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## Private Armed Guards in the Fight against Piracy

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### SECTION 1 INTRODUCTION

Contracting the services of Private Armed Guards (PAG) on board merchant vessels in High Risk Areas (HRA) and the use of firearms where occasion demands is currently engaging the affairs of States. A major area of contention is the lack of uniformity or settled law, resulting in multiplicity of regimes, practices and divergent opinions. To this end, this chapter seeks to examine current trends, views and positions held by parties, flag and port States, the International Maritime Organization (IMO), the International Chamber of Shipping (ICS), the Baltic and International Maritime Council (BIMCO), insurers and other stakeholders towards arriving at an acceptable legal basis for the use of armed guards on board vessels. In addition, this chapter will attempt to proffer answers to research questions, which include *inter alia*: Under what laws are the Private Armed Guards currently operating? Who takes responsibility during piracy attack, particularly for the just or unjustified use of firearms on board? What happens when armed guards capture pirates — who should they hand them over to since they are private concerns? Who takes responsibility when a guard shoots a person on board? What is the precise status of such PAG on board the vessel? What are the attendant risks to the master, crew or passengers on vessels with armed guards? What are the likely legal and administrative requirements for the reception of merchant vessels at ports with armed guards? Is the disposal of weapons at sea or use of floating armories as a means of storing weapons permissible under international law? The chapter further considers other related arrangements where Governments still retain monopoly of security under the so-called Vessel Protection Detach-

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ment and Shipriders Agreement. Incidents bordering on fatal shootings and consequential legal actions instituted are also dealt with along with national practices. The conclusion presents a summation of issues, emerging trends, recommendations and the way forward.

#### Paragraph 1 **Threat to Maritime Security/Global Response**

The continuous threat posed to international shipping, notably off the coast of Somalia, Gulf of Aden (GOA), South China Sea, Gulf of Guinea, Arabian Sea, Indian Ocean and Malacca Straits, has attracted a series of international intervention and industry-induced solutions. The International Maritime Organization (IMO) received reports of 198 incidents between January and June 2012 in these areas<sup>1</sup>. The attacks were noted to be more sophisticated than traditional modes of operation with the pirates firing automatic weapons and rocket propelled grenades at merchant vessels while attempting to board or hijack them.

The world maritime community has orchestrated a response to this problem, which has brought about a plethora of logistical and legal challenges<sup>2</sup>. For example, the United Nations has been called upon to intervene, in respect of incidents off the coast of Somalia/Gulf of Aden<sup>3</sup>. It is reported that “since the crisis off the coast of Somalia began to escalate in 2008, more than 3,000 seafarers have so far been kidnapped and held ransom, enduring months of appalling conditions”<sup>4</sup>.

The effect has been high level co-operation between States, particularly in the detachment of naval troops to patrol these areas now designated as High Risk Areas (HRA). Consequently, naval and State ships have continued to protect the shipping lanes particularly for vessels delivering humanitarian aid under the World Food Programme (WFP). In addition, the co-operation has facilitated global protection of international trade and suppression of piracy by interdicting pirate ships and escorting susceptible merchant vessels out of the HRA.

The international shipping community on its part, in collaboration with other relevant bodies, notably the UN Contact Group on Piracy has put in place Best Management Practices (BMPs)<sup>5</sup> aimed at assisting

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1. IMO Global Integrated Shipping Information Systems (GISIS), <http://gisis.imo.org/Secretariat/Default.aspx> (accessed on 30 October 2012).

2. G. Rodden and J. Walsh, “The Legal Issues of Private Armed Security on Commercial Ships”, *The Federal Lawyer*, Vol. 58, No. 4, May 2001, at 30

3. Series of resolutions have been passed by the UN Security Council. Resolution 1816 authorizes foreign forces to enter into the Somali territorial sea, others include 1838, 1846, 1851.

4. International Maritime Organization (IMO), *Piracy in the Indian Ocean*, World Maritime Day 2011 publication.

5. The latest version is the BMP4, “Best Management Practices for Protection against Somalia Based Piracy (Version 4, August 2011) Suggested Planning and

ships to avoid, deter or delay piracy attacks in the HRA<sup>6</sup>. BMP is strongly recommended to be applied throughout the HRA.

With the magnitude of violence being recorded in the Gulf of Guinea and its designation as HRA, plans are under way by the Economic Community of West African States (ECOWAS) to jointly combat the violence aimed at looting goods on board. Positive steps taken include joint sea patrols, launched by the Federal Government of Nigeria and Benin Republic, with the backing of France. The IMO and the Maritime Organization of West and Central Africa (MOWCA) are also holding consultations, with a view to establishing coast-guard functions, Maritime Domain Awareness and other logistic requirements in the area. The Round Table of international shipping associations (BIMCO, ICS, INTERCARGO and INTERTANKO) recently developed a set of Interim Guidelines for Owners, Operators and Masters for protection against piracy and armed robbery in the Gulf of Guinea region<sup>7</sup>. The guidelines, though stand-alone in nature, are to be read in conjunction with the BMP4.

With respect to the applicable law, there is no comprehensive legal framework on the issue of Private Armed Guards for maritime operations or regulation of carriage of arms on board merchant vessels. This position makes it imperative to establish a legal basis upon which armed guards are currently deployed on vessels. It is noteworthy that all the guidelines issued by IMO to date are not mandatory. The Law of the Sea Convention (UNCLOS), however, gives direction in respect of activities permitted in different maritime zones, which shall be accordingly examined.

## Paragraph 2      **The Observed Gaps in Past Initiatives**

Although there has been some remarkable global response to piracy by way of anti-piracy actions through naval patrols by the European Union Naval Force (EU NAVFOR), North Atlantic Treaty Organization (NATO) and the Combined Maritime Force (CMF) off the coast of Somalia and the application of Best Management Practices, some gaps still exist in attaining the desired level of security. Geo-

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Operational Practices for Ship Operators, and Masters of Ships Transiting the High Risk Area”, available at <http://www.lisecr/portals/o/BMP4.pdf> (accessed on 18 October 2012).

6. BMP4, item 2.4, “The High Risk Area defines itself by where pirate activity/and or attacks have taken place. For the purpose of BMP the High Risk Area is an area bounded by the Suez and the Strait of Homuz . . .”

7. New Interim Anti-Piracy Guidelines for Gulf of Guinea, available at <http://www.shipping.nato.int/Pages/Guidelines-for-Gulf-of-Guinea.aspx> (accessed on 28 March 2013).

graphical factors, such as the vast nature of coastlines, also limit the effectiveness of the patrols of the international navies, coupled with the reduction in most countries' defence budgets are mostly responsible for this development.

It has also been observed that as international navies are shrinking, the volume of trade by sea, on the other hand, is increasing. For example, the International Maritime Bureau (IMB) report for the first half of 2012 reflects that "Somali pirates continue to attack vessels in the northern Somali coast in the Gulf of Aden and the southern Red Sea in the Bab El Mandeb TSS despite the presence of warships"<sup>8</sup>. Most attacks were said to involve the use of highly sophisticated weapons, which is of great concern to the merchant navy fleet, as this poses serious threats not only to seafarers but also to the ship, cargo and environment. Spearing notes that, "the effective handling of Somali pirates has been an ephemeral and problematic task. Despite the international naval presence, the incidence of Somali piracy has increased."<sup>9</sup>

The world's insatiable demand for oil and gas draws prospectors to untapped reserves, much of which lie offshore. The limited natural resources will be underscored as the global population increases, stressing the vulnerability of the world's ports, as supply chain nodes. Against this backdrop, maritime crime will become very lucrative<sup>10</sup>.

### Paragraph 3     **Emergence of the Solution of Private Armed Guards**

Arising from the need for enhanced shipboard security, the current trend is a growing demand for the use of private armed guards. This development has been attributed largely to the perceived failure of Governments in their duty to offer the expected degree of protection to international shipping to correspond with the upsurge of the menace of unlawful acts at sea, notably piracy on strategic international routes. The limited effect navies have had so far precipitated a call by the United States to international commercial shippers to rely upon Private Security Companies<sup>11</sup>.

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8. ICC, International Maritime Bureau, Piracy and Armed Robbery against Ships. Report of 1 January-30 June 2012, p. 23.

9. C. Spearing, "A Private Security Solution to Somali Piracy: The U.S calls for Private Security Engagement and the Implications for Canada", <https://www.Usnwc.edu/getattachment/C6f939ef-5695-4ed8-bfoa-14>, at p. 56, accessed on 13 August 2012. (Naval War College Review, Autumn 2010, Vol. 63, No. 4.)

10. UK House of Commons Foreign Affairs Committee (Piracy off the Coast of Somalia submitted by the Security Association for the Maritime Industry (SAMI)). <http://www.publications.parliament.uk/>, accessed 23 August 2012.

11. C. Spearing, *supra* footnote 9, p. 56.

The shipping community received this development with mixed feelings: on the positive side, these companies accord protection to vessels travelling in dangerous waters. The seas are much too vast for warships to protect all merchant vessels<sup>12</sup>. The private armed guard initiative has consequently evolved as a mitigating factor in the face of the observed threats. Based on reluctance to accept additional cost and liability associated with self-protection, commercial shipping associations and trade unions have been more adamant in the past on their position that keeping the sea lanes safe is the exclusive job of States. However, in February 2011, this position was reviewed when the International Chamber of Shipping (ICS) Chairman declared a change in its stance and acknowledged that “arming ships is a necessary alternative . . .”<sup>13</sup>.

Rinehard referred to the view expressed by Peverett<sup>14</sup> that the armed maritime security providers “seem to be working, as there has been no successful attack on a vessel that has been carrying private armed security”<sup>15</sup>. As regards hijackings by Somali pirates, Cook stated that “no ship with armed guards on board has been hijacked by Somali pirates”<sup>16</sup>.

It has also been expressed that “there is now a general acceptance of armed guards across the industry, although some flag states are still not permitting”<sup>17</sup>. This can be further corroborated by the action of States in allowing arms on board commercial vessels pursuant to relevant legislative amendments. In any case, a positive effect of this is that the navy (military) remains as the “preserve of the State”<sup>18</sup>.

