

Privately Contracted Armed Security Companies In Merchant Shipping

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Bu makale hakem incelemesinden geçmiştir ve TÜBİTAK–ULAKBİM Veri Tabanında indekslenmektedir.

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PRIVATELY CONTRACTED ARMED SECURITY COMPANIES IN MERCHANT SHIPPING

ABSTRACT

Armed private security companies have recently become a method used by maritime companies to combat piracy or attempted to do so if permitted by flag states. This issue has been regulated to a certain extent by the guiding regulations of the International Maritime Organization (IMO), but there are still clarification issues such as liability, jurisdiction, sovereignty, and insurance. On this page, the current situation has been identified and maintenance-related solutions have been researched.

Keywords:

shipping

piracy

International Maritime Organisation

privately armed guard companies

liability

DENİZ TİCARETİNDE SİLAHLI ÖZEL GÜVENLİK ŞİRKETLERİ

ÖZ

Silahlı özel güvenlik şirketleri deniz haydutluğu ile başa çıkmak amacıyla son dönemde denizcilik şirketleri tarafından başvurulmuş veya bayrak devletlerinin izin verdiği ölçüde başvurularına çalışılan bir yöntem haline gelmiştir. Uluslararası Denizcilik Örgütü (IMO)'nun rehber niteliğindeki düzenlemeleri ile bu konu hakkında belli ölçüde düzenlemeler yapılmış ancak sorumluluk, yargı yetkisi, egemenlik ve sigorta gibi konularda halen açıklığa kavuşturulması gereken sorunlar mevcuttur. Bu makalede mevcut sorunların tespitine çalışılmış ve bunlarla ilgili çözüm önerileri araştırılmıştır.

Anahtar Kelimeler:

denizcilik

deniz haydutluğu

Uluslararası Denizcilik Örgütü

silahlı özel güvenlik şirketleri

sorumluluk

INTRODUCTION

Various measures are constantly being taken by states to combat piracy, which constitutes a major obstacle to global maritime trade. These measures are based on basically the self-defense of the crew within the means available to them and regional patrolling organizations formed by States. For example, manoeuvring, alarm systems, and physical barriers such as razor wires, water spray, and foam monitors are some anti-piracy methods recommended by the International Maritime Organization (IMO) in Best Management Practices (BMP). Non-violent self-defense measures and patrolling alleviated the issue, but it still threatens global maritime trade's continuousness and human life.

According to the International Maritime Bureau's official statistics, in the first half of 2022, 58 incidents of piracy and armed robbery against ships have been reported, which is the lowest total since 1994.^[1] On the other hand, 96 % of the vessels attacked were boarded and 23 crew members were taken hostage. These statistics demonstrate that self-defense mechanisms need some supplements to prevent merchant ships from piracy. For this reason, the application of privately contracted armed security guards was improved by the shipping industry. Due to limited availability and the costly nature of patrolling activities, there is a rising demand among shipowners for services provided by private maritime security companies.^[2] Increasing insurance costs due to piracy incidents and the expenses incurred to obtain hostage or boarded ships outweigh the costs of armed security companies. This situation makes the use of PCASP (Privately Contracted Armed Security Personnel) advantageous in recent years. But armed team presence on board does not mean removing other applications like BMPs or such.^[3]

[1] "ICC Commercial Crime Services," accessed December 14, 2022, <https://www.icc-ccs.org/index.php/1320-global-piracy-and-armed-robbery-incidents-at-lowest-level-in-decades>.

[2] Ilja Van Hespén, "Protecting Merchant Ships from Maritime Piracy by Privately Contracted Armed Security Personnel: A Comparative Analysis of Flag State Legislation and Port and Coastal State Requirements," *Journal of Maritime Law & Commerce* 45, no. 3 (July 2014): 372.

[3] MSC.1/Circ.1443, "Interim Guidance To Private Maritime Security Companies Providing Privately Contracted Armed Security Personnel On Board Ships In The

The de facto practice of armed guards on board shipping has eventually been accepted by IMO and some States.^[4] While IMO was strictly objecting to the use of force by private companies and their security personnel until May 2011, the Maritime Safety Committee of IMO at its 89th Session approved interim guidance to ship owners, ship operators, and shipmasters on the use of privately contracted armed security personnel on board ships in the high-risk area. This guidance stated that Private Maritime Security Companies (PMSC) should be operated consistent with the applicable law which means carrying, embarking, or disembarking of arms and deployment of armed personnel subject to the permission of the competent law. Even if every country in the world allows the use of force and regulates the rules for it, there are still questions about liability, jurisdiction, sovereignty, and insurance issues. This practice was born out of a de facto need, but the legal problems caused by the practice need to be resolved.

Since the private security companies aim to deter piracy at least so far, this article initiated with determining piracy activities conditions according to United Nations Convention on the Law of the Sea (UNCLOS) provisions. Then this study starts up with other piracy measures until private security companies implement them. Its implementation is quite new, so the delicate balance between self-defense rights and the use of force against piracy attacks must be determined. In our study, the problems that might be encountered in practice are mentioned under the title of general principles of international law.

UNCLOS 1982 and SUA Convention, respecting primary resources near international principles of law, are mentioned in the second section. As a secondary resource, the IMO Guidelines are examined to identify all actors' obligations from flag States to ship operators in maritime trade.

Lastly, the research analyses the main problems, as to the jurisdiction and liability of main actors, regarding the use of force by private security companies. The countries, one by one, applications are not in the scope of

High Risk Area," (25 May 2012), para. 5.4.

