

COUNTER PIRACY ARMED SERVICES, THE ITALIAN SYSTEM AND THE SEARCH FOR CLARITY ON THE USE OF FORCE AT SEA

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Abstract

There seems to be a broad consensus that maritime piracy is causing serious harm to life and property and to the safety of navigation. Nevertheless, it appears that the international community and affected States lack a coherent and coordinated approach to counter piracy. This article examines the increasingly emerging use of armed security services on board of civilian vessels. Italy, like other flag States fearing a significant threat to well-defined domestic interests, has begun to authorize the deployment of security personnel on national vessels navigating in international waters infested by pirates. However, according to the author, to avoid the consequent predictable escalation of violence at sea and the possible breach of human rights law applicable to suspected pirates, States are required to adopt proper legislative frameworks that duly regulate the actions of embarked armed services.

Keywords: maritime security; piracy; use of force; human rights.

1. INTRODUCTION

There has been maritime piracy “for as long as people and commodities have traversed the oceans”.¹ According to customary international law, piracy consists of unlawful acts of violence, detention or depredation on the high seas committed for private ends by a private vessel against another vessel. The customary rules on piracy were first codified by the 1958 Geneva Convention on the High Seas (High Seas Convention) and then reaffirmed by the 1982 UN Convention on the Law of the Sea (UNCLOS). Almost all States are party to at least one of these conventions, making the modern definition of piracy generally accepted.²

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¹ See ELLEMAN, FORBES and ROSENBERG, “Introduction”, in ELLEMAN, FORBES and ROSENBERG (eds.), *Piracy and Maritime Crime. Historical and Modern Case Studies*, Newport Papers, No. 35, Newport, 2011, p. 1.

² The origins of the modern definition of piracy lie in the Harvard Draft Convention, which strongly influenced the draft of the High Seas Convention (Geneva, 29 April 1958, 450 UNTS

Unfortunately, the belief that piracy had entered a period of terminal decline in the twentieth century has proved to be wrong. The resurgence of piracy, especially hijackings off the coast of Somalia, has been very rapid over the past ten years and its significant impact on global trade has promoted a range of measures to tackle it.³ In particular, in response to several resolutions of the United Nations Security Council (UNSC),⁴ States and international organizations have undertaken significant initiatives and focused most of their efforts on prevention of piracy at sea. Naval patrols act as deterrents, using their powers under international law to board vessels where piracy attacks are suspected. This includes collaborating with other naval forces through a series of combined operations and strategic alliances to ensure the freedom of navigation.⁵

Apparently, the military presence has been relatively useful in disrupting piracy. However, this kind of protection is extremely expensive, and the huge area in which pirates currently operate creates a sort of security gap that prevents naval patrols from defending every ship. As a consequence, ship owners and other operators are increasingly relying on armed security personnel on board civilian vessels transiting pirate-prone hotspots. Even though according to international law these forces are unable to board vessels and detain suspected pirates, they can act as an actual deterrent and consequently reduce the risk to the lives and well-being of those onboard targeted ships.

In light of these advantages, Italy recently introduced the possibility of armed security services embarking civilian ships sailing the Italian flag to protect them

11) and in turn the UNCLOS (10 December 1982, 1833 UNTS 397), where the modern definition of piracy is found (see Articles 14-22 of the High Seas Convention and Articles 100-110 of the UNCLOS). For a thorough analysis of the definition of maritime piracy, see BINGHAM et al., “Harvard Research in International Law: Draft Convention on Piracy”, *AJIL*, 1932, Supp. 739, p. 786; MUNARI, “La ‘nuova’ pirateria e il diritto internazionale. Spunti per una riflessione”, *RDI*, 2009, p. 325 ff.; LE HARDY DE BEAULIEU, “La piraterie maritime à l’aube du XXI^e siècle”, *RGDIP*, 2011, p. 653 ff.; SHEARER, “Piracy”, in WOLFRUM (ed.), *The Max Planck Encyclopedia of Public International Law*, Oxford, 2008, online edition (available at: <<http://www.mpepil.com>>), paras. 3 ff.

³ A total of 297 piracy attacks were reported worldwide to the International Chamber of Commerce’s International Maritime Bureau (IMB) as of 16 January 2013. The IMB is a non-profit organization established in 1981 in accordance with International Maritime Organization Resolution A 504 (XII) (5) and (9). This was adopted on 20 November 1981 to urge, *inter alia*, governments and organizations to cooperate and exchange information with each other. The IMB Reporting Centre makes information and figures on piracy available at: <<http://www.icc-ccs.org/piracy-reporting-centre>>.

⁴ Resolution 1846 (2008), para. 9.

⁵ The most prominent coalitions of forces currently operating against piracy are the NATO Operation Ocean Shield, the European Union Naval Force – Operation Atalanta, Combined Task Force 151, and Malacca Strait Patrols. Moreover, China, India, Japan, Malaysia, Russia, Saudi Arabia, South Korea, Yemen have activated national counter-piracy missions. See Geneva Academy of International Humanitarian Law and Human Rights, *Counterpiracy under National Law*, Academy Briefing No. 1, August 2012, p. 15 ff.

in dangerous international waters. The main purpose of the newly adopted legislation is to preserve the domestic shipping industry which has been particularly disrupted by modern-day pirates. As reported by the International Maritime Bureau, approximately 34 Italian vessels were hijacked by pirates between 2008 and 2012. The most recent attack concerned an offshore vessel off the coast of Nigeria on 23 December 2012, when armed pirates attacked and boarded a Naples-based shipping company vessel, kidnapping four crew members.⁶

Given this harsh scenario, a number of operators have greatly welcomed these new remedies to avoid the risk of falling prey to pirates. In fact, as of the time of this writing, no vessel with armed guards on board has ever been successfully hijacked. On the other hand, the recent incident concerning two Italian military members of a vessel protection detachment on board an Italian oil tanker accused of killing two Indian seamen off the coast of Kerala (India) has drawn the attention of the public to issues related to the use of force at sea.⁷ This prospect of increasing violence at sea poses a number of potentially serious challenges that have yet to be resolved.

On the basis of the current situation, it appears necessary to ascertain whether the use of armed services on board private vessels may be an effective and efficient remedy in preventing modern maritime piracy and preserving freedom of navigation. For this purpose we will first explore the international policy framework (section 2). Then we will proceed to a comparative analysis of the domestic approach adopted by the most significant maritime powers (section 3), in particular the legal and regulatory system applicable in Italy (section 4). We will then verify whether this new counterpiracy practice may be considered in line with international rules governing the use of force and respect of human rights mechanisms (section 5). We will conclude by outlining the strong and weak points of the new practice, envisioning the way forward in suppressing piracy (section 6).