According to Hoeger, “[h]aving armed guards is cheaper than the extra fuel required to detour around pirate areas or to go fast enough to outrun them”<sup>19</sup>. Despite the surrounding controversies the deployment

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12. C. Spearing, *supra* footnote 9, p. 61.

13. C. Berube and P. Cullen, Editors’ Introduction, “The Emergence of Private Maritime security”, in C. Berube and P. Cullen (eds.), *Maritime Private Security: Market Responses to Piracy, Terrorism and Waterborne Security Risks in the 21st Century*, London, Routledge, 2012, pp. 51-64.

14. T. Peverett, Head of Maritime Security, International Maritime Organization.

15. B. Rinehard, “Armed Guards on Merchant Vessels”, <https://www.cimicweb.org/>, accessed on 1 July 2012.

16. Michelle Wiese Bockmann and Alan Katz, “Shooting to Kill Pirates Risks Black Water Moment”, views expressed by Peter Cook, Chairman, Security Association for the Maritime Industry, <http://www.bloomberg.com/news/2012-05-08/shooting-to-kill-pirates-risks-blackwater-moment.html>, accessed on 14 August 2012.

17. “Piracy — Issues Arising from the Use of Armed Guards”, <http://www.skuld.com/upload/News%20and%20Publications/Publications/Piracy/Ince-Pirates-issues-arising-from-the-use-of-armed-guards.pdf>, pg4, accessed on 3 August 2012.

18. C. Spearing, *supra* footnote 9, p. 62.

19. *Supra* footnote 16: views expressed by R. Hoeger.

of PAG on commercial vessels is gaining ground. For example, warning shots fired by armed guards on board the *Maersk Alabama* foiled a pirate attack against the vessel<sup>20</sup>.

In summary, pirate activities remain a challenge, which cannot be completely remedied through conventional approaches. Having PAG on board reduces the vulnerability of vessels to attacks and serves as a preventive measure in comparison to the high costs associated with post-hijacking efforts such as negotiators' fees, ransom payments, rescue attempts and the need to transit longer routes via the Cape of Good Hope<sup>21</sup>. Theodore describes armed security guards on merchant ships as a necessary evil and argues that if pirates know that there are armed guards on board that acts as a deterrent<sup>22</sup>.

Be that as it may, PAG are not to be viewed as substitutes, but a complementary solution to multinational naval coalition and similar initiatives. Ship-owners should keep all options open in order to deter piracy attacks and defend their crews and vessels. The BMP4 contains, *inter alia*, provisions on crew safety, particularly safe muster point or citadel, freeboard, speed, sea state, planning and conduct expected prior to and during a typical pirate attack. It does not, however, recommend or endorse the general use of armed guards as this is considered as a matter for individual ship operators to decide following their own voyage risk assessment and approval of the respective flag States.

#### Paragraph 4      **Terminology**

The use of private security companies as service providers is considered not to be entirely new to the shipping industry as observed by Harrelson<sup>23</sup>; for years, private security companies provided services ranging from consulting on preventive measures to post attack services. It is further noted however that “the use of PAG varies from company to company”. The need for definitions and distinctions becomes imperative due to the different nature of contracts which under certain circumstances involve the Government. Consequently, for the purposes of consistency and convenience, the following defined terms will be used throughout this paper.

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20. The *Maersk Alabama* attacked previously on two occasions was targeted again by pirates on 9 March 2011; the attack was successfully repelled.

21. Source: “The American Club”, Mutual Protection and Indemnity Club domiciled in the United States of America.

22. *The Nation*, 25 March 2010.

23. J. Harrelson, “Blackbeard Meets Blackwater: An Analysis of International Conventions that Address Piracy and the Use of Private Security Companies to Protect the Shipping Industry”, *American University International Law Review* 25 (2010), No. 2, p. 297

## Paragraph 5 **Definitions and Distinctions**

### *A. Private Armed Guards/Privately Contracted Armed Security Personnel*

Private Armed Guards (PAG) are individuals on contract with Private Maritime Security Companies (PMSC), who serve as guards on board vessels. IMO adopts the term “Privately Contracted Armed Security Personnel” (PCASP) and regards them as employees of PMSC<sup>24</sup>. A number of PAG are “former members of the military and are highly trained in the proper handling of weapons and use of force during a crisis”<sup>25</sup>. For the purposes of this chapter, the terms PAG and PCASP are used interchangeably and denote the same meaning.

### *B. Private Maritime Security Companies*

These are security companies specifically for maritime domain, who enter into contracts directly with the shipping companies without any government involvement. IMO defines the PMSC as private contractors employed to provide security personnel, both armed and unarmed on board for protection against piracy. There are other private security companies who address land based issues and operate with or without government involvement. Mineau presents a catalogue of major Private Security Companies<sup>26</sup>.

### *C. Escort vessels*

This is an arrangement whereby PAG are not on board the merchant vessel but are in a smaller vessel engaged to lead the bigger vessel into or out of the HRA. The arrangement has been viewed as an effective way to remove shipboard threat through the use of escort platforms including ships, helicopters and small boats to provide a secure perimeter<sup>27</sup>. Experts consider the practice of convoying and escorting merchant vessels as an effective means of navigating in HRA.

24. MSC.1/1405.Rev.1.

25. G. Rodden and J. Walsh, “The Legal Issues of Private Armed Security on Commercial Ships”, *The Federal Lawyer*, Vol. 58, No. 4, May 2001.

26. M. Mineau, “Pirates, Blackwater and Maritime Security: The Rise of Private Navies in Response to Modern Piracy”, *Journal of International Business and Law* 9 (2010), No. 1, pp. 63-78.

27. C. G. Berube, “Anti-Piracy Escorts in the Gulf of Aden: Problems and Prospects”, in C. Berube and P. Cullen (eds.), *Maritime Private Security: Market Responses to Piracy, Terrorism and Waterborne Security Risks in the 21st Century*, London, Routledge, 2012, pp. 74-85.

The escort vessel may be approached and visited since it cannot enjoy immunity, being neither a warship nor a ship used only on government service and cannot exercise a right of visit. The escort ship does not possess the status of a commissioned vessel, which can be used for pirate hunting. Berube observes further that this concept is not necessarily new; historically, the use of armed escort vessels was apparent throughout most of the age of sail particularly in the form of privateers which were legitimate, State-sponsored security who might be issued letters of marque to attack enemy commerce<sup>28</sup>.

#### *D. Vessel Protection Detachment*

This term refers to small military teams deployed on civilian merchant vessel. In discussing this model Ronzitti highlights the fact that it is a similar but completely different phenomenon involving the detachment of armed soldiers on board<sup>29</sup>. The legal basis for the arrangement lies in international<sup>30</sup> and national<sup>31</sup> instruments. Vessel Protection Detachments (VPDs) are included within the scheme of EU NAVFOR, “Operation Atlanta”. Additionally, it involves uniformed personnel under regular discipline and thus differs from PAG. Armed teams are stationed on land in the Gulf of Aden region.

VPD teams are not only to resist and defend ships from pirates, but also to deter and intervene in order to bring an end to acts of piracy, including powers of arrest and seizure of assets under pirate control. The EU anti-piracy task force has organized a system of VPD for helping ships under piratical attack. Occasionally, navies provide an escort for a fee; for instance, the Yemeni navy provides escort services in the Gulf of Aden and charges up to US\$55,000 per ship. The EU anti-piracy task force has also organized a system of VPD for helping ships under piratical attack. Pirate hunting should, however, be excluded since the merchant ship cannot qualify as a warship or a duly authorized vessel on government service, even though it has a VPD on board<sup>32</sup>. Hence, there is no room for the application of Article 110 of UNCLOS.

The presence of VPD requires an agreement between the State to which the armed team belongs and the flag State of the merchant ship

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28. Letters of Marque were outlawed by the Treaty of Paris of 1856.

29. N. Ronzitti, “The Use of Private Contractors in the Fight against Piracy: Policy Options”, in F. Francioni and N. Ronzitti (eds.), *War by Contract, Human Rights, Humanitarian Law and Private Contractors*, Oxford University Press, 2011, pp. 37-51.

30. Article 92, UNCLOS.

31. Article 97 (1) of the Constitution of the Netherlands serves as the legal basis for VPDS on board vessels registered under its flag.

32. Please see definition of warship, Article 29, UNCLOS.

requesting the service. Declarations, which serve as a form of indemnity to the navies, are often signed.

### *E. Shiprider*

This operates by an agreement in which a law enforcement officer embarks on a vessel, usually a government warship, sailing a national flag different from the nationality of the shiprider. The purpose is to enlarge the powers of the vessel by embarking on board a law enforcement officer with due authorization to perform certain acts which may involve entry into territorial waters of the State, sending the shiprider or boarding and seizing a vessel flying the flag of that State or direct enforcement of its national laws.

The contracts are mainly on the protection of the marine environment, prevention of illegal trafficking of weapons, piracy and illegal migration. The shiprider arrangement also addresses issues of jurisdiction on probable areas of concurrence.

## Paragraph 6     **Scope**

This chapter will be confined to private maritime security arrangement. Hence, only PAG and Private Security Escorts will be examined. It will also seek to examine the main controversies and complexities in the use of PAG through the lens of the UNCLOS and industry regulations, with particular focus on IMO guidelines. Through a critical analysis of the complex subject of PAG, this chapter will make recommendations to the maritime world on the main issues in the use of PAG and consequential use of force on board merchant vessels. The legal and regulatory framework with regard to the use of PAG and the obligations incumbent on flag States, ship-owners, PMSC and PAGs will be also addressed here.