[4] Mišo Mudrić, "Armed Guards on Vessels: Insurance and Liability," *Poredbeno Pomorsko Pravo* 165, (2011): 242. Even the UN Security Council advises enhancing communication between governments and the private sector on maritime security in the August 2021 Monthly Forecast.

this research. Additionally, subjects related to insurance will be mentioned only when it is necessary.

I. THE DEFINITION OF PIRACY AND PRECAUTIONS FOR PREVENT FROM PIRACY

A) DEFINITION OF PIRACY

According to Article 101 of UNCLOS, piracy is defined as, illegal acts of violence or detention or depredation committed by a private ship against another for private ends on high seas outside the jurisdiction of any State. The definition of piracy adopted in UNCLOS was insufficient in terms of scope since the act of violence is required on the high seas for piracy to occur. For this reason, IMO adopted the “Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery Against Ships” by Resolution A.1025(26) on 2 December 2009, which introduces the acts of violence, detention and depredation committed for special purposes in the sovereignty areas of states are defined as the act of “armed robbery at sea”. The only thing that distinguishes the act of armed robbery at sea from piracy is the area where the act is committed. In addition to that, while universal jurisdiction has been accepted in piracy, armed robbery at sea is under the jurisdiction of states.

B) PRECAUTIONS FOR PREVENT FROM PIRACY

Various measures are constantly being taken by states to combat piracy, which constitutes a major obstacle to global maritime trade. It can be said that the regulations accepted within the scope of maritime security are generally based on piracy. This is because piracy is often associated with various criminal organizations such as terrorism and smuggling. Looking at the piracy data between 2010 and 2021 in line with the measures taken, it is understood that there is a decrease from year to year (except a slight increase in 2018 and 2020) across the world.^[5] While there were 445 attacks in 2010, this number decreased to 132 in 2021. This is a positive development for world maritime trade. This development also reveals the important contribution of global cooperation in the fight against maritime security.

[5] “Statista”, accessed December 17, 2022, <https://www.statista.com/statistics/266292/number-of-pirate-attacks-worldwide-since-2006/>.

In Global Integrated Shipping Information System (GISIS) of IMO publishes the location and time of the piracy activities simultaneously to guide the actors in maritime shipping. In addition, monthly and annual reports on current piracy data are published regularly.^[6] It is understood from these reports that piracy activities are concentrated in certain parts of the world (Strait of Malacca and Singapore, South China Sea, West Indian Ocean, Arabian Sea, East Africa, Persian Gulf, East Africa, South America Caribbean). For this reason, establishing various regional organizations by IMO is aimed at ensuring maritime security in these areas within the understanding of regional cooperation.

Maritime Organization of West and Central Africa (WOMCA) in Africa, Regional Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP),^[7] North Atlantic Coast Guard Forum (NACGF) in the North Atlantic and North Pacific Coast Guard Forum (NPCGF) are regional organizations established under the leadership of IMO. WOMCA was created with the participation of 25 states in Africa, which envisages cooperation between states in terms of piracy, maritime terrorism, unregistered and illegal fishing, drug smuggling, laying of illicit oil platforms and pipelines, and prevention of all kinds of smuggling activities at sea. The cooperation organization called ReCAAP was established in 2004 with the participation of 8 Asian countries to ensure maritime security. The agreement establishing this organization is the first multilateral international agreement to prevent piracy.

NPCGF and NACGF started their activities in 2000 and 2007 respectively. NPCGF carries out activities to increase regional security in the North Pacific region and aims to cooperate and exchange information between states to prevent piracy, drug trafficking, migrant smuggling, and illegal fishing activities. Both organizations are based on combining the experiences and intervention forces of the participating states at the time of crisis. In

[6] "IMO", Piracy Reports, accessed December 17, 2022, <https://www.imo.org/en/OurWork/Security/Pages/Piracy-Reports-Default.aspx>.

[7] Marco Odello, "The Enrica Lexie Incident and the Status of Anti-piracy Security Personnel on Board," *Journal of Conflict & Security Law* 26, no. 3, (Winter 2021): 571.

addition, funds were created for both organizations^[8] within the framework of Article 43 of UNCLOS.

Those regional organizations' activities are based on mainly patrolling and inspecting the ships in the scope of "rights of visit", which are granted only to warships and regulated in Article 110 of UNCLOS. Unfortunately, this method of defeating piracy through interdiction alone cannot be successful. Because navy patrols have limited effectiveness and navies cannot be omnipresent.^[9] Furthermore, states do not have a willingness to capture and punish pirates due to the prohibition of refolement.^[10] Another important issue more political than legal, is the fear of asylum claims by the convicted pirates at the end of their sentence. UNCLOS art. 105 also follows the same approach, which gives jurisdiction to States to judge alleged pirates, but does not oblige them to do so. At the same time, naval forces focus on the conflict between countries, not preventing crime. Moreover, countries often reject naval escorts through merchant ships, because its cost is too high.^[11]

One of the most important tools in the fight against piracy is BMP applications. BMP refers to passive and non-lethal measures vessels should take to protect themselves from a pirate attack. Most of the P&I Clubs insist on strict compliance with contemporary BMPs.^[12] The last version of BMP, which is BMP5, was published in June 2018. Non-lethal force as prescribed under BMP5 should be the first resource used as a counter-piracy

[8] James Kraska, Raul Pedrozo, *International Maritime Security Law*, (Leiden Boston: Martinus Npizorijhoff Publishers, 2013): 20-21.

