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Regulating PMSCs at Sea: Operational and Legal Specificities

Introduction

Thank you to the Chairperson for the kind introduction and the invitation to address you and the distinguished delegates this afternoon.

The use of Private Military and Security Companies (PMSCs) in the maritime context differs considerably from their use on dry land in notably two respects. First, there are the operational specificities, such as the fact that PMSCs operate on board ships and often far away from law enforcement authorities; second, there are the legal specificities, notably due to the manner in which the law of the sea informs certain issues. Therefore, it is essential to integrate a specific *maritime* perspective when discussing a possible new legal framework for PMSCs of general applicability or the further development of existing PMSC-applicable legal instruments.

In the following, I will highlight two issues, which exemplify the operational and legal specificities of the use of PMSCs at sea. First is the topic of jurisdiction at sea, i.e. how the law of the sea informs the question of which State can – or cannot – be the addressee of specific obligations.¹ Second is the issue of deprivation of liberty at sea by PMSC personnel, which I relate to the concept of ‘inherently State functions’, i.e. functions that cannot be outsourced or delegated to private persons or entities.²

Both of these issues, in my view, have not yet been sufficiently explored, discussed and researched – despite their practical importance. Before delving into these issues, I would like to stress that my presentation is based on the scenario that PMSCs protect merchant vessels from criminal threats, such as piracy. This is the primary use of PMSCs in the maritime context today. However, it is possible that in the future, PMSCs will be used for different types of operations at sea.

Part I: Jurisdiction at sea and the concepts of ‘Territorial State’ and ‘Contracting State’

Let me now turn to the first part my presentation, which deals with jurisdiction at sea and the related concepts of Territorial State and Contracting State. PMSC-related legal instruments, which are focusing on State obligations and which are of general applicability (i.e. not maritime-specific), usually

¹ For a detailed analysis of this issue, which refines the argument made in this presentation, see Anna Petrig, Looking at the Montreux Document from a Maritime Perspective, *Maritime Safety and Security Law Journal* 2 (2016), 1-20, available at <http://www.marsafelawjournal.org/contributions/336/>; and Anna Petrig, The Use of Force and Firearms by Private Maritime Security Companies Against Suspected Pirates, *International and Comparative Law Quarterly*, 62 (2013), 667-701.

² For further information on deprivation of liberty at sea, see David Hammond & Anna Petrig, Independent International Guidance on Deprivation of Liberty at Sea by Shipmasters, Crew and/or Privately Contracted Armed Security Personnel, June 2015, available at https://ius.unibas.ch/uploads/publics/42486/20150614183039_557dac2f9b4de.pdf.

address different categories of States. This holds true for the Montreux Document,³ which follows a four-fold structure of addressees by distinguishing between Territorial, Contracting, Home and Third States. Article 2 of the Draft Convention of the Working Group on Mercenaries⁴ follows up on that distinction, with the sole terminological difference being that it calls the ‘Territorial State’ the ‘State of Operation’. It is submitted here, that the concepts of Territorial State and Contracting State must be interpreted and refined for the maritime context specifically.

A. The meaning of a ‘Territorial State’ in the maritime context

I will first discuss the meaning that the term ‘Territorial State’ could have in the maritime setting. In a land-based context, it is quite easy to pinpoint which State qualifies as a Territorial State. However, in the maritime context, this task is more challenging. Let me explain why by recalling the definition of ‘Territorial State’: both the Draft Convention of the Working Group on Mercenaries and the Montreux Document define it as the State in whose territory PMSCs operate. This definition raises three key questions in the maritime context.

1st question

The first question is how the word ‘territory’ must be understood. If security services are provided on board ships, the notion cannot be understood as a geographical concept referring to a portion of land. Today, ships are no longer considered to be floating parts of a State’s territory. In the maritime context, the word ‘territory’ therefore rather means jurisdiction, i.e. a State’s competence to exercise legislative, executive and judicial functions. Thus, in the maritime context, the notion of the Territorial State means the State under whose jurisdiction PMSCs operate.

2nd question

If, in the present context, ‘territory’ means ‘jurisdiction’, a second question arises: which State has jurisdiction over a given vessel with private security on board? And here the law of the sea comes into play, namely its rules on the different maritime zones and the allocation of jurisdiction within these zones.

As long as the ship is travelling on the high seas, i.e. in an area under no jurisdiction, the details are – from a legal point of view – rather straightforward: it is generally the flag State that has exclusive jurisdiction. However, as soon as the ship enters the territorial or internal waters of a third State or calls port there, jurisdiction of the flag State might be concurrent with that of the coastal or port State. In this maritime area, the Territorial State can be the flag State, the coastal State and/or the port State. Hence, unlike the scenario at land or on the high seas, we do not have just *one* State that qualifies as the Territorial State but potentially three different States.

³ 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, available at www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf.

