.

2. Privately contracted armed security personnel (PCASP) may only use force as a last resort, in self defence when all other passive defence measures have failed. Such force may include ultimately lethal force. Any use of force by PCASP must comply, principally, with applicable national laws and regulations of the flag state. Applicable national law may also include the laws and regulation of coastal, port and other States.

3. Laws applicable to the use of force must be foreseeable and accessible to privately contracted armed security personnel (PCASP) from the outset of their employment.

4. At minimum, the following principles should serve as a guide for internationally recognized maritime rules for the use of force:

   i) The right of an individual to self-defence, as recognized and provided for under applicable law, is not affected or negated by the use of the rules in any way whatsoever.

   ii) The rules do not provide any defence to any person who uses force, including lethal force, unlawfully.

   iii) Nothing in these rules shall be construed as a derogation of the master’s authority under regulationV/34-1ofthe International Convention for the Safety of Life at Sea (SOLAS).

   iv) All crafts deemed to be suspicious, should, as the circumstances allow, be identified jointly by the master, the privately contracted armed security personnel (PCASP), officers or crew as an actual threat prior to invoking the maritime rules for the use of force. This process reduces the risk of mistaken identification of otherwise innocent seafarers and their craft.

   v) The identification of and immediate actions to be taken in relation to a suspicious contact or craft may occur within a very short time frame. Speed of decision-making on identification will be essential.

   vi) During an incident, an individual’s decision to use reasonable and necessary force in self-defence as part of a graduated response, up-to-and-including the use of lethal force, is to
be made in the context of all the information available to that person at the time and according to applicable flag State, national and international law.

vii). Prior to the use of any necessary and reasonable use of force against a suspicious surface contact or craft, warnings should be given by the privately contracted armed security personnel (PCASP) using all available means, as part of a graduated response.

viii) In all situations, no more force is to be used than is reasonable and necessary, in order to deter a potential threat:

(a) Any engagement that includes the use of force must be limited in its degree, intensity and duration and commensurate to the threat posed.

(b) In all instances care should be taken to minimise damage and injury and to respect and preserve human life.

(c) Lethal force should only be used as a last resort.

(d) Lethal force may only be used if the privately contracted armed security personnel (PCASP) has a reasonable and honest belief that there is an imminent threat to his or the lives of others.

(e) No more rounds of ammunition than are necessary should be fired.

6. The private maritime security company (PMSC), in consultation with the ship owner, should ensure that both the master and team leader of the privately contracted armed security personnel (PCASP) should have signed a contractual undertaking that they understand and agree the conditions governing when and how the decision to use force is made, and by whom.

7. Guidelines regarding duties subsequent to the use of force engagement

1. It is understood that any form of detention, such as the temporary deprivation of liberty, as well as the hand over of apprehended suspected pirates, should be undertaken in conformity with applicable national and international law, including human rights law. Such detention and hand over may qualify differently based on all applicable law, ranging from law enforcement to the temporary deprivation of liberty by private individuals.
2. The final authority with regards to any further after-action rests with the master in accordance with regulation V/34-1 of the International Convention for the Safety of Life at Sea (SOLAS).

3. In some instance the duty to render assistance in accordance with article 98 of the United Nations Convention on the Law of the Sea (UNCLOS) and regulation V/33 of the International Convention for the Safety of Life at Sea (SOLAS) may be relevant.

8. Guidelines for the consideration of Companies providing PCASP and their personnel

1. Private maritime security companies (PMSC) and the privately contracted armed security personnel (PCASP) are obliged to comply with international human rights laws. Such obligations should take into account the exclusive jurisdiction recognized under international law to the flag state on the high seas in accordance with article 92 of the United Nations Convention on the Law of the Sea (UNCLOS) and customary international law.

2. Private maritime security companies should provide all information necessary to support the ship owner or operator in addressing his due diligence responsibilities in accordance with established best practices and international quality management indicators highlighted in documents, such as, but not limited to, relevant International Maritime Organization (IMO) circulars and International organization for Standardization/Publicly Available Specification (ISO/PAS) 28007, as may be amended.