[9] Brittany E. Pizor, "Lending an "Invisible Hand" to the Navy: Armed Guards As a Free Market Assistance to Defeating Piracy," *Case Western Reserve Journal of International Law* 45, no. 1 and 2, (2012): 548.

[10] Matteo Tondini, "Some Legal and Non-Legal Reflections on the Use of Armed Protection Teams on Board Merchant Vessels: An Introduction to the Topic," *Military Law and Law of War Review* 51, no. 1, (2012): 12.

[11] Pizor, "Lending," 554.

[12] Gareth John Courtois, "Piracy and Privately Contracted Armed Security Personnel: A Comparative Analysis of The Global Response to the Deployment of Armed Guards on Board Merchant Vessels and South Africa's Policy as a Port and Coastal State," (Master's dissertation, University of Kwazulu-Natal, 2014), 24.

measure.^[13] The BMP5 outlines the best ways to prevent and handle pirate attacks, and while adherence to its recommendations is not mandatory, their adoption is highly encouraged by the IMO.^[14] According to BMP 5, The Maritime Security Center Horn of Africa (MSCHOA) is the planning and coordination center for the EU Naval Forces (EU NAVFOR). MSCHOA encourages companies to register their ships' movements before entering the High-Risk Area. Additionally, the ships are advised to report suspicious activity to the United Kingdom Maritime Trade Office (UKMTO).

II. THE URGENT NEED FOR REGULATING ARMED SECURITY GUARDS ON BOARD

Especially between the years 2005 and 2009, there was a rise in piracy in the Western Indian Ocean and the Gulf of Aden. Some merchant vessels initiated to operate with armed guards, to protect ships against pirate attacks on that region due to the insufficient resistance of naval patrols and BMP applications. Although IMO has apprehension about this issue at first, the Maritime Safety Committee (MSC) approved a variety of recommendations for using security personnel on board for all of the actors in the maritime sector since 2011. Security companies can give service with armed or unarmed security personnel, which depends on the agreement acted with the shipowner.

Dated 26 June 2009 MSC.1/Circ.1333, ordered not to use privately contracted armed security personnel on board ships and strongly discouraged the carrying and use of firearms by seafarers due to the possible escalation of violence which could result from the carriage of armed personnel on board merchant ships.^[15] Because the carriage of arms on board ships may encourage attackers to carry firearms or even more dangerous weapons. However, MSC at its eighty-ninth session (11 to 20 May 2011) approved interim guidance to the Flag States and to shipowners, ship operators, and shipmasters on the use of privately contracted armed security personnel

[13] Sony Vijayan, "The Use of Armed Forces on Merchant Vessels Without Strict Rules for the Use of Force," *Journal of Maritime Law & Commerce* 45, no. 1, (2014): 31.

[14] MSC.1/Circ.1601, "Revised Industry Counter Piracy Guidance," (8 December 2018).

[15] MSC.1/Circ.1333, "Recommendations to Governments for Preventing and Suppressing Piracy and Armed Robbery Against Ships," 12 June 2015. para. 5-7.

on board ships in the High-Risk Areas which is defined as some special measures in Indian Ocean, coast of east Africa and Arabian Peninsula.^[16]

In addition to IMO, the approach of States on this issue began to change over time. IMO has taken the lead for States regulating standard rules in their domestic laws.^[17] Increasing insurance and ransom expenses have an impact on the change of attitude.^[18] According to Article 92 of UNCLOS (United Nations Convention on the Law of the Sea), flag States have exclusive jurisdiction on the high seas and Article 94 of UNCLOS refers to “duties of flag State”. Therefore, the decision to allow PCASP on board ships is a prerogative of flag States, and not all States may allow their use.^[19] Moreover, coastal States could prohibit, or at least control, the carrying of arms by foreign-flagged ships in their exclusive economic zones or continental shelves under articles 58 or 78 of UNCLOS respectively.^[20] For an effective application, only flag States’ consent might not be sufficient. Because laws governing the use of force may differ over time and according to location and the applicable national law being that not only of the flag State but may also include that of coastal, port, and other States.^[21]

[16] High Risk Area defined in the Best Management Practices for Protection against Somalia-based Piracy, unless otherwise defined by the Flag State. MSC.1/Circ.1339, “Piracy and Armed Robbery Against Ships in Waters off the Coast of Somalia”, (September 2011).

[17] Clive R. Symmons, “Embarking Vessel Protection Detachments and Private Armed Guards on Board Commercial Vessels: International Legal Consequences and Problems under the Law of the Sea,” *Military Law and Law of War Review* 51, no. 1, (2012): 28.

[18] Tondini, “Some Legal,” 8. Hespren, “Protecting,” 365. Average amount of ransom paid has risen from 1.45 million USD in 2008, to over 1.9 million USD in 2009, 4.0 million USD in 2010, and 5.3 million USD in 2011.

[19] MSC.1/Circ.1443, para. 1.2.

[20] Symmons, “Embarking,” 32.

[21] MSC.1/Circ.1443, para. 3.3.