## SECTION 2     **THE GENERAL LEGAL FRAMEWORK OF PAG**

### Paragraph 1     **Legal and Regulatory Framework**

The movement of vessels with PAG on board is subject to regulations, which are international, regional or national in nature. To date, there is no international regulatory framework of a binding nature that comprehensively addresses the subject and no uniformity of laws on armed non-state actors at sea at the national level. Consequently, States

have taken different initiatives and measures. It has been observed that there is an array of standards created since 2009 which suggest good practice for private security teams, but none is legally binding<sup>33</sup>. Similarly, Cullen has expressed the view that “regulating maritime security companies is a very grey area”<sup>34</sup>. This section examines the relevant international treaty regimes as well as soft-law instruments; reference is also made to national laws and regulations.

### A. *The Law of the Sea Convention*

There are no explicit provisions on PAG or escort vessels in the Law of the Sea Convention (UNCLOS). However, the right of coastal States to legislate on safety of navigation<sup>35</sup> as well as of the flag State to regulate the safety of its vessels<sup>36</sup> is beyond any doubt. It is submitted that these provisions afford the requisite legal basis for States to enact legislations as they deem necessary towards enhancing shipboard security. Other relevant provisions having impact on the subject are discussed under relevant sections.

### B. *IMO Convention/Resolution/Guidelines*

Presently, there is no international convention by IMO on this subject. Attempts are however being made to establish a nexus between the International Ship and Port Security Facility Code (ISPS Code), which provides for private sector participation in managing maritime security risks, and PAG. The IMO, in collaboration with key stakeholders through its Maritime Safety Committee (MSC), has produced guidelines respectively to ship-owners, ship operators and ship masters, and made recommendations to flag, port and coastal States which are neither legally binding nor certifiable standards<sup>37</sup> on the use of PCASP.

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33. *The Economist*, “Laws and Guns Armed Guards on Ships Deter Pirates. But Who Says They Are Legal?”, <http://www.economist.com/node/21552553>, accessed on 29 August 2012.

34. P. Cullen, “Private Guards Kill Somali Pirates for First Time”, <http://www.foxnews.com/world/2010/03/24/private-guards-kill-Somali-pirate-time>, accessed on 1 July 2012.

35. Article 21 (1) (a), United Nations Convention on the Law of the Sea, 1982.

36. *Ibid.*, Articles 92 and 94.

37. MSC.1/Circ.1405 — Interim Guidance to Shipowners, Ship Operator and Shipmasters on the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area. MSC.1/Circ.1406 — 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.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.

In Circular MSC.1/Circ.1405.Rev.1, IMO notes

“[T]he increased threat to commercial shipping by Somalia-based pirates has led to extended use of armed guards and a marked expansion in the number of firms offering armed maritime security services for vessels transiting the HRA. The Organization, whilst not endorsing the use of privately contracted armed security personnel (PCASP), understands that shipping companies may find it difficult to identify reliable, professional private providers of armed security.”

The decision on the employment of PCASP on board ships is a complex one for a ship-owner. The absence of applicable regulation and industry self-regulation coupled with complex legal requirements governing legitimate transport, carriage and use of firearms gives cause for concern. IMO notes further

“this situation is further complicated by the rapid growth in the number of PMSC and doubts about the capabilities and maturity of some of these companies. Significant competence and quality variations are present across the spectrum of contractors offering services.”<sup>38</sup>

The following issues are all addressed in circular MSC.1/Circ.1405.Rev.1.

Risk assessment, PMSC Selection Criteria, PMSC Background Information, Selection and Vetting of PMSC, Training of PCASP, Service Provision considerations (Insurance, ship-owners insurance cover, PMSC insurance cover), PCASP Team Size, Composition and Equipment Command and Control of On-board Security Team — including relationship with the Master, Management of Firearms and Ammunition from Embarkation to Disembarkation, Rules for the Use of Force, Reporting and Record Keeping Categorization of PCASP, Reporting within HRA, Familiarization for Master and the crew.

A special segment of the MSC discussed the possible approaches, which the international community can adopt on issues related to the deployment of PCASP on board ships and the carriage of arms on board ships in HRA<sup>39</sup>. The outcome was MSC.1/Circ.1443, the Interim Guidance on “Private Maritime Security Companies Providing Privately Contracted Armed Security Personnel on Board Ships in the High Risk

38. MSC.89/WP.6, Annex 3, p. 2.

39. Session convened by the IMO Secretary-General, Koji Sekimizu, to discuss policy matters related to arms on board ships in the piracy high risk area, requested a working group to develop the Interim Guidance. MSC 90th session, 16 to 25 May 2012.

Areas”<sup>40</sup> coupled with MSC.1/Circ.1446 to prevent and mitigate Somali-based piracy. MSC.1/Circ.1443 makes provision, *inter alia*, for PMSC professional certification, company requirement, applicable law, insurance, PCASP composition and equipment, command and control, management of firearms, use of force and record keeping.

The Facilitation Committee (FAL) has also issued questionnaires on information on port and coastal State requirements on the subject<sup>41</sup>. These initiatives are in recognition of the growing demand and placement of armed guards on board vessels and the need for a degree of regulation.

Quite recently, the IMO has assigned the International Standards Organization (ISO) the task to develop the first global standards for PMSC which should be based on IMO MSC.1/Circ.1443. Accordingly, ISO with the liaison and participation of IMO, has developed the only published International Standards dealing with armed guards on ships referred to as ISO/PAS 28007:2012, “Ships and Marine Technology — Guidelines for Private Maritime Security Companies (PMSC)”, providing privately contracted armed security personnel (PCASP) on board ships (and pro forma contract). The document is presumed to have received the support of many stakeholders, including the UN Contact Group on Piracy off the Coast of Somalia<sup>42</sup>.

In the determination of the applicable law on PAG, numerous international conventions, regional arrangements and domestic law have a bearing, including human rights law.

MSC.1/1443 specifically makes reference to two other documents, i.e.

“The Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict<sup>43</sup>, and the International Code of Conduct for Private Security Service Providers (ICoC).”<sup>44</sup>

These documents are not directly relevant to the situation of piracy and armed robbery in the maritime domain and do not provide sufficient guidance for PMSC.

The Montreux Document restates rules of international law and provides a set of good practices for States. The ICoC, on its part, addresses

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40. Circular of 25 May 2012.

41. MSC-FAL./CIRC.2 of 22/09/2011.

42. Fighting Piracy — ISO Guidelines for Armed Maritime Guards, [http://www.iso.org/iso/home/news\\_index/news\\_archive/news.htm?refid=Ref1717](http://www.iso.org/iso/home/news_index/news_archive/news.htm?refid=Ref1717), accessed on 28 March 2013.

43. <http://www.eisf.eu/resources/item/?d=2051>.

44. The ICoC sets forth a set of principles for private security companies.

the private security industry and identifies a set of principles and processes for private security service providers on the support for the rule of law and respect for human rights. However, it is elaborated in the context of self-regulation and directed at land-based security companies only.

### *C. The UN Draft Convention*

The UN Draft Convention (Regulation, Oversight and Monitoring of Private Military and Security Companies) may also be considered as a related document when it will come into force. The Draft Convention has been the result of the legitimate concerns about the great dangers involved in the delegation or outsourcing of inherently governmental functions<sup>45</sup>.

In contemplation of the fact that important gaps remain in the national and international legal regimes applicable to private military and security companies, the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes is of significance. Emphasis is placed on the responsibility to protect all persons, whether civilians or military personnel, from abuses of their human rights by the actions or omissions of non- State actors including the private military and security companies<sup>46</sup>.

Noteworthy are the provisions on State responsibility contained in Article 4 (1) and (2) which provide respectively that:

“[E]ach State Party bears civil and criminal responsibility for the use of force under national and international law, whether the use of force occurs within its territory or outside its borders”

and that

“[E]ach State party bears responsibility for the military and security activities of private entities registered or operating under their jurisdiction, whether or not these entities are contracted by the State.”

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45. The final draft of the proposed convention for distribution is dated 13 July 2009, available at <http://www.mgimo.ru/files/121626/draft.pdf>, accessed on 19 January 2013.

46. The draft defines Private Military and/or Security Company (PMSC) as a corporate entity that provides on a compensatory basis military and/or security services, including investigation services by physical persons and/or legal entities. Military services refer to specialized services related to military actions including strategic planning, intelligence, investigation, land, sea or air reconnaissance etc., while Security services refer to armed guarding or protection of buildings, installations, property and people etc.

In addition, the companies are obliged to take cognizance of and to observe the norms of international humanitarian law and human rights law as well as relevant domestic law.

*D. BIMCO GUARDCON contract for employment of security guards*

The BIMCO GUARDCON contract for the employment of security guards on vessels (GUARDCON) was developed for the benefit of the wider shipping community. It is a product of a working group comprising ship-owners, property underwriters, insurance groups, Protection & Indemnity (P&I) clubs, maritime lawyers, representatives of security companies and other ship-owners and Maritime Insurance Associations. The intention is to harmonize the terms of engagement of PMSC as well as to simplify the processes for vetting and approval of contracts by members and their P&I clubs. It also constitutes a recommendation by BIMCO for the use of PAG on board vessels<sup>47</sup>. In this regard, PAG are only to be considered for placement on board a vessel after a risk assessment has been carried out with the master being involved in the decision-making process.

GUARDCON represents a positive attempt at creating uniformity in standards of the employment of security guards on vessels. Key issues addressed by GUARDCON by way of standards, which the PMSCs must adhere to, include: insurance, permits and licences to legally transfer weapons, knock-for-knock principle (liability and indemnity), masters' responsibility for the safe navigation and overall command of the vessel.

*E. National legislation and guidelines*

At the national level, States that allow PAG must set out an adequate regulatory framework. This can be construed from the duty of "due diligence" imposed to minimize risks to foreign nationals and States in respect of dangerous activities within their jurisdiction. Consequently, States that allow PAG are expected to make open declarations with necessary supportive legislation and guidelines<sup>48</sup>. The United Kingdom has issued an Interim Guidance to UK-flagged ships. In the United States, Club Guidance is in place via American Club Circular

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47. BIMCO Circular 5/12, published on 28 March 2012.