2. THE INTERNATIONAL POLICY FRAMEWORK

Even though customary international law – as codified by both the High Seas Convention and UNCLOS – entrusts the function of policing the seas only to warships and to other vessels clearly marked and identifiable as government units, the

⁶ See IMB, *Piracy and Armed Robbery against Ships*, Annual Report, 2012, p. 15. In particular, for the figures on the attacks against Italian ships, see Table No. 12 on nationalities of ships attacked in the period January-December 2008-2012. For the most recent incident see p. 30. Information reported by BBC is available at: <<http://www.bbc.co.uk/news/world-africa-20838755>>.

⁷ Cf. *supra* in this volume, RONZITTI, “The *Enrica Lexie* Incident: Law of the Sea and Immunity of State Officials Issues”. See also GUILFOYLE, “Shooting Fisherman Mistaken for Pirates: Jurisprudence, Immunity and State Responsibility”, *EJIL: Talk!*, 2 March 2012, available at: <<http://www.ejiltalk.org>>.

use of armed personnel on board civilian vessels for self-defence purposes is not covered by any explicit ban.⁸ However, notwithstanding this legal vacuum, since the resurgence of modern piracy the UN bodies and other international organizations have taken into account the need to enforce a combination of anti-piracy measures and have often invited States to adopt adequate instruments to prevent this crime. Various solutions have been considered.

On the one hand, the use of force at sea to repel piracy attacks seems to be consistent with the recent policy of the UNSC. In 2008, through a series of Resolutions adopted under Chapter VII of the UN Charter, the UNSC sought to reinforce domestic and international prohibitions against piracy and increasingly broaden its authorization for anti-piracy remedies. Notably, Resolution 1816 authorized States to enter Somali territorial waters and use “all necessary means to repress acts of piracy and armed robbery”.⁹ **A few months later, Resolution 1851 added an authorization to conduct “all necessary measures that are appropriate in Somalia for the purpose of suppressing acts of piracy and armed robbery at sea”.**¹⁰ In the same vein, the EU Council Joint Action recalls the wording of the UNSC in Article 2, where it states that Operation Atalanta shall take “all necessary measures, including use of force”.¹¹

⁸ See Article 21 of the High Seas Convention and Article 107 of the UNCLOS.

⁹ Resolution 1816 (2008), para. 7(b).

¹⁰ See UN Security Council Resolution 1851 (2008) of 16 December 2008, para. 6. For a thorough analysis, see *supra* in this volume, TREVES, “The Fight against Piracy and the Law of the Sea”; ID., “Piracy, Law of the Sea, and Use of Force: Developments Off the Coast of Somalia”, *EJIL*, 2009, p. 399 ff., p. 412; NOTO, “La repressione della pirateria in Somalia. Le misure coercitive del Consiglio di sicurezza e la competenza giurisdizionale degli Stati”, *CI*, 2009, p. 439 ff.; HARLOW, “Soldiers at Sea: The Legality and Policy Implications of Using Military Security Teams to Combat Piracy”, *Southern California Interdisciplinary Law Journal*, 2012, p. 1 ff.; JESUS, “Protection of Foreign Ships against Piracy and Terrorism at Sea: Legal Aspects”, *The International Journal of Marine and Coastal Law*, 2003, p. 363 ff.

¹¹ See EU Council Joint Action 2008/851/CFSP of 10 November 2008 (OJ (2008) L301/33, Art. 12(1)), 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. More recently, the EU mandate was extended until December 2014, along with its scope of action, which now also includes the Somali shoreline, thus allowing EU forces to disrupt pirate operations onshore. See Council Decision 2012/174/CEP of 23 March 2012. For a comprehensive analysis of the European system, cf. RIDDERVOLD, “Finally Flexing Its Muscles? Atalanta – The European Union’s Naval Military Operation against Piracy”, *European Security*, 2011, p. 385 ff.; GNES and CHITI, “Cronache europee 2010”, *Rivista trimestrale di diritto pubblico*, 2011, p. 803 ff.; YAKEMTCHOUK, “Les Etats de l’Union européenne face à la piraterie maritime somalienne”, *Revue du Marché commun et de l’Union européenne*, 2009, p. 441 ff.; FISCHER-LESCANO and KRECK, “Piracy and Human Rights: Legal Issues in the Fight against Piracy within the Context of the European ‘Operation Atalanta’”, *GYIL*, 2009, p. 542 ff.; House of Lords (European Union Committee), *Combating Somali Piracy: The EU’s Naval Operation Atalanta*, 14 April 2010; SANCHEZ BARRUECO, “The European Strategy against Piracy Off the Somali Coast. A Multi-Pillar Response to a Cross-Pillar Concern”, in SOBRINO HEREDIA (ed.), *Maritime Security and Violence at Sea*, Bruxelles, 2011, p. 323 ff.

On the other hand, the International Maritime Organisation (IMO), which is currently playing a prominent role in the fight against modern piracy, is much more careful. Rather than armed force, it recommends the self-defence remedies collected in its Best Management Practice (BMP).¹² This document provides non-binding recommendations aimed at assisting vessels to avoid, deter or delay piracy attacks when sailing in pirate-infested areas. It is based on the principle that if pirates are unable to board a vessel they cannot hijack it. In particular, the main BMP requirements consist in the submission of specific forms concerning ship position and ship movements when transiting a high risk area and in implementing basic ship protection measures, such as physical barriers, water spray and foam monitors.

Nonetheless, as the IMO is well-aware of the recent significant increase in the number of companies offering armed maritime security services, it has softened its traditional position against firearms on board merchant ships and has recently issued, and then revised, interim guidelines addressed to all relevant operators in the field aimed at regulating when, where and how armed force may be used in countering piracy.¹³ However, as expressly indicated by the IMO Secretary-General at the Conference held in London on 15 May 2012 on Capacity-Building to Counter Piracy off the Coast of Somalia, “the use of [private contractors] on board ships was an exceptional measure to be used only in exceptional circumstances in the high risk area, and should not become institutionalized”.

In theory, although general and treaty rules do not expressly authorize the use of armed services on board commercial vessels to prevent modern piracy, other entities are issuing guidance to regulate the new and emerging security practice. The appreciable purpose of these remedies is probably to advise operators in the field providing them with general coordination. The fear, nonetheless, is that such soft-law instruments will not be sufficient to oblige States to adopt a specific conduct.

¹² MSC.1/Circ.1339, Best Management Practices for Protection against Somalia Based Piracy (BMP 4) (revokes MSC.1/Circ.1337) 1, 4 September 2011.