A) PRIMARY SOURCES

1- General Principles of International Law and International Regulations Regarding Use of Force

The monopoly of using force ought to belong to States only according to the conventional view in international law.^[22] However, when a state is unable to protect its citizens, the law of self-defense must be applicable. International law recognizes self-defense as a human right, but there is no unified definition of it.^[23] It depends on the situation and perspective. Some decisions on this issue are still controversial. For example, in the *Enrica Lexie* incident, the armed forces on the Italian ship opened fire on a boat approaching the ship on suspicion of piracy, and two innocent Indian fishermen were killed. Italy advocated that the warning light be turned on there and the necessary warnings be made, but the boat continued to approach.^[24] Nevertheless, the Indian court decided to arrest two Italian marines.^[25] At this point, the necessity of a common definition of self-defense emerges.^[26] The IMO needs to define common rules regarding the intervention of suspicious ships. Because special forces cannot always determine how they should behave.

[22] This understanding based on John Locke's idea which is written in "*Letter Concerning Toleration*". He argued that individuals in the state of nature have both a right to preserve themselves and a right to punish wrongdoing. But having private persons exercise these rights creates problems. In any dispute, private persons will favor their own interests, they are liable to punish too much, and, even if their claims are rightful, they may lack the raw power to see justice done over a stronger adversary. Robert Leider, "The State's Monopoly of Force and the Right to Bear Arms," *Northwestern University Law Review* 116, no. 1 (2021): 35-80.

[23] Pizor, "Lending," 558. Article 51 of the UN Charter acknowledges a right to self-defence, but the Human Rights Council advocates for a restriction the private use of firearms, hindering the ability of people defend themselves. And the limits of self-defence right vary greatly from country to country.

[24] Symmons, "Embarking," 29.

[25] Hespen, "Protecting," 374.

[26] Pizor, "Lending," 561.

Some States such as the Netherlands only allow to use of their military forces on merchant vessels,^[27] to overcome the problems that may arise from self-defense right interpretation. These teams known as Vessel Protection Detachments (VPD) operate under their State of nationality's formal rules of engagement.^[28] Those are special domestic rules for military forces that define the circumstances, conditions, degree, and manner in which the use of force, or actions.^[29] VPDs are also subject to the relevant laws on the use of force and self-defense like Private Security Armed Guards (PSAG). They should act in moderation and avoid excessive use of force.

In customary international law, the use of force is restricted to cases of necessity or self-defense^[30]. The use of force must be in the cases in which there is no other way out and in which the requirements of necessity, reasonableness, and proportionality. In *M/V Saiga (No. 2) Case*^[31] para. 155 states that “*International law . . . requires that the use of force must be avoided as far as possible, and, where the force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances. Considerations of humanity must apply to the law of the sea, as they do in other areas of international law*”. However, it is hard to define whether the action is more than the limits of self-defense or appropriate to international law. For example, there is a traditional rule regarding the application of non-lethal methods primarily in case of piracy attacks.^[32] However, the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials regulates

[27] France, Spain, Israel, and Italy provide VPDs to guard commercial vessels flying their flag, but nowadays they allow to use PCASP. Hespen, p. 382.

[28] Symmons, “Embarking,” 23.

[29] Britannica, <https://www.britannica.com/topic/rules-of-engagement-military-directives>, accessed March 3, 2024.

[30] Anna Petrig, “The Use of Force and Firearms by Private Maritime Security Companies Against Suspected Pirates,” *International and Comparative Law Quarterly* 62, no. 3, (2013): 683.

[31] The *M/V “Saiga” (No.2)*, (*Saint Vincent and the Grenadines v. Guinea*) 1999. https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_2/published/C2-J-1_Jul_99.pdf.

[32] Symmons, “Embarking,” 48.

that “*Law enforcement officials shall not use firearms against persons except in self-defense or defense of others against the imminent threat of death or serious injury, or to prevent the perpetration of a particularly serious crime involving grave threat to life*”. Therefore, in some situations of an imminent and serious threat, warning shots are not an absolute requirement.^[33] As a result of that, MSC.1/Circ.1405/Rev.2 advises Private Maritime Security Companies (PMSC) to access competent maritime legal advice on a 24/7 basis.

Besides the principles of international law, the Montreux Document^[34] regulates private security companies in an armed conflict situation, so that is a part of international humanitarian law. The International Code of Conduct for Private Military and Security Providers (ICoC),^[35] which is based on the Montreux Document, is also a set of principles relating to private military and security companies. However, both of them are not applicable for private maritime security companies, because they are regulated only for land-based companies.

[33] Symmons, “Embarking,” 44.

[34] <https://www.montreuxdocument.org/about/montreux-document.html>, accessed March 11, 2024. Pınar Akarçay and İrem Şevval Akbaş, “Montrö Dokümanı’nın Uluslararası Örf ve Adet Hukuk Kuralı Olarak Uygulanabilirliği” in *Uluslararası Sistem, Konjonktürel Değişim ve Güvenlik Trendleri*, ed. Dr. Suat Dönmez (İstanbul: Atı Yayınları, 2023), 199-226. The Montreux Document, prepared by the Swiss Government and the International Red Cross Organization, entered into force on 17 September 2008. Today, 58 states and three international organizations are parties to the Montreux Document. The Montreux document is not a binding international agreement but is a guideline that aims to develop good practices for states related to operations of private military and security companies during armed conflict. However, it is an important document in terms of defining the actors related to private security companies (contracting, home states and territorial states) for the first time and determining their obligations in the context of international law.

[35] Akarçay and Akbaş, “Montrö Dokümanı’nın Uluslararası Örf ve Adet Hukuk Kuralı Olarak Uygulanabilirliği”, 222. This regulation was signed by 58 private security companies with the initiative of the Swiss Government in 2010, and the number of signatory companies increased to more than seven hundred within 3 years. With this regulation, the obligations of private security companies and good practices are regulated, not the liabilities of states arising from private security companies, as in the Montreux Document.