48. D. Guilfoyle, "Shooting Fishermen Mistaken for Pirates: Jurisdiction, Immunity and State Responsibility", <http://www.ejiltalk.org/shooting-fishermen-mistaken-for-pirates-jurisdiction-immunity-and-state-responsibility>, accessed on 19 January 2013.

No. 18/11 of 3 June 2011, while the Liberian Bureau of Maritime Affairs developed similar guidance<sup>49</sup>. India is an example of a country that has amended its national laws to reflect its current position. Further considerations are given to this under “Use of Force by Private Armed Guards — Regulation by National Law” (Section 3, para. 2, *infra*).

## Paragraph 2     **The Relevant Stakeholders and Their Obligations under International Law**

### *A. Flag States*

The law of the flag State is of paramount importance for the employment of PAG on board merchant vessels. This is in line with the provisions of Article 94 (1) of UNCLOS which states that “every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag”. To this end, the flag State is expected to issue explicit regulations with respect to licences/permits required for the carriage of arms and use of weapons on board its vessels, set rules of engagement/rules for the use of force and provide written consent to the ship-owners. The position of IMO, as stated in its Circular, is that “the decision to allow PCASP, on board ships is the prerogative of flag States and not all flag States may allow their use”<sup>50</sup>. Therefore, the responsibility to allow and regulate further the deployment of PCASP falls upon the flag States.

### *B. Ship-owner*

The ship-owner is vested with the responsibility of operating the vessel safely with the required degree of care for the crew and co-ordinate effective training between master, crew, and security company personnel, particularly the proper designation of roles and responsibilities.

As regards vessels with PAG on board, the main operational factors are safety, security, legal compliance and competence<sup>51</sup>. The ship-owner is therefore expected to act in due diligence and undertake some prelimi-

49. The Republic of Liberia, Bureau of Maritime Affairs, Maritime Security Advisory: Interim Guidance on the Use of Privately Contracted Armed Security Personnel on Board Ships in High Risk Area, [http://www.liscr.com/liscr/portals/0/securityAdvisory\\_03/2011](http://www.liscr.com/liscr/portals/0/securityAdvisory_03/2011).

50. MSC.1/Circ.1443, Annex, p. 1, para. 1.2.

51. Darren Dixon, Oxberry Risk Strategies, “What to Expect Operationally When Armed Guards Are Used on Board”, paper presented at 4th Maritime Piracy & Security Summit 30-31 January 2013, London.

nary steps by way of conducting detailed risk assessment in the selection of the PMSC that will deploy the PAG. In the discharge of this obligation, it is expected that the PAG to be deployed must be trained, intimately familiar with BMP and carry only licensed weapons on board. Furthermore, the ship-owner bears the duty to enquire if the respective flag State allows PAG on their vessels as well as to enquire of the related issues of licences or permits requirements for the carriage and use of weapons and rules of engagement.

In addressing the question of “how does a commercial ship owner choose an appropriate private security firm” Hook responds that

“there are many domestic and international companies that offer armed and unarmed security services, and they have an equally broad range of experience, skills and abilities. While this is a good start, there are still a number of issues that confront a commercial operator in this process, particularly in the due diligence required to access private security reliability, quality of training and consistency of performance . . .”<sup>52</sup>

It is noted that a number of companies lacking required expertise have come on stage, which suggest compromise on standards. In the words of Ramachandran<sup>53</sup>,

“[a] number of maritime companies have jumped into the fray, but the quality of manpower employed by many of these companies is questionable. There have been reports of inadequate professional expertise, sloppy behavior and failure to follow safety regulations. What is more worrisome is the absence of standards or appropriate regulations to reign in security companies or clear guidelines on the use of force, particularly lethal force, on when to use the force and how much.”

The ship-owner must also provide the P&I club with the flag State’s written consent and should verify that PMSC maintain insurance cover for themselves, their personnel and third-party liability cover and ensure that the PMSC terms of engagement do not prejudice or potentially prejudice the ship-owner’s insurance cover. It is therefore strongly recommended that ship-owners consult with their insurers prior to con-

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52. G. E. Van Hook, “Private Security at Sea; A Customers Perspective”, in C. Berube and P. Cullen (eds.), *Maritime Private Security: Market Responses to Piracy, Terrorism and Waterborne Security Risks in the 21st Century*, London, Routledge, 2012, pp. 65-73.

53. U. Ramachandran, “Armed Men on Board Merchant Ships — Boon or Bane?”, <http://www.thehindubusinessline.com/industry-and-economy/logistics/armed-men-on-board-merchant-ships-boon-or-bane/article3342539.ece>, accessed on 29 September 2012.

tracting with and embarking PAG to assess the potential impact on their insurance cover, particularly as it relates to armed engagements and liability insurance held by the PMSC. Consequently, effective liaison with the master and crew which includes overview of vessel defence strategy, realistic review of threat and risk assessment and weapons safety brief have been identified as critical success factors<sup>54</sup>. Understanding of the national laws of the country, where the security company employing PAG is based, as well as the insurance cover is also important.

### C. Master

The master is endowed upon with the overall responsibility of the vessel particularly safe passage of vessel, with authority to take any step to avoid threats to passage or danger to crew<sup>55</sup> and comply with BMPs while navigating through HRA. For the example, in the *Maersk Alabama* case<sup>56</sup>, the master's judgment to take the vessel through a particular route was erroneous.

Where PAG are on board the vessel, the question of who is responsible in the event of a piracy attack is much debated. This is based on the expertise that can only be demonstrated by PAG when the use of force becomes imminent. Under GUARDCON contract, the master has the authority to order the cease-fire. However, the authority to use of force is retained by the PAG. This position is not shared by the IMO.

### D. Private Maritime Security Company

It is the duty of the employers of PAG to seek the approval for their deployment, firstly, from the competent authorities in countries where PMSC is registered and, secondly, from the authorities in countries in which operations are conducted, including those in which PAG may transit (MSC.1/Circ.1443). Awareness and understanding of applicable laws of flag, port and coastal States with respect to the transport, carriage, storage and use of firearms, security related equipment and the use of force are also required. In addition, the PMSC should possess a policy governing command and control of PAG on board; it should ensure that PAG are fully aware of them and the team manages firearms and ammunition in a responsible manner at all times.

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54. Darren Dixon, Oxberry Risk Strategies, *supra* footnote 51.

55. Regulation 8, The International Ship and Port Facility Security Code (ISPS Code) implemented through Chapter X1-2 of the International Convention for Safety of Life at Sea.

56. *Supra*, footnote 20.

*E. Privately Armed Guards/Private Contracted Armed Security Personnel*

In the discharge of their obligations, it is of utmost importance that all steps taken by PAG are consistent with its role, which is exclusively the protection of life of persons on board and the ship from armed pirate attack. All reasonable steps must be taken to avoid the use of force; however, if force is eventually used, it should be used as part of a graduated response plan, including strict implementation of the BMP. In general, the use of force in excess of what is strictly necessary and reasonable in the circumstances must be avoided and care taken to minimize damage/injury and to respect and preserve human life. It is envisaged that firearms would only be used against persons in self-defence or in defence of others.

The need for PAG to have a complete understanding of, and fully comply with, the applicable laws governing the use of force cannot therefore be over-emphasized.

Based on the variety of high-risk tasks committed to PAG including convoy duties and close protection of individuals at risk of suffering harm, concerns have been raised about their mental health which may have commercial implications with research currently underway to determine the mental health of PAG<sup>57</sup>.

In order to accommodate the presence of PAG on board, they are often listed as “supernumeraries”, which is preferable to listing them as passengers which creates problems on terms of employment and carriage of weapons<sup>58</sup>. Such designation alleviates the concerns raised by some ports on the status of non-crew on the ship. As a measure of comfort, seafarers have expressed the appeal for PAG aboard ships especially in HRA<sup>59</sup>.

The numerous controversies surrounding the use of PAG have made the Contact Group on Piracy off the Coast of Somalia to view it as “more legally challenging than VPDs”<sup>60</sup>. Rinehard rightly points out that “the use of PAG remains controversial and several aspects have to be considered, including legal aspects”<sup>61</sup>.

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57. L. McMahon, “A New Frame of Mind for Armed Guards”, *Lloyd’s List*, 31 May 2012.

58. BIMCO GUARDCON, “Explanatory Notes”.

59. M. Garfinkle, “The Psychological Impact of Piracy on Seafarers”, The Seamen’s Church Institute, 2012.

60. Communiqué of the Eleventh Plenary Session of the Contact Group on Piracy off the Coast of Somalia, 29 March 2012, [http://www.thecgpcs.org/plenary.do;jsessionid=7UgnMnFBhbHOavdRDL8NmfcjifC2ckgaQ7NOSqgNkp11S1sG1e51ZyYM7VuwD11XF?action=plenarySub&seq=20,para\(5c\)](http://www.thecgpcs.org/plenary.do;jsessionid=7UgnMnFBhbHOavdRDL8NmfcjifC2ckgaQ7NOSqgNkp11S1sG1e51ZyYM7VuwD11XF?action=plenarySub&seq=20,para(5c)).

61. B. Rinehard, *supra* footnote 15.

### *F. Insurance*

The presence of PAG on board does have consequences on insurance cover. IMO calls upon the PMSC to hold and maintain public and employers' liability insurance cover to an appropriate level required by the ship-owner and personal accident, medical expenses, hospitalization and repatriation insurance. PAG, who carry and use the firearms, are to be insured for accidents, injury and damage arising from the use of firearms and liability for any claim that might arise from the carriage and/or negligent or intentional misuse of arms.

Conversely, PAG on board vessels may have a positive impact on insurance premiums. Reportedly, the growing trend among kidnap and ransom insurers is to demand the presence of armed guards on vessels transiting the Gulf of Aden and the Indian Ocean as a condition for providing cover, while others give substantial discounts to ship-owners with PAG on board in HRA. The IMO invites PSCs to note the impact that deployment of PAG may have on ship-owner's property and liability insurance cover.