¹³ See MSC.1/Circ.1443, Interim Guidance to Private Maritime Security Companies Providing Contracted Armed Security Personnel on Board Ships in the High Risk Area; MSC.1/Circ.1408, Interim Recommendations for Port and Coastal States Regarding the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area; MSC.1/Circ.1406/Rev.1, Revised Interim Recommendations for Flag States Regarding the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area; MSC.1/Circ.1405/Rev.2, 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; and a Joint MSC and Facilitation Committee Circular, Questionnaire on Information on Port and Coastal State Requirements Related to Privately Contracted Armed Security Personnel on Board Ships, which is aimed at gathering information on current requirements.

3. THE EVOLVING PRACTICE ON THE USE OF ARMED SECURITY SERVICES AT SEA

As stressed by IMO recommendations, the legal issues related to the deployment of armed security guards is subject to domestic legislation, policy and procedures.¹⁴

As far as the practice of States is concerned, a first relevant step was undertaken by four of the world's largest ship registries – Panama, the Bahamas, Liberia and the Marshall Islands – when they presented the “New York Declaration” during the Contact Group plenary session in May 2009.¹⁵ This declaration is a non-binding political document requiring ship registry countries to adopt internationally recognized best management practices in defending their ships and seafarers against acts of maritime piracy and armed robbery. In particular, the signatory States fully recognized that the self-defence measures taken by ships to avoid, deter or delay piracy constitute an essential part of compliance with the International Ship and Port Facility Security Code, which is an amendment to the International Convention for the Safety of Life at Sea (SOLAS). This concerns the minimum standard of safety of merchant ships.¹⁶ Shortly afterwards, other countries around the world, including the United States of America (US), Japan, Cyprus and Singapore signed this Declaration and promulgated guidelines and recommendations providing new measures to ensure secure navigation in international waters.¹⁷

These developments were highly significant. Practice shows that when a flag State decides to sign the New York Declaration it further decides to play a more proactive role in the fight against maritime piracy and, very often, to count on armed security services for this purpose. For instance, Panama, one of the first signatory countries, issued specific regulations setting out the basis upon which national vessels are authorized to carry armed personnel onboard. Another significant

¹⁴ See MSC.1/Circ.1406/Rev.1, Revised Interim Recommendations for Flag States Regarding the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area.

¹⁵ The Contact Group on Piracy Off the Coast of Somalia was created on 14 January 2009 according to UN Security Council Resolution 1851 (2008). This voluntary, *ad hoc* international forum brings together countries, organizations, and industry groups with an interest in fighting acts of piracy and armed robbery.

¹⁶ The SOLAS was adopted on 1 November 1974 by the International Conference on Safety of Life at Sea, which was convened by the IMO, and entered into force on 25 May 1980. It has since been amended twice by means of the 1978 SOLAS Protocol, which entered into force on 1 May 1981, and the 1988 SOLAS Protocol, which entered into force on 3 February 2000, and subsequently replaced and abrogated the 1978 Protocol.

¹⁷ The United Kingdom signed the New York Declaration with the following caveat: “The UK supports fully the objectives and content of the first four paragraphs of the New York Declaration. The UK is not yet in a position to accept the final paragraph on the direct link to the ISPS code, needing first to consult relevant organizations and bodies within the UK and outside, but with this exception is content to become a co-signatory to the remainder of the New York Declaration, and encourages all our international partners also to become co-signatories”.

example in this context is given by the US. Shortly after the adoption of the above mentioned Declaration, the US National Defense Authorization Act recommended that the government assign armed security teams on board US flagged vessels carrying US government cargo in areas at risk of piracy and this turned out to be a very positive and useful decision. Only few months later, a private security team on board the US container ship “Maersk Alabama” successfully repelled bandits off the coast of Somalia.¹⁸

As for the policy followed by EU Member States, the possibility of allowing armed personnel on board civilian ships is still somewhat contradictory and based on different approaches. The two main options are to allow either military forces to act as a vessel protection detachment, or private armed security guards. The practice followed by France, for example, is to embark armed units of the French military force to protect French flagged trawlers transiting high-risk areas. Accordingly, over the past few years French authorities have focused on strengthening regional and bilateral cooperation on counter-piracy efforts and have consequently signed a Status of Forces Agreement (SOFA) with the Seychelles establishing the legal procedures to be followed in employing French military personnel directly in the Seychelles to provide protection to French fishing ships. In this respect, it is interesting to note that, more recently, French practice has been followed by Denmark as well as by the EU itself, which have ratified further SOFAs aimed at providing formal legal systems for the operation of the Danish and EU military forces in the Seychelles territory or waters in connection with counter-piracy operations.¹⁹

The military option was also chosen by the Netherlands, while Spain, where the political will to react against the resurgence of maritime piracy is becoming more and more marked, has decided to provide certain vessels with private security personnel. Specifically, Spain adopted Royal Decree No. 1628/2009 on private security and weapons, which allows armed private security guards on board merchant ships and fishing vessels travelling through international waters under a national flag. It then issued Order PRE/2914/2009 and Royal Decree No. 1628/2009, set-

¹⁸ See Panama Maritime Authority, Merchant Marine Circular MMC-228, 6 July 2011, in relation to the Requirements Regarding the Use of Privately Contracted Armed Security Personnel on Board Panamanian Flagged Vessels Addressed to Ship-owners/Operators, Company Security Officers, Legal Representatives of Panamanian Flagged Vessels, Panamanian Merchant Marine Consulates and Recognized Organizations. More recently, on November 2011, the US Department of State issued guidance encouraging “the responsible use of Privately Contracted Armed Security Personnel on merchant vessels transiting high-risk waters off the Horn of Africa”. Cf. HARLOW, *cit. supra* note 10.

¹⁹ See Ministry of Foreign Affairs, Ministry of Defense, Ministry of Justice, Ministry of Economic and Financial Affairs, *Strategy for the Danish Counter-Piracy Effort 2011-2014*, May 2011; FRANCONI and RONZITTI (eds.), *War by Contract. Human Rights, Humanitarian Law, and Private Contractors*, Oxford, 2011, p. 44 ff.; BARTOLONI, “Sulla partecipazione del Parlamento europeo alla formazione di accordi in materia di politica estera e sicurezza comune”, RDI, 2012, p. 796 ff.

ting out the conditions for the possession, control, use and acquisition of weapons by security companies. Secondly, still with the aim of facilitating the repression of piracy, Spain passed Law No. 5/2010, which filled a temporary legal vacuum and reintroduced the crime of maritime piracy in the Spanish Criminal Code (Articles 616-*ter* and 616-*quáter*).²⁰ Thirdly, an important step has also been undertaken at the jurisprudential level. In line with the most recent national case law,²¹ the Spanish courts appear to fully intend to begin prosecuting piracy, whenever domestic interests are violated. This is apparently the case in the judgment recently issued by the Criminal Chamber of the Spanish Supreme Court, concerning the kidnapping of the “Alakrana”, a Spanish tuna ship attacked off the coast of Somalia in 2009. By means of this judgment the Supreme Court upheld the first instance decision and convicted two Somali pirates on the basis of international legal instruments, even though at the time of the attack, Spanish legislation did not expressly criminalize the offence of maritime piracy.²²