2- United Nations Convention on the Law of the Sea (UNCLOS–1982)

UNCLOS is generally silent on the use of force at sea and it orders that *“high seas shall be reserved for peaceful purposes”* in Article 88. Likewise, according to Article 301 of UNCLOS, *“In exercising their rights and performing their duties under this Convention, States Parties shall refrain from any threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the principles of international law embodied in the Charter of the United Nations.”* Those provisions ought to be evaluated with general principles of international law which has been mentioned above. Self-defence is an inherent right that gives any vessel to apply a degree of allowable force when they are under piracy attack. In addition to that non-aggressive military uses of seas are presumed non-prohibited in international law because maritime security is principally based on protection against unlawful and deliberate acts.^[36]

Additionally, it is worth to mention that whether the UNCLOS provisions, which provide for intervention in the event of suspected piracy, can be applied to the VPDs and PCASPs. According to article 107 of UNCLOS, only military vessels are authorized to seize ships involved in piracy, which means both VPDs and PCASPs cannot seize a suspected ship with piracy. This is also valid for patrolling the suspected vessel, VPDs and PSAGs embark on an individual ship and are only able to protect that ship. In Article 110 of UNCLOS, the “right of visit” is regulated. According to this provision, when there is a reasonable ground for suspecting that the ship engaged in piracy, a warship is justified to boarding. Underlining a warship, the right of visit cannot apply to VPDs.^[37] Because Article 29 of UNCLOS defines warships as *“For this Convention, “warship” means a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent, and manned by a crew which is under regular armed*

[36] Natalie Klein, Joanna Mossop and Donald Rothwell, *Maritime Security: International Law and Policy Perspectives from Australia and New Zealand* (London: Routledge, 2010), 22.

[37] However, some writers defend its opposite. They see VPDs as a state-controlled military personnel. Therefore, the right of visit can be extended for VPDs. Symmons, “Embarking,” 37.

forces discipline". In the VPDs application, there is an armed or unarmed security team collected with state-controlled military personnel, but the ship is owned by a private shipping company.

3- Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA Convention)

In March 1988, adopted the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation by IMO.^[38] The 1988 SUA Convention is the first international convention that includes penal provisions for secure navigation at sea. In this Convention, some crimes are defined and the states are obliged to prosecute or extradite alleged offenders. Among the unlawful acts covered by the SUA Convention in Article 3 are the seizure of ships by force, acts of violence against persons on board ships, and the placing of devices on board a ship that is likely to destroy or damage it. The 2005 Protocol to the SUA Convention was adopted by the Diplomatic Conference on the Revision of the SUA Treaties held from 10 to 14 October 2005. Within the adoption of articles 3bis, 3ter, and 3 quarter of the 2005 Protocol, the number of criminal acts is increased.

B) GUIDELINES OF IMO

MSC at its eighty-ninth session (11 to 20 May 2011) approved interim guidance to Flag States and shipowners, ship operators, and shipmasters on the use of privately contracted armed security personnel on board ships in the High Risk Area. The guidance for ship owners, ship operators, and ship masters, MSC.1/Circ.1405/Rev.2, was revised in May 2012. MSC.1/Circ.1406/Rev.3, the guidance for flag States, revised in June 2015. Similarly, the MSC adopted MSC.1/Circ.1408 in September 2011, which has interim recommendations for port and coastal states regarding the use of privately contracted armed security personnel on board ships in the High-Risk Area.

Above mentioned IMO regulations are advisory. The recommendations are not intended in any manner to override or otherwise interfere with the

[38] IMO Website, <https://www.imo.org/en/About/Conventions/Pages/SUA-Treaties.aspx>, accessed December 25, 2022.

implementation and enforcement of the national legislation of a State or to interfere with that State's rights under international law.^[39]

The recommendations do not address all the legal issues that might be associated with the use of privately contracted armed security personnel (PCASP) on board ships. They provide considerations on the use of PCASP if and when a flag State determines that such a measure would be appropriate and lawful.^[40]

According to IMO Recommendations determine the aspects that need to be covered by a State's legal framework to actively permit the use of PCASP on board the merchant ships flying its flag. Until flag States constitute legal barriers, merchant ships will be unable to hire armed guards.^[41] Ships are also subject to coastal states' regulations to carry guns for protection against pirates because coastal countries exercise jurisdiction over ships that innocent passage through territorial waters. Security companies should give the services within the confines of the law. For example, if coastal states do not allow to carrying of guns, security companies can use unarmed personnel in that territory or one company can use a helicopter to drop a bundle of guns on a ship once the ship reaches international waters.^[42] Port states can also protect their interests by controlling whether security companies or security guards obtain licenses. Countries may introduce a law such as requiring ships to place guns in a locker when a ship pulls into port.^[43]

[39] MSC.1/Circ.1408, "Revised Interim Recommendations for Port and Coastal States Regarding The Use of Privately Contracted Armed Security Personnel on Board Ships in The High Risk Area", (25 May 2012), Annex para. 2.

[40] MSC.1/Circ.1406/Rev.3, "Revised Interim Recommendations for Flag States Regarding The Use of Privately Contracted Armed Security Personnel on Board Ships in The High Risk Area," (12 June 2015), Annex, page 1, para.1.