The BIMCO GUARDCON has been recognized as a guide to minimum standards for P&I Clubs facing the challenge of identifying an appropriate provider. It prescribes four-man security on board comprising three supports and a team leader. A compromise on this has far-reaching consequences as

“[a]ny company that agrees to reduce manning levels on transit to less than four risks invalidating its insurance cover — as well as risking the lives of crew on board if its remaining staff prove unable to deter a pirate attack”<sup>62</sup>.

Other factors that may negate insurance cover include the use of other personnel to double as security team members referred to as “weapon guardians”, engaged to monitor the use and location of hired weapons, or the use of staff with language barrier<sup>63</sup>.

## **SECTION 3 OPERATION OF PRIVATE ARMED GUARDS UNDER INTERNATIONAL AND NATIONAL LAWS**

### **Paragraph 1 Jurisdiction**

Private security operations are not as complicated on land as they are in the maritime environment in ways typically not

62. L. McMahon, PMSC, “cost-cutting tactics could invalidate insurance.” Views expressed by T. Jakobsson, in *Lloyd's List*, No. 60, 17 October 2012.

63. *Ibid.*

encountered by their counterparts on land<sup>64</sup>. Security operatives on land have defined operational zones mostly confined to a single State. However, for maritime operatives it is necessary to cross over different jurisdictions with differing legal systems and laws. PAG are therefore often subjected to the overlapping jurisdictions of both the flag State as well as the littoral State whose territorial waters they are traversing. The maritime zones that vessels with PAG on board transit are the following.

#### A. High seas

Under UNCLOS, a vessel on the high seas is subject to the exclusive jurisdiction of the flag State<sup>65</sup>; this entails that PAG fall under the general criminal jurisdiction of the flag State. For example, in the *Almezaan* incident, which involved a Panama-flagged merchant vessel attacked by pirates off the Somalia coast, the death of one of the assailants by PAG would attract the flag State criminal jurisdiction and concurrent jurisdiction of other States involved.

#### B. Internal waters/port

By virtue of its sovereignty, the coastal State is entitled to regulate and prescribe conditions for access to its ports<sup>66</sup>. By entering foreign ports and internal waters, ships put themselves within the territorial sovereignty of the coastal State. Accordingly, that State is entitled to enforce its laws against the ship and those on board, subject to the normal rules relating to sovereign and diplomatic immunities which arise chiefly in the case of State-owned ships<sup>67</sup>. It is pertinent to mention that States do not however exercise jurisdiction over the internal affairs of ships in its ports as this remains under the control of the flag States.

With respect to the reception of vessels with PAG on board into port, the legal and administrative requirements in this respect are still unclear. It is for the coastal State to set forth conditions on admission of ships with PAG to its internal waters or port and request information in that connection.

In contemplation of the fact that the facilitation of the movement of

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64. C. G. Berube and P. Cullen, "The Future of Private Security at Sea", in C. Berube and P. Cullen (eds.), *Maritime Private Security: Market Responses to Piracy, Terrorism and Waterborne Security Risks in the 21st Century*, London, Routledge, 2012, at pp. 139-149.

65. Article 92, UNCLOS.

66. Article 25 (2), UNCLOS.

67. R. R. Churchill and A. V. Lowe, *The Law of the Sea*, 3rd ed., Manchester University Press, 1999, p. 54.

PAG should be subject to national legislation of port and coastal States, the IMO developed recommendations to coastal and port States on aspects related to the embarkation, disembarkation and carriage of PCASP and of firearms and security related equipment, for use by PCASP on ships entering, transiting or leaving their territorial sea(s)<sup>68</sup>. The Guidelines encourage Governments in developing such policies to take the following factors into consideration: embarkation (requirements regarding notification of firearms and security related equipment proposed for embarkation); disembarkation (requirements relating to pre-arrival notification of ships carrying PCASP, firearms and security related equipment); vessel calling (requirements regarding the notification of PCASP, firearms and security related equipment retained on board).

The varying legal regimes encountered by PAG when transiting from port to port highlights the need for harmonization of the laws regarding the admission of vessels into their ports which must be respected by foreign vessels. As a way out of these conflicting legal regimes, some private companies have reportedly stored guns aboard floating armories on the high seas while some have disposed of weapons at sea<sup>69</sup>. The legality of floating armories in international law is unclear and recently highlighted as “one pressing and ongoing regulatory problem . . .”<sup>70</sup>.

A number of vessels have been chartered to act as floating armories as a reaction to the increase in regulation and cost of moving weapons in and out of littoral States<sup>71</sup>. Hook, on his part, posits that except the PMSC secure transit licence rights at multiple voyage points, for their escort ships, security personnel and weapons, their ability to provide escort services is severely hampered. Some companies have attempted to avoid this complication by using ships that can store weapons and permit transfer at sea<sup>72</sup>. It has been concluded that “[d]espite the legal grey area that surrounds floating armories, they may be permitted if private maritime security companies can prove they fulfill licensing requirements” and, in addition, “that no international law specifically

68. MSC.1/1408 drawn up to address the concerns of port and coastal States with respect to the presence of PCASP and of firearms and security-related equipment for use by PCASP.

69. G. Manchuk, “Armed Guards, Marine Insurance, and the Implied Warranty of Legality”, *U.S.F. Maritime Law Journal*, Vol. 24, No. 2, pp. 309-373, at p. 313, “since AK-47s are inexpensive, a provider could readily dump them overboard before it entered the territorial waters of a state that prohibited them”.

70. View expressed by S. Askins, in L. McMahon, “Consistent Global Standards for Guards Hard to Achieve”, *Lloyd's List*, 11 October 2012.

71. “Piracy — Issues Arising from the Use of Armed Guards”, *supra* footnote 17.

72. Van Hook, *supra* footnote 52.

prohibit PMSC storing weapons offshore”<sup>73</sup>. The issue of the UN arms embargo on Somalia requires clarification in relation to the deployment of PAG.

### *C. Territorial waters/contiguous zones*

Under international law, States exercise sovereignty over their territorial sea<sup>74</sup>, subject to the right of innocent passage, in respect of which States may adopt laws and regulations relating to the said innocent passage through the territorial sea<sup>75</sup>. UNCLOS, however, precludes such laws and regulations from applying to the design, construction, manning or equipment of foreign ships. The question that arises here is whether the deployment of PAG on board vessels can be seen as manning of the vessel, which is exempted from the legislative powers of a State. In the view of the author, manning in relation to this subject will be viewed from the broader perspective of security.

It is observed that an increased number of attacks on vessels are now being recorded in the territorial waters of some States with a high degree of violence; however, this would not qualify as piracy as defined under UNCLOS<sup>76</sup>. It is pertinent to state that hunting pirates entering the territorial sea from the high seas or taking any police action against armed robbers is forbidden in foreign territorial seas unless authorized by the coastal State.

Maintaining law and order within territorial waters is an activity reserved for the coastal State and cannot be performed by foreign States unless the territorial sovereign consents.

Article 27, UNCLOS, imposes a limitation on the criminal jurisdiction of the coastal States. As such, this jurisdiction should not be exercised on board a foreign ship passing through the territorial sea either to arrest any person or to conduct any investigation in connection with any crime committed on board the ship except in circumstances listed in the convention<sup>77</sup>.

Arguably, a coastal State may regard the death of a fisherman or pirate as a result of defensive action taken by a merchant ship as an exceptional circumstance. This may subject the ship to confiscation.

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73. *World Maritime News*, “Gulf of Aden: Armed Guards Use Floating Armories”, <http://worldmaritimeneews.com>.

74. Article 2, UNCLOS.

75. Article 21 contains provisions on laws and regulations of a coastal State regarding innocent passage.

76. Article 101, UNCLOS. Such incidents are covered by the Convention for the Suppression of Unlawful Acts of Violence against the Safety of Maritime Navigation (SUA), 1988, and its 2005 Protocol.

77. See Article 27 (1) (a) to (d).

#### *D. Innocent passage*

Special reference must be made to the right of innocent passage, which is granted to ships of all States navigating through the territorial sea. In relation to PAG, this right has generated a lot of controversy with a number of questions being raised. Ronzitti puts forward the following:

“Are merchant vessels with security teams on board whether PMSCs or VPDs, entitled to innocent passage through the territorial sea of foreign states and to transit passage through international straits? Does the same solution apply to merchant vessels escorted by PMSCs or are escorting vessels required to abandon the escort before entering the territorial sea or at the embouchure of an international strait? Does a carrying armed team on board constitute a violation of the rules of innocent passage?”<sup>78</sup>.

Ronzitti submits that the question may be answered in the negative as long as weapons are stored on board and the ship is not carrying out “any exercise or practice with weapons of any kind”, an activity which is forbidden under Article 19 (2) (a) of UNCLOS. It is further submitted that while it may be within the rights of coastal States to prohibit ships from entering their ports with weapons on board they cannot prohibit the presence of weapons on board during passage, placing reliance on Article 21 of UNCLOS, which does not prohibit arms on board during passage. This position may not be flawed considering the fact that warships with heavy ammunitions are granted the right of innocent passage (*argumentum ad maiore ad minus*). The concerns raised with respect to PAG with weapons on board in my view is predicated on the fact that placement in this circumstance is on board merchant vessels with possibility of arms proliferation; this may be far-fetched as the passage must be expeditious.

Another school of thought, however, avers that the passage of vessels with armed escorts may indeed be denied. Whilst it is recognized that Article 17 of UNCLOS grants to ships of all States the right of innocent passage through the territorial sea, the passage rights to be enjoyed will only remain innocent “so long as it is not prejudicial to the peace, good order, or security of the coastal State”<sup>79</sup>. Article 19 (2) (a) and (b) mentions prejudicial circumstances as including, *inter alia*: any threat or use of force against the sovereignty, territorial integrity or the political independence of the coastal State and any exercise or practice with weapons of any kind, respectively. The combined effect of the foregoing pro-

78. N. Ronzitti, *supra* footnote 29.

79. Article 19 (1).

visions will be that States have the authority to pass laws to prevent vessels from entering territorial waters if the vessel poses a threat to the peace and order of the State. Fedeli, therefore, submits that “[h]eavily armed security guards aboard a vessel could legitimately pose a threat to the safety and of a State”<sup>80</sup>.