²⁰ In the text reference is made to a *temporary* legal vacuum, since previous Spanish criminal legislation, such as the 1928 Spanish Criminal Code, expressly criminalized piracy. In the rest of the world a significant number of States still lacks an adequate legal regime to prosecute pirates consistent with international law. The importance of adopting appropriate steps under national law to facilitate the apprehension and prosecution of those who are alleged to have committed acts of piracy is also oft recalled by the UN bodies. See General Assembly Resolution A/RES/65/37; Security Council Resolution 1918 (2010), preamble; and IMO Circular Letter No. 3180 concerning Information and Guidance on Elements of International Law Relating to Piracy, 17 May 2011, in particular Legal Committee, Piracy: Establishment of a Legislative Framework to Allow for Effective and Efficient Piracy Prosecutions, submitted by Ukraine, 25 February 2011.

²¹ For Italy see *Tribunale di Roma (Sez. minori), Montecristo*, 16 June 2012, charging four Somali minors with 7 years sentence; *Tribunale di Roma*, 28 November 2012, charging eight Somali citizens with 16 and 19 years sentence; *Tribunale di Roma, Valdarno*, 4 December 2012, charging eleven Somali citizens with 3 and a half year sentence. For the Netherlands see *Rechtbank di Rotterdam*, judgments No. 10/600012-09, LJN: BM8116 of 17 June 2010, No. 10/960248-10 LJN: BR4930, and No. 10/960256-10 LJN: BR4931 of 12 August 2011. For the US, see District Court for the Eastern District of Virginia, *USA v. Modin Hasan et al.*, case No. 2:10-cr-00057-RAI-FBS, Judgment of 24 November 2010; *USA v. Cali Saciid*, case No. 2:10-cr-00057-RAI-FBS, judgment of 17 August 2010. For a thorough analysis of the national case law, see KONTOROVICH, “The Penalties for Piracy: An Empirical Study of National Prosecution of International Crime”, Public Law and Legal Theory Series, 2012, p. 1 ff.; DEL CHICCA, “La pirateria marittima di fronte ai giudici di Stati membri dell’Unione europea”, RDI, 2012, p. 104 ff.; BEVILACQUA, “Il problema della repressione del reato di pirateria marittima e il necessario bilanciamento tra le esigenze di esercizio effettivo della giurisdizione e di garanzia dei diritti individuali”, *Il diritto marittimo*, 2012, p. 664 ff.; CLAY, “A Tale of Two Judgments: *United States v. Said* and *United States v. Hasan*”, available at <http://ssrn.com/abstract=1783681>.

²² For the first instance decision in *Alakrana*, see Audiencia Nacional (Fourth Chamber), judgment No. 10 of 3 May 2011; for the appeal decision, see Supreme Court (Criminal Chamber), judgment of 12 December 2011. For a thorough analysis of this case, see ANDREONE, “Chronique de la Jurisprudence”, *Annuaire du Droit de la Mer*, 2011, p. 689 ff.

A somewhat different approach is taken by the United Kingdom (UK). It has brought no suspected pirates to the UK for trial even though British citizens have often been taken hostage and modern day piracy poses a considerable threat to the UK's national interests. However, rather than prosecute suspected pirates, the government has preferred to rely on transfer agreements with countries in the region, including the Seychelles, Mauritius and Tanzania. Moreover, to intensify the protection of British-flagged shipping, the UK has recently reversed its previous position of discouraging carrying weapons on board and has permitted, only in exceptional circumstances, the deployment of private armed security guards on board British-flagged cargo ships and internationally trading passenger ships.²³

The above analysis reveals that the domestic, political and legal framework is very fragmented and still evolving worldwide. The major trend seems to be in favor of an extended adoption of security forces at sea since this appears to be the most efficient and effective remedy to counter the current resurgence of piracy. This is even more common when well-defined domestic interests are in jeopardy. However, there are still some countries that neither forbid nor authorize the deployment of armed personnel.²⁴ In this scenario and in light of this legal and material uncertainty, an effort at clarification would be more than welcome.

4. THE ITALIAN LEGAL AND REGULATORY SYSTEM FOR DEFENDING SHIPS AGAINST PIRACY

Italy is one of the States with a well-defined interest in protecting national vessels from maritime piracy. As is well known, the Italian industry is significantly grounded on international trade at sea. In addition, Italy has a traditional shipping

²³ With respect to the damages caused to the British shipping industry, see High Court of Justice, Queen's Bench Division, Commercial Court, *Cosco Bulk Carrier Co. Ltd. v. Team-Up Owning Co. Ltd.*, Case No. 2009-1301, Judgment of 11 June 2010; THORP, *Preventing and Prosecuting Piracy at Sea: Legal Issues*, Standard notes No. 6237, 28 February 2012 (available at: <<http://www.parliament.uk/briefing-papers/sn06237>>). With respect to the agreements for supporting countries in the region to let seized pirates be prosecuted regionally, see GATHI, "Kenya's Piracy Prosecutions", *AJIL*, p. 416 ff.; ID., "Jurisdiction to Prosecute Non-National Pirates Captured by Third States Under Kenyan and International Law", *Legal Studies Research Paper Series n. 39*, 2009-2010. On the UK counter-piracy system, see Department for Transport, *Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend against the Threat of Piracy in Exceptional Circumstances*, November 2011 (updated June 2012).

²⁴ To have a clear picture of the flag States authorizing the use of arms as well as the employment of private armed guards on board, see the information provided by International Chamber of Shipping and European Community Shipowners Association, July 2012, at <www.skuld.com>.

industry²⁵ and, since the recrudescence of modern piracy, its domestic fleet has been increasingly threatened by piracy attacks. Consequently, Italian authorities have decided to fight this international crime by relying on the participation of the Italian Navy in two multinational operations for patrolling the waters off the coast of Somalia: the EU Operation “Atalanta”²⁶ and the NATO Operation “Ocean Shield”.²⁷ Moreover, pursuant to both the customary principle of universal jurisdiction²⁸ and the existing national legislation²⁹ the suspected pirates possibly captured by means of these military operations might also be tried before competent Italian criminal courts. In this respect, it is interesting to note that for the first time since the recrudescence of modern piracy, Somali citizens suspected of involvement in the “Montecristo” and “Valdarno” cases, were recently tried and sentenced before the Italian criminal courts in Rome.³⁰

On the other hand, these military initiatives were useful, but not sufficient to overcome piracy in practice, thus private ship-owners have long been advocating, through the main Italian associations of ship-owners representatives (*Confitarma*), the adoption of further instruments to protect their vessels against the increasing escalation of piracy attacks. There has been a lively debate about how best to manage armed security for vessels transiting in high risk piracy zones and, as in most other European States, the two main options taken into account were embarking military forces to act as a vessel protection detachment or allowing private armed

²⁵ SRM (Studi e Ricerche per il Mezzogiorno), *Trasporto Marittimo e Sviluppo Economico – Scenari internazionali, analisi del traffico e prospettive di crescita*, Napoli, 2012, p. 72 ff.