[41] Pizor, "Lending," 556. MSC.1/Circ.1406/Rev.3 Annex, page 1, annex para. 5. However, in open registry countries neither there is a legal prohibition towards the use of armed security guards, nor they have a regulation regarding the requirements with respect to carriage and usage of firearms. Only Cyprus has adopted specific legislation towards their use, including particular provisions about the issuance of certificates.

[42] Pizor, "Lending," 557.

[43] Pizor, "Lending," 569.

III. THE ACTORS OBLIGATIONS IN SHIPPING SECTOR

A) FLAG STATE'S OBLIGATIONS

Flag States should have a policy on whether the use of PCASP will be authorized.^[44] It seems that explicit authorization is required from IMO recommendations. Because there must be an authorization process that is granted the PCASP meets flag State's requirements. It is a requirement of the principle that regulated by UNCLOS Article 91, ships must comply with the rules of the flag state.

The carriage of such personnel and their firearms and security-related equipment is subject to flag State legislation and policies. That is recommended in IMO guidance, flag States should take into account the possible escalation of violence that could result from the use of firearms when deciding on their policy.^[45] This obligation is quite important to understand whether private security companies have caused excessive use of force over time. Because in the beginning, flag States and other actors in maritime trade had concerns about this. While some writers claim using PCASP on boards will augment the violence in seas^[46], others believe private companies behave more backward concerning the use of firearms.^[47] MSC.1/Circ.1405/Rev.2 regulates in Annex 5.15. paragraph, PMSC should require that their personnel not use firearms against persons except in self-defense or defense of others. Flag States should provide to hold their control on their own.

Flag State should determine the minimum criteria or minimum requirements with which PCASP should comply. Flag States should issue certificates that demonstrate that the security company meets the requirements.

[44] MSC.1/Circ.1406/Rev.3 Annex, page 1, annex para. 5.

[45] MSC.1/Circ.1406/Rev.3 Annex, page 1, annex para. 3.

[46] Tondini, "Some Legal," 15.

[47] Pizor, "Lending," 566.

B) PORT AND COASTAL STATE'S OBLIGATIONS

MSC.1/Circ.1408 regulates IMO recommendations for port and coastal states regarding the use of privately contracted armed security personnel on board ships. This document is not intended to override or otherwise interfere with the implementation and enforcement of the national legislation of port and coastal States.^[48] According to IMO Guidance, Member States should facilitate the movement of PCASPs and their firearms and security-related equipment. The recommendation also warns States to communicate with IMO and share information with the shipping industry and the PCASP service providers.^[49] Port and coastal States are needed to regulate the embarkation and disembarkation of PCASP, firearms, and security-related equipment and the requirements related to vessel calling. Yet, their measures should not hinder the continuation of maritime trade or interfere with the navigation of ships and States should ensure that all measures are consistent with international law.^[50] Additionally, MSC published a questionnaire, MSC-FAL.1/Circ.2, to guide port and coastal States on 22 September 2011.

C) SHIPOWNERS, SHIP OPERATORS AND SHIPMASTER'S OBLIGATIONS

The risk assessment is the most important part of the shipowner's obligation because it is in the basement of the contract which between the shipowner and the security company. The risk assessment should include, according to MSC.1/Circ.1405/Rev.2;

- “Ship and crew security, safety and protection,
- whether all practical means of self-protection have been effectively implemented in advance,
- the potential misuse of firearms resulting in bodily injury or death,
- the potential for unforeseen accidents,
- liability issues,
- the potential for escalation of the situation at hand, and

[48] MSC.1/Circ.1408, Annex, p. 1., para. 2.

[49] MSC.1/Circ.1408, Annex, p. 1., para. 5.

[50] MSC.1/Circ.1408, Annex, p. 1., para. 6.

- compliance with international and national law.”

The use of PCASPs shouldn't be considered as an alternative to BMPs and other protective measures by shipowners.^[51] Shipowners should contract with a company that provides the requirements of selection criteria in IMO Guidance. PMSC should have maritime experience and it must be documented in certificates. In addition to this, PMSC should prove with documents its management and team-leading skills, chain of authority, and understanding of flag State, port State, and coastal State requirements concerning carriage and usage of firearms with certificates. The company should have written references from previous clients, an understanding of the Somalia-based piracy threat and maintain current knowledge, an understanding of BMP and ship protection measures, and access to competent maritime legal advice on a 24/7 basis.^[52]

Security companies should comply with the selection criteria of their personnel and provide necessary education to their personnel. PMSC maintains insurance cover for shipowners, security company personnel, and third-party liability cover.^[53] This coverage should be verified by shipowners and the terms of the agreement signed between the shipowner and security company do not prejudice or potentially prejudice the shipowner's insurance cover. Security companies should also have liability insurance coverage and insurance for personal accidents, medical expenses, hospitalization, and repatriation insurance. Additionally, PMSC should ensure their personnel carry and use firearms on such voyages for accident, injury, and damage arising from the use and carriage of firearms.^[54]

The contract which signed with PMSC should include *“a clear statement recognizing that at all times the Master remains in command and retains the overriding authority on board, and an agreed procedure in the event of*

[51] 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,” (25 May 2012), Annex, para. 1.5.

[52] MSC.1/Circ.1405/Rev.2, Annex, para. 4.3.

[53] MSC.1/Circ.1405/Rev.2, Annex, para. 5.1.