Liss expresses the view that “while UNCLOS does not address the employment of armed guards/escort vessels specifically, its regulations may however give some insights”<sup>81</sup>. UNCLOS regulations are open to interpretations permitting some observers to see the above as principally allowing armed PMSC personnel, with others seeing armed guard (particularly when heavily armed) on board vessels and certainly armed escort vessels as breaching the condition of innocence and transit passage as defined above, if the guards do not comply with laws of (or have permission from) the States in whose waters they are operating. Arguably, most Governments would most likely interpret the UNCLOS regulations as not allowing armed personnel on board vessels in national waters.

#### *E. Straits used for international navigation*

For straits used for international navigation, UNCLOS includes specific regulations relating to transit passage. All ships enjoy the right of transit passage which shall not be impeded except in circumstances provided<sup>82</sup>. Article 38 defines “transit passage” as the exercise of the freedom of navigation for the purpose of continuous and expeditious transit of the straits. The Strait of Malacca had witnessed a number of armed robbery incidents upon which the Dutch Ship-owners Association sought government protection through provision of naval protection to vessels transiting the straits. The request was however stepped down based on the finding that large parts of the straits formed part of the territorial waters of the coastal States.

The Strait of Malacca is crucially important for the Malaysian and Indonesian Governments. These States have demonstrated strong reactions to unauthorized PMSC, thus requiring strict compliance with extant regulations. Singapore may also be involved, depending on the route of the vessel<sup>83</sup>.

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80. T. Fedeli, “The Rights and Liabilities of Private Actors, Pirates, Masters and Crew”, One Earth Future Foundation Working Paper, July 2010, <http://www.onearthfuture.org>, accessed on 22 August 2012.

81. C. Liss, “Commercial Anti-Piracy Escorts in Malacca Strait”, in C. Berube and P. Cullen (eds.), *Maritime Private Security: Market Responses to Piracy, Terrorism and Waterborne Security Risks in the 21st Century*, London, Routledge, 2012, pp. 51-64.

82. Article 38, UNCLOS.

83. C. Liss, *supra* footnote 81.

**Paragraph 2 Use of Force by Private Armed Guards — Regulation by National Law**

The use of force by PAG is subject to multiple national laws: the laws of the flag State of the vessel with PAG concerned on board, the laws of the flag State of the vessel against which force was used, the laws of the State of nationality of the victim and of the PAG respectively. Resorting to force, particularly lethal, must after all be considered a measure of last resort, as there are other non-violent means of repelling attacks<sup>84</sup>.

IMO Circulars and virtually all industry guidelines have included provisions on the use of force. The need for clear rules concerning the use of force (RUF) has been reiterated by experts. Titahena and Sumser-Lupson observe that

“one of the complications therefore is that there is no current uniform system that can be adopted by a security system. Therefore, because each flag state and indeed security companies are likely to have their own RUF it is likely that problems posed by this issue will arise in the near future.”<sup>85</sup>

Thus,

“If a Private Security Company uses force resulting in the death, or injury of crew and pirates, multiple states could assert jurisdiction over issues concerning the use of force. Legal standards and authorities differ from country to country and countries have different standards for judging whether their use of force was necessary or proportional.”<sup>86</sup>

Concerns have also been raised about the safety of crew members when force is being used. They are seen as more likely to suffer the negative consequences of having armed guard on vessels. The pirates claim to have no desire to hurt the crew members, however potentials of violence escalating is very high during exchange of fire between them and PAG. The crew members are considered as

“currently safer being taken hostage rather than being caught in a gun battle, the dangers to the crew members may therefore out-

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84. Ships are known to have used non-lethal means in the face of piracy attacks which include, sonic weapons, high pressure water cannons, blinding strobe lights, foam, chemicals that can burn the eyes for about 45 minutes.

85. J. Titahena and K. Sumser-Lupson, *Privately Contracted Armed Security Personnel (PCASP) on Ships in High Risk Areas, Impacts, Concerns and Challenges*.

86. Rodden and Walsh, *supra* footnote 25, p. 32.

weigh the potential deterrent effect of putting armed guards on vessels”<sup>87</sup>.

Suffice to say that IMO does not permit arming crew on merchant vessels.

### Paragraph 3 **Arrest of Pirates**

When PAG foil a pirate attack and successfully capture/arrest the pirates, the question arises as to the appropriate party to hand them over to since PAG are private concerns with no capability under international law to hold them in custody. No express provision is contained in UNCLOS on the capture of pirates by private concerns<sup>88</sup>. The call to pay closer attention to what happens with captured pirates was reiterated by Kraska and Wilson<sup>89</sup>; they argue that the greatest challenge is not the capturing of the pirates but the detention and prosecution which stem from the numerous nationalities involved.

Harrelson notes that the

“UN Security council passed numerous temporary resolutions. The most current resolution extends the authority of co-operating states to enter and capture pirates in areas normally considered Somalia’s sovereign territory”<sup>90</sup>.

He further notes that the United States has agreed to turn captured pirates over to Kenya for detention and prosecution. These types of agreements are currently necessary “because no country including the U.S, has been willing to hold the (captured ) pirates”. He proceeds to observe that “similar agreements exist between other countries: however there is no uniformity among the various agreements due to different political climates and practical issues”. Another international partnership, the Contact Group on Piracy off the Coast of Somalia, has as its main goal to “examine practical options for strengthening the ability of countries willing to detain and prosecute suspected pirates”.

Noteworthy is the fact that some pirates have been treated on a “catch and release basis” which involves the return of pirates to Somali beaches based on issues of jurisdiction and lack of social infrastructure to prosecute the pirates in Somalia<sup>91</sup>. PAG are to observe the norms of international humanitarian law and human right law in this area.

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87. J. Harrelson, *supra* footnote 23, p. 311.

88. Articles 105 and 107 recognizes only government vessels as able to seize pirates, pirate ships and property on board.

89. J. Kraska and B. Wilson, “Fighting Pirates. The Pen and the Sword”, *World Policy Journal*, 25 (4), pp. 41-52.

90. Harrelson, *supra* footnote 23, pp. 289-290.

91. J. Kraska and B. Wilson, “Fighting Pirates. The Pen and the Sword”, *World Policy Journal*, 25 (4), pp. 41-52.

It is safe to conclude therefore that where pirates are in the hands of PAG they should be handed over to the master of the vessel, who will in turn use the same principles as if PAG were not on board. Thereafter, the registry or flag of the attacked vessel, the State of nationality of any of the victims, the nationality of the on-scene warship, and coastal and port States in some instances all have a valid basis for asserting jurisdiction, provided that they have asserted the necessary legislative jurisdiction by enacting adequate national laws<sup>92</sup>. The US Municipality Statute provides that “whoever commits the crime of piracy as defined by the law of nations and afterwards brought into the U.S shall be imprisoned for life”<sup>93</sup>. It is equally possible to prosecute a pirate in English court as piracy is an offence under its statute laws<sup>94</sup>. The Joint Cyprus Ship-owners Association (JCSA) strongly advocates that individual States must amend their national legislation in order to provide for PAG and allow for arrest, prosecution and sentencing of pirates in fast track procedure.

In conclusion, Ronzitti expresses the view that

“arming vessels and hiring contractors for pirate hunting is legally possible if the vessel is on government service, authorised to chase Pirates, and the hiring government bears the international responsibility”.

#### Paragraph 4 **Case Law/Incidents**

##### A. *The Almezaan*

Reportedly,

“private security guards on board a UAE-owned cargo ship registered in Panama shot dead a pirate attempting to hijack the vessel off the coast of Somalia. The incident is the first in which a hijacker was killed by private contractors . . .”<sup>95</sup>.

The Spanish frigate *ESPS Navarra* forces aboard the warship took custody of the pirate’s body and sank the larger boat while six others were

92. BBC News “What to do with a captured pirate”, <http://www.bbc.co.uk/news/world-africa-11813168>, accessed on 19 January 2013.

93. 18 USC, § 1651-Sec.1651, Piracy under Law of Nations, <http://www.us-code.vlex.com/vid/sec-piracy-under-law-nations-19190482>, full text 18 USC, Chapter 81.

94. S.26, Merchant Shipping and Maritime Security Act, 1997.

95. See article by Loveday Morris, “Pirate Shot Dead in Attack on UAE Ship”, *The National*, <http://thenational.ae/news/uae-news/pirate-shot-dead-in-attack-on-uae-ship>, accessed on 9 October 2012.

arrested but subsequently released by the EU NAVFOR because the captain declined to identify them for the purposes of legal action. According to Fox News,

“The killing raises questions over who has jurisdiction over a growing army of armed guards on merchant ships flying flags from many nations. . . . Legal experts said there is no consensus on who is responsible for investigating the incident, and there are several possibilities: Panama, whose flag the *Almezaan* flies, the United Arab Emirates, where the ship’s owners are based; or the nations which the security contractors come from . . .”

### B. MV *Enrica Lexie*

This incident involved the shooting and killing of two unarmed Indian fishermen by Italian naval guards, which mistook them for pirates. While the focus of this chapter is not on naval guards, this incident is being referred to as a means of highlighting and drawing a distinction on the effect of the action of the navy and PAG.

According to reports<sup>96</sup>, India claims that the fishing boat, *St. Antony*, carrying 11 unarmed crew reported being fired upon at 1500 hrs, 2 or 3 nautical miles off the coast of India. Of the 11 fishermen two were shot. India claims that 20 shots were fired by the two Italian marines without any warning shots fired by the marines, who took the fishing boat to be a pirate vessel.