²⁶ EUNAVFOR was launched on 8 December 2008 in support of UN Security Council Resolutions 1814, 1816, 1838, and 1846. It aims at protecting World Food Program humanitarian deliveries and at deterring and disrupting piracy attacks on other vulnerable shipping. See *supra* note 5.

²⁷ NATO Operation Ocean Shield began on 17 August 2009 following the approval from the North Atlantic Council. It adopts a comprehensive approach to counter-piracy efforts and focuses on operations at sea but also assists regional States, at their request, to develop counter-piracy operations and capacity. See *supra* note 5.

²⁸ See Article 19 of the High Seas Convention and Article 105 of the UNCLOS. For a comprehensive analysis on the principle of universal jurisdiction, cf. BROWNLIE, *Principles of International Law*, Oxford, 1999, p. 301; NORDQUIST, ROSENNE and NANDAN (eds.) *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. III, Boston/London, 1995, p. 212 ff.; RANDALL, “Universal Jurisdiction under International Law”, *Texas Law Review*, 1988, p. 785 ff., p. 840; and the case before the Kenya Court of Appeal, Judgment of 18 October 2012, para. 36, available at: <<http://piracylaw.files.wordpress.com>>.

²⁹ See Articles 1135 and 1136 of the Italian navigation code (*codice della navigazione*) and article 5 of Law No. 12 of 24 February 2009 (GU No. 47 of 26 February 2009), enactment as a Law, with amendments, of Decree Law No. 2099 of 30 December 2008, concerning the postponement of the Italian participation to International missions. Cf. COCCO, “Dal pirata *hostis human generis* alla pirateria contemporanea: verso un diritto penale universale?”, *RIDPP*, 2012, p. 409 ff.

³⁰ Cf. *supra* note 21. The judgments have not been published yet. Some comments are reported on the Maritime Security Review (available at: <<http://www.marsecreview.com/>>).

security guards.³¹ Meanwhile, during this debating phase, Italian ship owners have started to rely on flags of convenience,³² i.e. on the flag of those States that already had a more convenient framework in force that allowed for the deployment of armed security personnel on board. A flag of convenience was particularly useful in avoiding the risk of falling prey to pirates off the coasts of the Seychelles on 26 April 2009, when pirates attacked the cruise ship “MSC Melody” belonging to an Italian firm but flying the flag of Panama, and were repelled thanks to an Israeli security team placed on board.³³

In this context, and in order to provide Italian vessels with more freedom of navigation in dangerous international waters, on 6 August 2011 Decree Law No. 107/2011, as amended by Law No. 130 of 2 August 2011, was turned into law.³⁴ Law No. 130/2011 has a very wide scope. On the one hand, it extends the participation of the Italian armed and police forces to some international missions and to deployment cooperation, peace support and stabilization processes until 31 December 2011, while on the other hand, it comprises several provisions on the implementation of Security Council Resolutions on Libya and on international efforts to fight piracy.³⁵

Regarding the subject at hand, Law No. 130/2011 introduces new counter-piracy measures, by authorizing private shipowners to embark vessel protection detachments (*nuclei militari di protezione*) or, alternatively, private security guards (*guardie giurate*) on board Italian commercial ships navigating across dangerous international waters. To make these provisions enforceable, the Italian government will be issuing further implementing regulations. In this sense, on 1 September

³¹ See Fourth Permanent Commission – Defense, Resolution on the possible deployment of vessel protection detachments on board Italian civil vessels transiting international waters under risk of maritime piracy, 22 June 2011, p. 7. Moreover, a draft was tabled on 3 March 2010 before the Italian Parliament to allow private security services on board of Italian flagged vessels (Senato della Repubblica, XVI Legislatura, Disegno di Legge di iniziativa dei senatori Amato e Catoni, No. 2050. *Adde* draft No. 2092, submitted by Senatore Enrico Musso et al. No C 3321).

³² Cf. SCHIANO DI PEPE, “La questione della nazionalità delle navi dinanzi al Tribunale internazionale per il diritto del mare”, RDI, 2002, p. 329 ff.

³³ See the information reported by BBC, available at: <<http://news.bbc.co.uk/2/hi/africa/8019084.stm>>.

³⁴ Cf. Law No. 130 of 2 August 2011 (GU No. 181 of 5 August 2011), enactment as a Law, with amendments, of Decree Law No. 107 of 12 July 2011, concerning the extension of the intervention of development cooperation, support of peace and stabilization processes, international missions of the Armed and Police Forces, as well as the implementation of the Resolutions 1970 (2011) and 1973 (2011) adopted by the UN Security Council. With respect to the two Resolutions afore mentioned and recalled by Law No. 130/2011, see Resolution 1970 (2011) on Peace and security in Africa and Resolution 1973 (2011) adopted to authorize Member States to take all necessary measures to protect civilians under threat of attack in Libya.

³⁵ See the comments by RUBAGOTTI, IYIL, Vol. XXI, 2011, p. 428 ff.

2011 the Ministry of Defence adopted Decree No. 55447,³⁶ to identify areas at risk of piracy in line with the IMO periodical reports concerning the so-called High-Risk-Area. In addition, on 11 October 2011 the Ministry of Defence and Confitarma entered into a Memorandum of understanding (*protocollo di intesa*) specifying the modalities to protect national vessels.