[54] MSC.1/Circ.1405/Rev.2, Annex, para. 5.4.

the Master being unavailable".^[55] IMO Guidance highlights the master's control obligation maintains all times. Despite the master's overall obligation for his ship, a lethal threat in such circumstances may deprive the master of any final decision to use force. In the case of VPD deployment, there is no obligation of the ship's master, since obligation for any use of force is normally clarified in an agreement between shipowners and the State of VPDs.^[56] Even such military agents hired out, they bound to the instructions of the master concerning navigation and safety issues.^[57]

When a PCASP is employed, the superior authority of the master is another debating issue. IMO Guidance indicates that it is important to involve the Master in the decision-making process^[58] in risk assessments, however, there might be some unimagined situation that requires the PCASP team leader to have a full-command capability to give an immediate response. It is suggested that security service contracts may include clauses under which the master of the vessel is under an obligation to follow the instructions coming from the PCASP team leader.^[59] Therefore, the contract between the security company and the shipowner is the primary source of order prioritization for the master and PCASP team leader.

IV. MAIN PROBLEMS REGARDING JURISDICTION AND LIABILITY

A) JURISDICTION

Justification of legal cases regarding the use of force by PCASPs or VPDs might be in the jurisdiction of different countries because of different nationalities coming together in the same event. According to Article 92 of UNCLOS, ships shall focus on the exclusive jurisdiction of the flag state while on the high seas. This provision is easily understandable when a single ship is involved in the event or crime. When the scenario alters to the use of force from one ship against persons on board another ship, there

[55] MSC.1/Circ.1405/Rev.2 Annex, para. 5.9.1.

[56] Symmons, "Embarking," 36. The article refers to *Enrica Lexie* case.

[57] Symmons, "Embarking," 38.

[58] MSC.1/Circ.1405/Rev.2, Annex, para. 1.5.

[59] Mudrić, "Armed Guards," 245.

is no absolute prohibition on concurrent jurisdiction being permissible like that of *Enrica Lexie*.^[60] Multiple jurisdiction or concurrent jurisdiction no matter what we call, it is inevitable in some situations.

In the *Enrica Lexie* case, India claimed criminal jurisdiction according to its domestic law and the Bozkurt-Lotus Case of ICJ (1928).^[61] In the Bozkurt-Lotus Case, in an incident involving collusion between a French mail steamer and a Turkish vessel on the high sea, the sinking of the Turkish vessel led to the death of 8 Turkish seamen on board. Turkish Court justified the captain of the French vessel and sentenced him, then he was released on bail. France objected to Türkiye's jurisdiction and took a case against Türkiye to the Permanent Court of International Justice,^[62] this Court held that Türkiye was justified in its exercise of jurisdiction because "*there is no rule of international law prohibiting the State to which the ship on which the effects of the offense have taken place belongs from regarding the offense as having been committed in its territory*".

Italy objected to Indian court jurisdiction, citing the Article 97 of UNCLOS.^[63] This provision states that "*In the event of a collision or any other incident of navigation concerning a ship on the high seas, involving the penal or disciplinary responsibility of the master or any other person in the service of the ship no penal or disciplinary proceedings may be instituted against such person except before the judicial or administrative authorities either of the flag State or of the State of which such person is a national*". Italy defend the acts which committed deliberately or intentionally includes the term "collusion or any other incident" in this provision, which is claimed gives exclusive jurisdiction to Italy beside Article 92 of UNCLOS.

Principally, as indicated Bozkurt-Lotus Case, jurisdiction can be claimed by the flag State of the vessel from which the use of force emanated or

[60] Symmons, "Embarking," 55.

[61] ITLOS, The "*Enrica Lexie*" Incident (Italy v. India), no. 24: 199, para. 94.

[62] http://www.worldcourts.com/pcij/eng/decisions/1927.09.07_lotus.htm, accessed March 11, 2024. Case of the S.S. Lotus (France v. Türkiye) (PCIJ 1927).

[63] ITLOS, The "*Enrica Lexie*" Incident (Italy v. India), no. 24: 190, para. 41.

the flag State of the victim vessel.^[64] Similarly, the SUA Convention gives jurisdiction to both flag states; for the ship where the crime was committed under Articles 6(1)(a) and 6(1)(c), for the ship affected by crime under Articles 6(1)(a) and 6(2)(b). Eventually, the Indian court rejected Italy's claims on account of both of the parties of the SUA Convention.^[65] Italy advocated continuously both marines should be allowed to return to their homes. In July 2015, Italy took the case to the International Tribunal for the Law of the Ocean (ITLOS). The Tribunal could decide if they ought to be prosecuted in India or not. The matter was then referred to the Permanent Court of Arbitration.^[66]

Whilst most of the commentators object Indian court's jurisdiction about the principle, accepted in the *Bozkurt-Lotus Case*, which has become questionable nowadays,^[67] there is a reality of the inexistence of any provision still abolishing nationality of victim ship country's jurisdiction. Article 97 of UNCLOS does not intend to prohibit one of the flag State's jurisdiction in case of captain of both ships was at fault in the accident. Additionally, there is no intentional act in the *Bozkurt-Lotus Case*, it's different than in *Enrica Lexie*. It is worth mentioning that, the SUA Convention gives

[64] Symmons, "Embarking," 55.

[65] Odello, "The *Enrica Lexie*," 554.

[66] Permanent Court of Arbitration, <https://pca-cpa.org/en/cases/117/>, accessed December 27, 2022.