⁴ Draft of a possible Convention on Private Military and Security Companies (PMSCs) for consideration and action by the Human Rights Council, Annex to the Report of the Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of people to self-determination, UN Doc. A/HRC/15/25 (5 July 2010).

3rd question

This leads us to the third question: which State – the flag, coastal or port State – is *obliged* to fulfil a specific obligation of a given legal instrument related to PMSCs in situations of concurrent jurisdiction? And which State is *excluded* from exercising its jurisdiction? To answer this question, we must refer to the rules of the law of the sea, which allocate jurisdiction. Concretely, the rules distributing powers between the flag, coastal and port State for specific subject matters within territorial waters. I will illustrate this using two examples.

Example 1: The obligation of Territorial States to regulate arms

The first example turns on the obligation of Territorial States to regulate arms on board ships.

Legal instruments on PMSCs generally oblige the Territorial State to enact rules on the possession of weapons by PMSCs (e.g. Good Practices 43-44 of the Montreux Document). What does the law of the sea tell us in terms of which State is obliged to regulate the possession of weapons on board merchant ships and which State is arguably prohibited (in certain respects) from doing so?

According to Article 94 UNCLOS⁵ and customary law, the flag State is obliged to effectively exercise its jurisdiction over vessels flying its flag, namely by enacting relevant legislation. Hence, the flag State *must* regulate arms on board its merchant ships.

Is the coastal State also allowed to regulate arms on board a merchant ship passing its territorial waters? According to the law of the sea (notably Article 21 UNCLOS), each State enjoys the right of innocent passage through the territorial sea of a third State. This is key to realising the freedom of navigation. Therefore, the law of the sea considerably limits the coastal State's competence to adopt rules on innocent passage.

If each coastal State were free to enact detailed and restrictive rules for passing ships, the foreign ships could not *de facto* (efficiently) complete a journey that passes through different States' territorial waters. Therefore, the law of the sea leaves little leeway for coastal States to regulate arms on board merchant ship passing through their waters (even if, in practice, many States broadly regulate the issue, which arguably amounts to an excessive jurisdictional claim).

This example demonstrates the following: According to the law of the sea, flag States are obliged to regulate the issue of arms on board ships, while coastal States are arguably only permitted to do so in a very limited fashion. Since they are *both* Territorial States, a rule obliging *all* Territorial States to comprehensively regulate arms on board ships seems too wide.

Example 2: The obligation of Territorial States to establish criminal jurisdiction

A second example of where the law of the sea suggests differing obligations of the flag, coastal and port States – all of which qualify as Territorial States – is the establishment of criminal jurisdiction.

The law of the sea (notably Article 27 UNCLOS) limits the coastal State's competence to enforce violations of its domestic criminal law. Broadly speaking, the coastal State should not exercise its crimi-

⁵ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 397.

nal jurisdiction over foreign-flagged vessels (and persons on board) merely passing through its territorial waters.

Also, the port State's criminal jurisdiction over foreign-flagged vessels calling at its port is not absolute. Simply put, port States are not allowed to interfere with the internal economy of a foreign ship. This rule limits the port State's penal power as regards certain offences allegedly committed by PMSCs on board a foreign ship.

Hence, again, we have law of the sea rules, which contain a statement on which State is allowed to exercise its criminal jurisdiction, and which State must refrain from doing so. Therefore, a rule obliging *all* Territorial States – that is, the flag, port and coastal States – to establish criminal jurisdiction over offences allegedly committed by PMSCs within their territory appears overly broad.

In situations like in the two examples, it seems necessary to introduce a distinction between the obligations of the flag, coastal and port States. Or to at least specify in the respective obligation set forth in a PMSC-applicable instrument that it does not derogate from the jurisdictional rules of the law of the sea.

B. The meaning of a 'Contracting State' in the maritime context

I now turn to the meaning of a 'Contracting State', to which various instruments relating to PMSCs explicitly or implicitly refer (see, e.g., Article 5(3) Draft Convention of the Working Group on Mercenaries).

Contracting States are generally defined as States that directly contract with PMSCs for their services. Hence, the underlying assumption is that *States* rely on the services of PMSCs. However, in the maritime setting, this is the exception rather than the rule. The most common situation is that private entities – generally ship-owners and sometimes ship-charterers – hire PMSCs to protect their commercial vessels.

If we adhere to the wording of the definition of Contracting States, which is the State that is *itself* contracting with PMSCs, then the rules addressed to Contracting States would, in most cases, not be applicable in the maritime context. However, it could be argued that the rules for Contracting States should apply by analogy to a given State if a private entity incorporated in that State contracts for the services of PMSCs.

If a new legal instrument is adopted, the definition of a Contracting State should from the outset be worded in a way that includes the situation where a private entity incorporated in a given State hires PMSCs.