All relevant provisions concerning the new counter-piracy measures are included in Article 5 of Law No. 130/2011, which comprises two main groups of provisions: the first addressed to vessel protection detachments (Article 5, paragraphs 1-3), the second addressed to private guards (Article 5, paragraphs 4, 5, 5 *bis* and 5 *ter*). As far as military teams are concerned, all operations are coordinated by the Chief of the Italian Navy, to whom all requests have to be addressed. Each military team shall consist of a leader and additional members of the Italian Navy (or other national forces). It shall be subject to the authority of the shipmaster, with the exception made in the event of pirate attacks. In these cases, military personnel shall be subject to the sole authority and responsibility of the military team-leader, who assumes the role of judicial police officer and guides all military team members in accordance with the rules of engagement issued by the Ministry of Defence. The use of force is allowed on the basis of the need to protect the vessel at risk of piracy. If the military personnel are available, they will be embarked in the identified port at the agreed time.³⁷

On the contrary, if such personnel are not available, shipowners may also rely on private guards. Both military and private services are subject to certain common general principles. For instance, both can act only to protect the ship and the crew on board from possible piracy attacks. As recalled above, pursuant to Article 21 of the High Seas Convention and Article 107 UNCLOS, only warships and other vessels clearly marked and identifiable as being on governmental services are entitled to hunt pirates at sea. Moreover, both may only board vessels flying the Italian flag. Accordingly, Italian ships flying foreign flags do not fall within the scope of Article 5 of Law No. 130/2011. This is probably to protect the Italian shipping industry from competition from the above mentioned flags of convenience. Finally, in both circumstances the heavy costs of military and private guards will be borne by the shipowners. With specific respect to military personnel, this is expressly underlined

³⁶ Cf. Decree of the Ministry of Defense No. 55447 of 1 September 2011 (GU No. 212 of 12 September 2011), on the identification of the international area at risk of maritime piracy where the vessel protection detachments (*nuclei militari di protezione*) can be embarked.

³⁷ See Law No. 130/2011, Article 5, paras. 1 and 3. For a thorough analysis of the Italian legislation introducing the possibility to embark armed services on board, cf. RONZITTI, "Un passo avanti per la tutela delle navi italiane ma troppa cautela nella legge di conversione", Guida al diritto-Il sole 24 Ore, No. 43, 2011, p. 54 ff.; RICCIUTELLI, "La recente normativa sulle misure di contrasto alla pirateria marittima", The Italian Maritime Journal, No. 3, 2011, p. 2 ff.; BEVILACQUA, "Uso della forza, diritto alla vita e misure di difesa attiva nella legge italiana sul contrasto alla pirateria marittima", DUDI, 2012, p. 391 ff.; TONDINI, "Impiego di NMP e guardie giurate in funzione antipirateria", Rivista marittima, 2013, p. 32 ff.

in Article 5, paragraph 6 *ter*, which, recalling the wording often used in times of economic crisis, clarifies that their deployment cannot lead to any additional burdens on the State.³⁸

Notwithstanding these commonalities, public and private security guards are subject to different rules. In particular, private security personnel must always be subject (and thus, also in the event of pirate attacks) to the authority of the shipmaster and operate on board according to the national laws regulating the use of private security services on Italian territory.³⁹ In addition, pursuant to Article 5, they may be embarked only where military teams are not available and only under specific conditions. Some of these conditions apply to the vessel, which, for example, must have in force at least one of the ship-protection measures listed in the aforementioned IMO BMP. Other requirements concern the security team itself, all components of which must have a specific licence for the use of weapons and have attended specific training. In addition to such conditions, pursuant to Article 5, paragraph 5, in order to board ships at risk of piracy, private guards must observe the rules listed in an *ad hoc* Decree on the use of force and weapons issued by the Ministry of the Interior. However, although this Decree should have been adopted few months after the entry into force of Law No. 130/2011, it has not been passed yet. Consequently, pursuant to a Decree-Law of 29 December 2011, the Italian Government has authorized their deployment for a temporary period, notwithstanding the absence of rules on the use of force and weapons by private guards, provided that they have participated in international missions of the Italian Armed Forces for at least 6 months.⁴⁰

The adoption of Law No. 130/2011 constitutes a first relevant step forward in the international security market. Since the resurgence of modern maritime piracy, it is the first time that private ships flying Italian flags are allowed to use security services for defence purposes against possible piracy attacks. In principle, through these new instruments, Italian ships can once again compete with foreign vessels and navigate safely in international waters at risk of piracy. In practice, an effort at clarification is still required for a number of reasons. At first sight, the new counter-piracy provisions provide shipowners with the opportunity to choose alternatively between public and private security guards. On this basis, if compared with the practice of other States, Article 5 of Law No. 130/2011 has a wider scope of application. However, notwithstanding the significant demand, the use of private forces

³⁸ See Law No. 130/2011, Article 5, paras. 4, 5, 5 *bis* and 5 *ter*.

³⁹ Cf. Articles 133 ff. of the *Testo unico delle leggi di pubblica sicurezza* (Consolidated Act of Laws on Public Security), included in the *Regio decreto* (Royal-Decree) No. 773 of 18 June 1931 and subsequent amendments, and Article 249 ff. of the related executing Regulation, included in the *Regio decreto* (Royal-Decree) No. 635 of 6 May 1940 and subsequent amendments. These rules are expressly recalled in the Law under review (Law No. 130/2011) at Article 5, para. 4.

⁴⁰ Cf. Decree Law No. 215 of 29 December 2011 as amended by Law No. 13 of 24 February 2012.

is possible only where public teams are not available and only where the above mentioned conditions are met and, thus, their use is made *de facto* very difficult and uncertain, so that the only enforceable option is that of vessel protection detachments.

Moreover, there is additional uncertainty regarding the category of ship that can be protected by armed security services. Indeed, according to Article 5, paragraph 1, military teams can board *commercial* vessels, whereas paragraph 4, with respect to private guards, makes reference to *merchant* vessels and *trawlers*, but no reason is given for this distinction. Besides, as proven by the incident mentioned above regarding the “MSC Melody”, a cruise ship can also easily fall prey to pirates. This leads to an additional question as to whether, on the basis of the new law, such a ship falls within the category of “protected” ships or not. In light of such uncertainty, it is worth recalling that in the US two seafarers sued two companies, “Heidmar” and “Marida Tankers”, for failing to place armed guards on a ship that fell into pirate hands.⁴¹ A last reason of concern is that the new Italian law is silent regarding the possible capture of suspected pirates. In other words, no reference is made to the possibility and the modalities to detain suspected bandits on board or to transfer them to competent courts for trial.

5. THE USE OF FORCE AT SEA: IN SEARCH OF CLARITY

With respect to regulations governing the use of force at sea, an additional effort at clarification seems to be required. This is particularly true in light of the fear that the increasing number of piracy attacks, together with the rapid growth of profitability of the counter-piracy market, may foster an equivalent escalation in violence at sea, with alarming consequences.⁴² Unfortunately, this potential fear is also confirmed by maritime practice. For instance, in March 2010, a suspected pirate was shot and killed by a private security team on board a Panama-flagged cargo vessel en route to Mogadishu.⁴³ Better known, as it generated a major diplomatic row between Italy and India, is the abovementioned case of the *Enrica Lexie*, whereby two Italian sailors boarded an Italian oil tanker, allegedly killed two Indian fishermen off the coast of Kerala, mistaking them for bandits.⁴⁴

⁴¹ See Geneva Academy of International Humanitarian Law and Human Rights, *cit. supra* note 5.