[67] Valeria Eboli, Jean Paul Pierini, "The "Enrica Lexie Case" and the Limits of the Extraterritorial Jurisdiction of India," *Online Working Paper*, no. 39 (March 2012): 14-26. https://www.researchgate.net/publication/329216960_The_Enrica_Lexie_case_and_the_limits_of_the_extraterritorial_jurisdiction_of_India/link/5bfd4652299bf1c2329d5d8b/download, accessed 27 December 2022. The Article says "in the *Lotus case*, does not provide directly jurisdictional link", "...the so called *Lotus Case* which has been baldly invoked as "good law" in the present case. The decision in the *Lotus Case* and common misperceptions on its real meaning..". Symmons, "Embarking," 54. Writer mentions under footnote 158, with refers to A. Raman and The Petition to the EU Commission, "some commentators have taken very global view that reliance on the *Lotus* principle is wrong because the law has now changed and UNCLOS specifically derogates from this in giving exclusive jurisdiction to the flag State".

jurisdiction to more than one State Party to ensure that crimes do not remain unpunished.^[68]

The jurisdiction of India was also controversial due to the immunity status of VPDs regarding “*ratione materiae*”. This might be defensible because of the different status of VPDs which are subject to flag State’s rules of engagement. This position is in line with the prevailing opinion in international law. The fact that the Tribunal recognized the immunity of Italian military personnel deployed as VPD on a merchant ship raises several questions about similar situations that may occur when private contractors and security companies may be deployed to protect private vessels from pirate attacks.^[69]

B) LIABILITY

IMO guidelines determine the obligations of flag States, security companies, and whatever, but it is unspecified when those duties are not accomplished. If there are deficiencies in authorization and certification, the States Parties will pass over the problems within the supervisory mechanism of applicants over time. However, if any accident or incident occurs due to the current use of PCASP, the result of this might be fatality, injury, or only financial loss, it should be determined who and to what extent can be held liable. The issue becomes very complex when charterers get involved.

First of all, when an incident occurs due to PCASP activities, many actors in maritime trade, especially the flag state, can be held responsible. The obligation of the flag State, as mentioned above, may arise from Article 92 of UNCLOS and its other relevant provisions or from the SUA Convention. Besides flag State, shipowner (or operator) and security company might be held liable for acts of PCASP concerning misuse of force. Unfortunately, their obligations are intertwined with each other. IMO Guidance seems to have somewhat circumvented this issue by seeking insurance from both parties, however, the issue is not fully covered in IMO recommendations.

Currently, the marine insurance industry introduced “*knock-for-knock*” clauses in security contracts to solve the difficulties that remain out of

[68] SUA Convention, article 6/1-2. Kraska and Pedrozo, “International Maritime Law,” 810.

[69] Odello, “The *Enrica Lexie*,” 573.

contract in cases of pirate attacks.^[70] In other respects, the liability of PSCs from that of the shipowner is separated by stipulating that the risk is borne where it occurs, which means the PSCs will cover damage suffered by their personnel, whereas the shipowners will cover their liability.^[71] This principle is valid also for ship operators and cargo interests. On the other hand, the parties of legal cases might be held responsible according to the domestic rules of applicable law.

[70] Mudrić, “Armed Guards,” 245.

[71] Mudrić, “Armed Guards,” 245.

CONCLUSION

20 years of de facto and approximately 10 years of legal implementation of PMSCs, helped to understand this way of fighting piracy is relatively low costly than insurance premiums due to piracy risk, which include primary risks (occurring damages to hull and cargo during pirate attack), secondary risks (the costs related breach of some contracts such as charter and carriage contracts, the insurance coverage and the investment in security equipment) and tertiary costs (when piracy attack results successfully the ransom and vessel hijacking payments).^[72] Because armed guard teams seem to eliminate piracy attacks as long as they exist on board. The cost of insurance is about 10 times more than the cost of having armed personnel on board.^[73]

Similarly, there is a tolerant and even supportive approach settled by the international community in general. Although the International Court of Justice did not address the use of force by non-State actors on the high seas,^{[74][74]} the UN Security Council emphasized the need to enhance channels of communication between governments and the private sector on maritime security in the August 2021 Monthly Forecast.^[75]

On the other hand, although the idea that private companies will make fewer murder attempts outweighs, security companies might be a reason for a variety of troubles for states as the use of force might cause fatalities and injuries, the flag State will be responsible for the actions of the PCASP and VPD teams, the lack of unity in international regulations related armed security guards might cause political crisis between states in such situations like that of *Enrica Lexie*, vetting and certification process brings another obligation for states and there must be a standardization among states' application in this regard.

Regarding the exercise of the self-defense right, when different nations exist in the same event, for example security team might be from a different

[72] Mudrić, "Armed Guards," 253.

[73] Mudrić, "Armed Guards," 242.

[74] Pizor, "Lending," 559.

[75] <https://www.securitycouncilreport.org/monthly-forecast/2021-08/maritime-security.php>, accessed December 26, 2022. UN Security Council Report, Monthly Forecast, (August 2021).

country than the flag State of the ship and the operation might be on the coast of a third State, the domestic law of each may bring a different regulation. Private armed security guards ensure the continued lack of a coherent global strategy for providing a balance between the use of force and self-defense rights. Giving only legal support will not be able to address the confusion regarding applicable law.

Despite the summarized challenges, private security companies will alleviate and share the obligation of fighting against the piracy of states. The shipping industry's willingness to benefit private security guards albeit adding an extra cost for them cannot be disregarded. Use of force in the maritime environment needs the fine balance of sovereign rights and obligations, the international community in general and flag states may improve the standardization. Unified rules and codification may be provided under the leadership of IMO. Besides, as recommended by all, collaboration between companies can be increased with navies.

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