Italy, on the other hand, claims that at 1600 hrs, while navigating 33 nautical miles off the Indian coast, a 12-metre boat with six armed men was spotted approaching the Italian tanker. It kept nearing even after the soldiers showed their guns at which point they opened fire into the air and the water and the boat turned away without anyone being hit. *Enrica Lexie* immediately reported the incident to authorities in Rome. Italy says that satellite data confirms that the ship was 33 nautical miles off the Indian coast, whereas India says it was 2-3 nautical miles off the Indian coast. The two Italian marines were charged with murder under the Indian penal code (IPC) with Italy commencing its national investigation into the incident. India is considered as having a tangible advantage being in custody of the marines.

This incident involves significant legal questions concerning jurisdiction, State responsibility and immunities. It has been stated that

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96. *MV Enrica Lexie* off Kochi. Source: Aijaz Rahi/Associated Press, “The *Enrica Lexie* Incident and International Law: Some Preliminary Thoughts”, <http://ilcurry.wordpress.com/2012/02/27/the-enrica-lexie-incident-and-international-law-some-preliminary-thoughts>, accessed on 8 October 2012.

“ever since the Indian authorities detained the ship, and instituted murder charges against the guards, a diplomatic row has arisen with Italy insisting that India does not have jurisdiction to try the crew of an Italian ship sailing beyond India’s territorial waters. On the other hand, Indian authorities insist that the perpetrators will face Indian Law as the victims were fishermen on board an Indian fishing vessel.”<sup>97</sup>

Pursuant to India’s position on jurisdiction and immunity for the Italian guards, it has been suggested that State immunity is not lost in fatal injury cases and likely to be upheld in cases of genuine mistake<sup>98</sup>. Be that as it may, Italy has reversed its earlier position as demonstrated by its decision to send the marines back to India for trial based on the assurance by India to protect their fundamental human rights<sup>99</sup>.

### C. Maersk Alabama

A member of the crew of the US flagged container ship *Maersk Alabama* filed a lawsuit against Maersk Line Ltd. and the company that supplied the crew following a pirate attack at sea on April 2009 in the Gulf of Aden<sup>100</sup>. He alleged that Maersk was negligent and that the *Maersk Alabama* was unseaworthy by sending him to a pirate infested zone rather than taking another safer route, which led to his injury.

It is reported that

“on April 8, 2009, the U.S. flagged container ship *Maersk Alabama* was attacked by pirates in the Gulf of Aden. Four pirates armed with assault rifles boarded the cargo ship and attempted to take over the vessel and its 21 crew members. The majority of the ship’s crew locked themselves in the ships steering room and remained there for nearly twelve hours . . .”<sup>101</sup>

The question for the court was whether the *Maersk Alabama* was an

97. U. Ramachandran, *supra* footnote 53.

98. See post of Guilfoyle and Messineo at <http://www.ejiltalk.org>., accessed on 19 January 2013.

99. See post of K. S. Harisankar, <http://www.ejiltalk.org/jurisdictional-and-immunity-issues-in-the-story-of-enrica-lexie-a-case-of-shoot-scoot-turns-around>, accessed on 1 April 2013.

100. Law-suit (case 2009-26129) filed on behalf of Richard Hicks, a steward on board *Maersk Alabama* in the 270th Judicial Court in Houston, Harris County, Texas.

101. Darren Frieman, “Liability Lessons from Maersk Alabama”, <http://www.maritime-executive.com/article/2009-06-18-liability-lessons-maersk-alab>, accessed on 8 October 2012.

unsafe work place because she was ordered to pass through waters that were infested with armed criminals who happen to be modern-day pirates<sup>102</sup>. This case emphasizes the ship-owner's obligations in this regard.

#### Paragraph 5      **National Practices**

The use of PAG on board vessels is gradually accepted by States and the international community. The International Chamber of Shipping (ICS) in conjunction with the European Shipowners Association (ECSA) compiled rules and policies of several flag States which reveals the position of these States on the matter<sup>103</sup>. These can be categorized as follows: States that allow, expressly prohibit, VPD option, States in consultation with a view to allowing or maintaining status quo.

The United Kingdom now allows PAG on United Kingdom flagged vessels and has issued interim guidelines; the United States, for its part, allows under the principle of self-defence, Greece has also recently passed a law allowing PAG, while Qatar has approved a proposal by the Interior Ministry to allow ships with armed guards on board to enter into the Middle East nation's territorial waters.

It is noted that a number of countries are in the process of enacting legislation in support of PAG (Norway/Germany). Poland, for its part, has expressed no legal disposition to place armed guards, private or State, on merchant ships due to registration of almost all ocean-going vessels under third country flags.

Japan and the Netherlands are major maritime nations that are yet to allow PAG on board vessels. Nigeria also belongs to this category; however, discussions are ongoing at the highest level in Nigeria with a view to determining if the time has come for a policy reversal with legislative backing in line with current realities.

As noted earlier, the positive effect of the activities of the international navies in the Gulf of Aden has caused a dispersal of piracy to the Gulf of Guinea and off the coast of Nigeria, a factor that becomes relevant in government decision-making on the matter.

Provisions relating to the carriage of arms are contained in a number of laws which include the Constitution of the Federal Republic of Nigeria,

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102. M. Schuler, "Maersk Alabama Crew Member Files Lawsuit against Ship Owner — Legal Principles behind the Claim", <http://gcaptain.com/Maersk-alabama-crew-member-files/> accessed on 8/10/2012.

103. International Chamber of Shipping, Circular MLC(12)20/IC(12)05, Flag State Rules and Requirements on Arms and Private Armed Guards on Board Vessels: Updated ICS/ECSA, Table.

the Armed Forces Act of Nigeria and related statutes. Under these laws, the possession of any form of firearm within Nigerian territory by any persons other than those expressly permitted is illegal<sup>104</sup>. A breach of any of these laws may attract penalties ranging from a fine to up to 10 years' imprisonment or both. The carriage of firearms by unauthorized persons have recently been viewed much more seriously amidst the land-based security challenges and escalating incidents of attack on vessels around the geographical area. The Federal Government of Nigeria would take a dim view of anyone caught with firearms, whether on land or within Nigerian territorial waters.

Without prejudice to whatever the laws of the flag State may provide, it is settled international law that the coastal State would continue to enjoy full territorial sovereignty over its geographical zone. As amply demonstrated, Nigerian law will frown at unauthorized persons carrying firearms within the country's territory, whether on land or water. It is also settled law that by entering foreign ports and other internal waters, ships put themselves within the territorial sovereignty of the coastal States<sup>105</sup>. Where a ship-owner requires escort within territorial waters, the ship-owner must contract with the Nigerian Government<sup>106</sup>.

It is pertinent to mention that private security provides a critical component of offshore oil and gas security in the Gulf of Guinea. The success of the Private Security Companies in providing this service relies on the selection of qualified maritime security professionals who understand the complexity of the threat, and design and deliver a security solution grounded in maritime offshore operations in the Gulf of Guinea<sup>107</sup>.

The Netherlands is one of the notable States that have opted for the "so-called VPD model" along with Belgium, Estonia, France, Italy and the United States. This option is a reflection of maintaining government monopoly on the use of force. The domestic framework for implementation rests on each State taking into cognizance their respective circumstances.

The VPD model was adopted by the Netherlands as a national measure

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104. Nigerian Navy or men of the Nigerian police (Marine Division) are entitled to carry firearms on board any vessel. This is clearly borne out by the provisions of the Nigerian Navy Act (1990), the Armed Forces Act (2004) and the Police Act (2004).

105. Unpublished Legal Opinion by Femi Atoyebi, Senior Advocate of Nigeria, Femi Atoyebi & Co. Solicitors, No. 26, Keffi, Lagos, Nigeria.

106. T. Fedeli, *supra* footnote 80.

107. R. Hawkes, "Securing the Offshore Oil Industry in the Gulf of Guinea", in C. Berube and P. Cullen (eds.), *Maritime Private Security Market Responses to Piracy, Terrorism and Waterborne Security Risks in the 21st Century*, London, Routledge, 2012, pp. 65-73 at pp. 139-149.

to protect ships flying its flag. The Government also posits that under certain circumstances, the protection of individual maritime transport was its responsibility. A daily charge is however imposed for the provision of the security team. This has generated a lot of controversy and viewed as discriminatory against the practice in other European Union countries who do not request such payment. It is argued that there can be no legal basis for the payment based on the fact that security of the Dutch merchant fleet is a defence task force and a constitutional duty<sup>108</sup>.

The French practice is to embark armed teams belonging to the French State (Equipes de Protection Embarquées) protecting ships traversing the Gulf of Aden and also on board trawlers with the French flag stationed in the Seychelles. To this end, a Status of Force Agreement (SOFA) has been negotiated by France with the Seychelles for the protection of fishing vessels in sea areas plagued by pirates. The service is free of charge and is provided only for French flagged ships<sup>109</sup>. The Chinese and Russian navies are offering VPD services that have been accepted by a number of ships.

The position of Egypt with respect to the Suez Canal is considered unique as presented below:

“In August 2011, the Egyptian Ministry of Defence announced a prohibition on the carriage of armed guards, weapons and ammunition on vessels in transit in the Suez and Egyptian waters. The position was reviewed and replaced with a requirement that vessels carrying armed guards, weapons or ammunition must submit to the Suez Canal Authority in advance or transit a letter endorsed by the flag State with the following: name of the vessels and owners, quantity and description of weapons and ammunition on board, number of armed guards on board, identity of the armed guards’ employer, and confirmation that the weapons will not be used while the vessel is in Egyptian territorial waters.”<sup>110</sup>

Owners are advised to check with local agents prior to entering the Suez Canal or Egyptian territorial waters to ensure that they are able to meet the requirements as set by the Government.

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108. Geert Jan Knoops, “Waarblijven die privéebewakers?” (Where Are Those Private Escorts?), <http://digitaleeditie.nrc.nl/digitaleeditie/NH/2012/7/2012o817-/arivle6-image.h...5-9-2012>.

109. N. Ronzitti, *supra* footnote 29.

110. SKULD, National Regulations on the Use of Armed Guards, <https://extranet.skuld.com/Insight/Piracy/Armed-Guards/National-regulations-on-the-use-of-armed-guards> accessed on 19 October 2012.