Alternatively, or in addition, one could argue that, in the maritime context, the rules addressed to the Contracting State apply by analogy to the contracting business entity. However, many of the Contracting State's obligations relate to the adoption and enforcement of legislation, which are State functions. Hence, there are clear limits to this analogy.

The aim of this first part of my presentation was to demonstrate how the concept of jurisdiction and the related notions of Territorial and Contracting States must be analysed and interpreted in light of

the maritime context specifically and be refined accordingly. This allows for the requirements of the law of the sea and the unique factual situations of at-sea use of PMSCs to be taken into account.

Part II: Deprivation of liberty at sea and ‘inherently State functions’

Let us now turn to the second part of this presentation, which deals with deprivation of liberty at sea by PMSC personnel.

There is a view that certain functions are inherently governmental functions, which cannot be delegated and/or outsourced to private entities. This view is reflected in Article 9 of the Draft Convention of the Working Group on Mercenaries, while Article 19(1) obliges each State to make the acts of carrying out such functions by PMSCs or their personnel criminal offences. Included in the list of inherently State functions, found in Article 9 of the Draft, are the police powers of arrest and detention.

Under current national and international law, it is rather unclear under which circumstances PMSC personnel are allowed to deprive a criminal suspect, who has been overpowered in self-defence, of his liberty until surrender to law enforcement authorities. And under what title they are doing so – be it as law enforcement official or as a private person.

As a consequence, it is difficult to identify the cases of deprivation of liberty at sea by PMSC personnel that amount to arrest and detention qualifying as an inherently State function – an act which, as per the Draft Convention of the Working Group on Mercenaries, is not only prohibited but should also amount to a criminal offence.

Most soft law instruments on the use of PMSCs are silent on deprivation of liberty at sea by private persons, and many flag States do not regulate the issue either. Where it is regulated, different approaches exist – as will be demonstrated now.

A. Arrest and detention by the shipmaster/PMSC personnel acting as law enforcement officials

There is a first category of States that vests certain private persons with law enforcement powers. Even in these jurisdictions, the general rule is that only competent State authorities may deprive a person of his liberty. These acts are generally referred to as arrest and detention. However, exceptionally, private persons are vested with law enforcement powers. Thus, for example, under Italian law, the shipmaster is an officer of the judicial police. As regards PMSC personnel, they are generally not vested with law enforcement powers.

B. Deprivation of liberty by the shipmaster/PMSC personnel acting as private persons

Then, there is a second category of States, where shipmasters or PMSC personnel do *not* possess law enforcement powers. In these cases, only a so-called ‘private arrest’ (also referred to as a ‘citizen’s arrest’) is possible. In order to lawfully engage in a private arrest, an authorisation under law is necessary – put another way, the act must have a legal basis.

Where can a legal basis for a private arrest be found? Three broad categories can be discerned:

- (1) Exceptionally, States have an explicit rule on private arrest in their legislation, which allows citizens to hold a suspect overpowered in self-defence or caught red-handed in the commission of a crime. Some States provide for general self-help rights; however, these rules applicable to all

persons were generally drafted for the land-based context (e.g. Article 281 Swiss Criminal Procedural Law). Certain States have shipmaster-specific rules (e.g. Greece and Germany), while other States specifically allow PMSC personnel to engage in a private arrest (e.g. Belgium).

- (2) However, most States do not have such explicit rules on private arrest. Some of these States take the stance that the right to hold an alleged attacker is an implicit component of self-defence.
- (3) Finally, the rules allowing private persons to surrender a criminal suspect to the competent authorities provide yet another legal basis for private arrest. If a private person is allowed to surrender a suspect, he or she can also hold that suspect until surrender. However, in most cases, such domestic rules are based on Article 8 SUA Convention, according to which only the shipmaster, but not PMSC personnel, is allowed to hold a person until surrender (e.g. United States of America).

The research conducted on deprivation of liberty at sea by private persons revealed the following: First, it is often unclear whether a private person is acting as a law enforcement official or as a private person. Second, in cases of private arrest, the issue is seldom clearly regulated; and when it is regulated, various approaches exist.

It is crucial to further explore the circumstances under which PMSC personnel are allowed to hold an overpowered person on board. This is necessary so as to draw a clear line between lawful acts of deprivation of liberty by PMSC personnel, and situations where they engage in arrest and detention qualifying as an inherently State function, which is prohibited.

Only then will PMSC personnel be protected from unwarranted criminalisation and suspects will be protected from unlawful interferences with their right to liberty.

Conclusion

To conclude, I stressed in my introduction that there are various operational and legal specificities applying to the use of PMSCs at sea. Therefore, it is necessary to look at PMSC-applicable rules from a maritime perspective specifically. This holds true for both approaches to bolstering the regulation of PMSCs – the clarification and development of existing legal frameworks and a possible new legal instrument on PMSCs.