⁴² Pirates might first of all seek to match the escalating level of arms and, hence, the more protected ships become and the more armed the pirates may become. Secondly, arming more ships might make non-guarded ships more vulnerable. In many cases shipowners calculate that the risk of having the vessel hijacked versus the possibility of having to pay a ransom does not justify the expensive cost of hiring armed security services.

⁴³ Reported by EUNAVFOR, *Pirate Dies in Attempted Hijacking – EU NAVFOR Detains Pirate Action Group*, 24 March 2012.

⁴⁴ See *supra* note 7.

As seen above, in many States a general legal framework to regulate the use of armed security services exists. Some States, such as Panama, the US, Spain and the UK have also adopted specific regulations and guidance to clarify under what conditions security services can embark on ships and use armed force against possible pirate attacks. More recently, other entities, such as the Baltic and International Maritime Council,⁴⁵ have also begun to adopt guidance to coordinate operators in the field. In this scenario, however, the case of Italy requires particular attention. Implementing regulations on the use of force and firearms by private contractors have long been promised by the Italian authorities, but never been issued. More specifically, what is currently lacking in Italy is a regulatory framework establishing whether and under what conditions security personnel may be armed, with what kind of weapons they may be armed, and when and how such weapons may be lawfully embarked and eventually used. This regulatory vacuum and the consequent uncertainty are quite problematic. In the case of accidents, it would be very difficult to verify whether the force used by private personnel on Italian flagged ships was in line with the above mentioned conditions on the use of force required by different human rights mechanisms.⁴⁶ Additionally, some uncertainty inevitably also affects the case of armed security provided by vessel protection detachments. Indeed, their rules of engagement are covered by military secret and thus they are not common knowledge.⁴⁷

The current situation should draw our attention to the risk of potential abuses of human rights. The principle of respect of human rights is universally accepted. However, in terms of more concrete provisions, both the International Covenant on Civil and Political Rights (ICCPR) as well as the European Convention of Human Rights (ECHR) require a State party to respect the human rights (as set out in these Treaties) of all individuals who fall within their jurisdiction. Therefore, on the basis of the common interpretation made by the UN Human Rights Committee and the European Court of Human Rights (ECtHR), we can say that a State party to these Treaties must also respect the human right of a suspected pirate on the high seas over whom it has effective control.⁴⁸ In this context, rights of particular relevance

⁴⁵ Cf. BIMCO, the largest international shipping associations, has detailed a standard contract for the employment of security guards on vessels (GUARDCON). See also Industry Guidelines for the Use of Private Security Contractors May 2011.

⁴⁶ See *Audizione al Senato del Ministro dell'Interno* (Hearing of the Ministry of the Interior before the Senate) on the state of implementation of the legislation on counter-piracy, 31 July 2012.

⁴⁷ See *Quarta Commissione Permanente* (Fourth Permanent Commission – Defense), Reply to the Parliamentary question No. 5-06448 concerning the activity of the Italian marines operating for the protection against acts of piracy on board Italian merchant vessels, 28 March 2012, p. 96 ff. On the enforcement of the rules of engagement during maritime operations, see TONDINI, “Regole di ingaggio e uso della forza in mare”, *Rivista marittima*, 2005, p. 57 ff.

⁴⁸ Human Rights Committee, General Comment No. 31, 2004. See, for example, *López Burgos v. Uruguay*, Communication No. 52/1979, 29 July 1981, and *Lilian Celiberti de Celiberti*

include freedom from torture and other cruel, inhuman or degrading treatment, freedom from arbitrary deprivation of liberty and, above all, the right to life. In light of the predictable accidents seen above, respect for the right to life will be extremely important when force is used to protect vessels from pirate attacks.

With respect to the interpretation of the right to life (Article 2 ECHR) as per the ECtHR, starting with the case *McCann*, the boundary existing between the respect of the right to life and the lawful use of force has been drawn on the basis of a case-by-case approach.⁴⁹ As regards the right to life, even though this is not an absolute right, its enforcement appears to be extremely wide.⁵⁰ States are prohibited at all times from arbitrarily depriving any person of his or her life and, accordingly, it cannot be abrogated arbitrarily when, for instance, suspected pirates are captured, released, or transferred.⁵¹ Moreover, from an objective perspective, the prohibition on the taking of life extends to the use of force resulting in intentional as well as unintentional actions and applies also in the absence of death.⁵² From a subjective perspective, the prohibition concerns the taking of life by police, soldiers and any other agents exercising police powers and, thus, also in the case of public and private personnel.⁵³

As far as the use of force is concerned, Article 2, paragraph 2, delineates the situations where it is allowed to use force and, thus: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection. However, the use of force for the achievement of one of the purposes set out in Article 2, paragraph 2, must respect the two core law en-

v. Uruguay, Communication No. R.13/56, 17 July 1979; ECtHR, *Al-Skeini and Others v. United Kingdom*, Application No. 55721/07, Judgment of 7 July 2011, para. 136 and *Medvedyev and Others v. France*, Application No. 3394/03, Judgment of 28 March 2010, para. 67.

⁴⁹ Cf. ECtHR, *McCann et al. v. United Kingdom*, Application No. 18984/91, Grand Chamber, Judgment of 27 September 1995; *Kakoulli v. Turchia*, Application No. 38595/97, Judgment of 22 November 2005, para. 45; *Isayeva Yusupova and Bazayeva v. Russia*, Application Nos. 57947/00, 57948/00 and 57949/00, Judgment of 24 February 2005, para. 41; *Giuliani and Gaggio v. Italy*, Application No. 23458/02, Grand Chamber, Judgment of 24 March 2011, para. 175.

⁵⁰ See Article 3 of Protocol No. 6 concerning the abolition of the death penalty, which also prohibits any derogation of Article 15 (derogation in time of emergency) of the ECHR.

⁵¹ Cf. BESTAGNO, "Diritto alla vita", in BARTOLE, DE SENA and ZAGREBELSKY, *Commentario breve alla Convenzione europea dei diritti dell'uomo e delle libertà fondamentali*, Padova, 2012, p. 36 ff.; CATALDI, "Deroga in caso di stato d'urgenza", *ibid.*, p. 555 ff.; HARRIS, O'BOYLE and WARBRICK, *Law of the European Convention on Human Rights*, Oxford, 2009, p. 56; PIEDIMONTE BODINI, "Fighting Maritime Piracy under the European Convention on Human Rights", *EJIL*, 2011, p. 829 ff.; CALLEWAERTH, "Is There a Margin of Appreciation in the Application of Articles 2, 3, and 4 of the Convention?", *HRLJ*, 1998, p. 6 ff.; GUILFOYLE, "Counter-Piracy Law Enforcement and Human Rights", *ICLQ*, 2010, p. 151 ff.

⁵² Cf. *McCann*, *cit. supra* note 49, paras. 148-149; *Ilhan v. Turchia*, Application No. 22277/93, Grand Chamber, Judgment of 27 June 2000, para. 75.

⁵³ Cf. ECtHR, *Avsar v. Turkey*, Application No. 25657/94, Judgment of 10 July 2001, para. 37.

forcement principles, which are “proportionality” and “necessity”.⁵⁴ According to the first criterion, there must be proportionality between the measure of force used and the purpose pursued as well as between the force used and the interest pursued. According to the second criterion, the use of force must be avoided, as far as possible, and, where force is inevitable, it must not go beyond what is reasonable and necessary in the circumstances. To give an idea of what can be considered necessary in relation to the use of force at sea, in the *I’m Alone* and in *M/V Saiga (No. 2)* cases, the International Tribunal of the Law of the Sea (ITLOS) stated that sinking a ship to prevent its escape and firing live, large-caliber rounds into a slow-moving merchant ship are scarcely necessary actions.⁵⁵

In addition to this case law, the importance of the right to life with respect to the use of force against suspected pirates is expressly mentioned in several provisions and was recently recalled in UNSC Resolutions, which affirm that human rights law is applicable during counter-piracy operations.⁵⁶ Likewise, in May 2012, the IMO’s Maritime Security Committee⁵⁷ issued a new interim guidance for privately contracted armed security personnel, where it is stated, *inter alia*, that it should ensure that armed personnel understand that:

“[...] [A]ll reasonable steps should be taken to avoid the use of force and, if force is used, that force should be used as part of a graduated response plan, in particular including the strict implementation of the latest version of BMP; [...] the use of force should not exceed what is strictly necessary and reasonable in the circumstances and that care

⁵⁴ See Article 8-*bis*, para. 9, of the 1988 Convention for the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation (SUA Convention), as amended by the 2005 SUA Protocol; the 1979 Code of Conduct for Law Enforcement Officials, adopted by General Assembly Resolution 34/169 of 17 December 1979; the 1995 UN Fish Stocks Agreement for the Implementation of Provisions of the UNCLOS, relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stock (ILM, 1995, Vol. 34, p. 1547 ff.).

⁵⁵ Cf. *S.S. “I’m Alone” (Canada/United States)*, United Nations Reports of International Arbitration Awards, Vol. III, p. 1609 ff.; ITLOS, *The M/V “Saiga” (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, Judgment of 1 July 1999. See TREVES, *cit. supra* note 10. See also GUILFOYLE, *Shipping Interdiction and the Law of the Sea*, Cambridge, 2009, p. 268 ff.

⁵⁶ See, among others, UN Security Council Resolution 1851 (2008), *cit. supra* note 10, para. 6.

⁵⁷ The MSC is the highest technical body of the IMO consisting of all Member States. The functions of the MSC are to “consider any matter within the scope of the Organization concerned with aids to navigation, construction and equipment of vessels, manning from a safety standpoint, rules for the prevention of collisions, handling of dangerous cargoes, maritime safety procedures and requirements, hydrographic information, log-books and navigational records, marine casualty investigations, salvage and rescue and any other matters directly affecting maritime safety”.

should be taken to minimize damage and injury and to respect and preserve human life [...]”.⁵⁸

On these grounds, States are required not only to respect human rights but also to protect them from interference by others, including private firms employing armed security personnel.⁵⁹ Thus, armed personnel, when protecting the vessel from piracy attacks will be bound by several human rights instruments, whereas States should have in place proper legislative and administrative frameworks that regulate the actions of armed services on board and ensure they are properly accountable when they operate on flagged vessels.⁶⁰

6. CONCLUSIONS

Whether one likes the idea or not, armed security services on board civilian vessels will become an increasingly common feature of counter-piracy. Moreover, considering that there is not enough naval capacity to secure all pirate-prone hotspots, on a short-term basis, the deployment of private contractors is probably the way forward to provide ships with actual freedom of navigation.⁶¹

However, **the widespread use of security contractors experienced in this context** and also in other areas, including the nine years occupation of Iraq, shows the importance of relying on adequate regulations to control the use of force at sea. On an international level, more binding rules are urgently needed to coordinate operators in the field.⁶² Our main idea is to encourage agreements on the use of armed security personnel among all those States sharing common interests to combat piracy, with particular reference to primary maritime powers and countries in the regions

⁵⁸ IMO, “Interim Guidance to Private Maritime Security Companies Providing Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area”, MSC.1/Circ.1443, 25 May 2012, para. 5.15.

⁵⁹ It is also argued that companies themselves have a duty to respect fundamental human rights, such as the right to life and the right to freedom from torture. Under the 2008 UN “Protect, Respect and Remedy” Framework on Human Rights and Business, developed by the UN Special Representative of the Secretary-General on the issue of transnational corporations and other business enterprises with regard to human rights and endorsed by the Human Rights Council with Resolution 8/7 of 18 June 2008 (para. 1), there is a corporate responsibility to respect human rights. See also Report of the independent international commission of inquiry on the Syrian Arab Republic, UN Doc. A/HRC/19/69, 22 February 2012, para. 106.

⁶⁰ See Geneva Academy of International Humanitarian Law and Human Rights, *cit. supra* note 5, p. 19 ff.

⁶¹ Cf. GUILFOYLE, *cit. supra* note 7.

⁶² See PATEL (Chairperson of the United Nations Working Group on the Use of Mercenaries), “New Forces Need New Rules”, in Opinion Piece by UN Working Group on the Use of Mercenaries, 25 September 2012; UN News Center, *Somalia: UN Experts on Use of Mercenaries Urge Greater Oversight for Private Security Contractors*, 16 December 2012.

infested by pirates. At national level, detailed rules on the use of force, aimed at preventing unreasonable violence at sea, are also urgently required. In Italy, regulations intended to ensure the quality of the private security industry is extremely weak. The foregoing analysis shows that there is a need for Italian authorities to take steps towards issuing implementing rules to establish detailed conditions for embarking armed private contractors on Italian-flagged vessels.

While we are aware of the fact that the way forward in piracy suppression can only be driven by a combination of factors, including, notably, more effective action on land in Somalia and other pirate infested regions, the need for preventing violent accidents at sea, arising from piracy attack as well as from other kinds of crimes could also be met by enhancing prosecution capabilities in this particular area of international law, which at present are sorely lacking.⁶³

⁶³ Cf. KONTOROVICH, “A Guantánamo on the Sea: The Difficulty of Prosecuting Pirates and Terrorists”, *California Law Review*, 2010, p. 244 ff.; BEVILACQUA, *cit. supra* note 21, p. 665 ff.