## SECTION 4 STATE RESPONSIBILITY AND LIABILITY ISSUES

### Paragraph 1 State Responsibility

The issue of State responsibility arising out of the operation of PAG is of primary significance in the current discourse. Primarily, no governmental element can attach to a private contract upon which PAG arrangement rests in the light of Article 5 of ILC Articles on the Responsibility of States for Internationally Wrongful Acts (2001). It is not envisaged that any duty will be imposed on the flag State of the vessel on which PAG is deployed.

This fact can be appreciated from the cases referred to above (*The Almezaan* and *Enrica Lexie*) where the issue of State responsibility was immediately brought to the fore based on the involvement of the Italian marines. According to Papastavridis,

“the only basis for attribution of such acts to the flag state seems to be article 5 of ILC Articles on State Responsibility, namely the conduct of persons or entities exercising elements of governmental authority. This would depend upon each state’s domestic legislation authorizing the use of PAGs. However, it appears difficult to find legislation, which would explicitly empower such persons with governmental authority . . .”<sup>111</sup>

The draft UN Convention<sup>112</sup> seeks to impose responsibility on States for the activities of Private Security Companies registered in their jurisdiction, whether or not these entities are contracted by the State<sup>113</sup>.

A question that has also arisen for determination is whether Article 94 of UNCLOS imposes liability on the flag State that allows the use of PAG on its vessels. This certainly invites further research in the future.

### Paragraph 2 Liability Issues under International and National Legislation

#### A. Rules for the use of force

The Rules on the Use of Force (RUF) refer to standards set for the use of force either in legislations or guidelines. Potential

111. A. Papastavridis, Responses for “Shooting fishermen mistaken for pirates, jurisdiction, immunity and state responsibility”, by D. Guilfoyle, <http://www.ejiltalk.org/shooting-fishermen-mistaken-for-pirates-jurisdiction-immunity-and-state-responsibility>, 12 March 2012, accessed on 29 August 2012.

112. See footnote 45, *supra*, UN Convention on Regulation Oversight and Monitoring.

113. See Article 4 (2).

liability may arise should PAG not comply with the law or laid-down standards.

A key question to address is who takes responsibility for the just or unjustified use of firearms on board? The authority of the master on board a vessel has long been established; Article 34 (1) of SOLAS states that,

“[T]he owner, Charterer, the Company operating the ship as defined in Regulation IX/1 or any other person shall not prevent or restrict the Master of the ship from taking or executing any decision which, in the master’s professional judgment is necessary for the safety of life at sea and protection of the marine environment.”

Under the International Ship and Port Facility Security Code (ISPS Code)<sup>114</sup>, the master of a ship has the ultimate responsibility for the safety and security of the ship at all times. PMSC are expected to have policy and procedures governing command and control of PAG on board, with a clear statement recognizing that at all times the master remains in command and is the overriding authority, and agreed procedure in the event that the master is unavailable.

Manchuk explained the reason why common law gives the master unbridled authority to lawfully compel others to obey by citing the statement of Judge Ware in *Bangs v. Little*<sup>115</sup>, in which he proposed that

“[t]he service in which [the master] is employed is one of uncommon peril, not only requiring great skill, but often demanding great promptitude of decision and action, and admitting not time of delay for deliberation, reasoning, or expostulation. Upon him the obligation is imposed to meet and provide for these emergencies, and if there is not an instantaneous obedience to his orders, it may involve the loss of the ship and all who are in it. The law, therefore, vests him with the absolute power of command, and clothes him with all the authority which is necessary to enforce the most prompt obedience to his orders.”

The presence of PAG on board should therefore not impact on the authority ordinarily exercisable by the master. This position should be maintained irrespective of a situation whereby the master may need to abide by expert security provided by PAG on board, given that they are the security expert on board. The prior consent of the master to assume control of the incident situation must, nevertheless, be obtained. There-

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114. The ISPS Code is an amendment to the Safety of Life at Sea (SOLAS) Convention (1974/1988) which came into force in 2004.

115. G. Manchuk, *supra* footnote 69, p. 371.

after, the master shall — subject to his overriding authority — respect the instructions of the PAG and shall reassume the authority granted upon cessation of the incident<sup>116</sup>. The masters' authority will be displaced whenever force can be used without the masters' prior approval which can be regarded as a breach on the part of PAG.

Titahena affirms<sup>117</sup> that RUF should be attached to the contract and discussed in detail with the master and crew and these should also be endorsed by the flag State, whose laws would govern the use of force in deterring or preventing any criminal act.

India, for example, has issued Guidelines on Deployment of Armed Security Guards on Merchant Ships<sup>118</sup>. This provides *inter alia* complete understanding of the rules for the use of force as agreed between ship-owner, PMSC and the master and fully complies with them together with a detailed graduated response plan to a pirate attack as part of its team's operational procedures.

All responsible steps must be taken to avoid the use of force and where the same is to be applied; it should be in a manner consistent with applicable law. In no case should the use of force exceed what is strictly necessary and in all cases should be proportionate to the severity of threat and actual situation at the material point in time. PMSC should require that their personnel not use firearms against persons except in self-defence or in defence of others against the imminent threat of death or serious injury, or to prevent the preparation of a particularly serious crime involving grave threat to life.

The right of self-defence in this circumstance is deemed to override the master's authority. IMO emphasizes the need for clear definition of roles, documented command and control structure on the use of force.

Norway has adopted new regulations to govern the use of armed guards on ships, the IMO guidelines provides the basis for the Norwegian rules<sup>119</sup>. The rules applicable to Norwegian registered ships and drilling units sets out when force can be used in self-defence<sup>120</sup>, which

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116. G. Manchuk, *supra* footnote 69, p. 367.

117. J. Titahena, *supra* footnote 85, p. 8, this is in agreement with the views expressed by Askins (2011), *Shipping Piracy — Issues arising from the Use of Armed Guards*, Ince & Co., International Law Firm, London, United Kingdom.

118. Pursuant to some sections in its existing law (S. 86, "Transit and Transshipment of Stores", 77 — Declaration by Owner of Baggage, and 80 — Temporary Detention of Baggage of Customs Act, 1962, and Section 45A of the Indian Arms Act, 1959.

119. Rules adopted on 1 July 2001, through amendments to the existing Security Regulations for Ships, 2004, and the weapons Regulations, 2009, and entered into force immediately.

120. Rein Wikborg, "New Regulations Govern Use of Armed Guards on Ships", International Law Office, Shipping and Transport, Norway.

is generally permitted under the criminal code and now endorsed in safety regulation. Force, which must be proportionate, can only be used when there is a direct, imminent, substantial and unavoidable threat.

The master must approve each instance of a carrying arms or the actual use of force, which must be respected by all persons on board including PAG. It is expected, where possible, that attackers should be warned through light and sound signals, as well as warning shots, before firing any direct shots.

The US Coast Guard Authorization Act<sup>121</sup> removes liability for monetary damages for injury or death caused by the use of force to defend a United States-flagged vessel against an act of piracy from owners, operators or individuals who use or authorize such force. The use of force must be in accordance with the standard rules of self-defence for the immunity to apply. It has been observed that the UK Interim Guidance requires critical details on application of force and answers on what is permissible, especially if PAG on board United Kingdom-flagged vessel can open fire at a fast approaching skiff.

From the customers' perspective, Hook notes that most US companies abide by Rules of Engagement (ROE). This framework is closely aligned with the US Coast Guard's Port Security Advisory (PSA) programme which discusses the use of force and closely follows established law for self-defence, the defence of others and the vessel. Under such laws, deadly force may only be used in self-defence or defence of others when an individual has a reasonable belief the person or persons to whom the deadly force would be directed possesses an "imminent danger of death or great bodily harm". In other words, the objective when using deadly force is defence of life and not the vessel<sup>122</sup>.

In conclusion, the need for set and clear guidance on the RUF cannot be over-emphasized. This is because the moment of monitoring an impending attack would not be a time for questions of legality to be uppermost in the minds of the master and PAG.

In this regard, it is advocated<sup>123</sup> that ship masters be guided so they become "comfortable, confident and cognizant in the use of force from their vessel".

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121. US Coast Guard Authorization Act of 2010, Section 912, Use of Force against Piracy, Chapter 81 of Title 46 is amended by adding a new Section 8107.

122. G. E. Van Hook, "Private Security at Sea; A Customers Perspective", in C. Berube and P. Cullen (eds.), *Maritime Private Security: Market Responses to Piracy, Terrorism and Waterborne Security Risks in the 21st Century*, London, Routledge, 2012, pp. 65-73.

123. Security Association for the Maritime Industry (SAMI), <http://www.seasecurity.org/mediacentre/force-is-the-issue>, accessed on 30 January 2013.

### Paragraph 3 **Criminal and Civil Actions for Breach by Private Armed Guards**

The prohibition of the use of potentially deadly force, save for self-defence and proportionate application of force by PAG, implies that there would be consequences for a breach or non-compliance, which may extend to the master and the ship-owner.

In the event that the crew or guards on board the vessel exceed their right of self-defence by using excess force, the person along with the master may face criminal prosecution. Further, under the Norwegian rules of criminal liability, the ship-owner can also be subjected to prosecution. Cook notes that there are many fears and concerns for masters today as they wrestle with issues of criminalization, which should be recognized<sup>124</sup>.

According to Fedeli,

“If private security personnel were to egregiously kill unarmed civilians on the high seas, it would be defined as piracy under international law, and any state would have jurisdiction to prosecute. Armed private guards who perpetrate acts of violence on the high seas do meet the requirements for being declared pirates under UNCLOS.”<sup>125</sup>

He further observed that

“Innocent fishermen killed or injured at sea might also seek civil damages against private security guards personally and against private security companies generally, under the theory of *respondeat superior sea*.”<sup>126</sup>

The question of who bears the cost of reparation when a guard shoots has also been raised. It is the view of the author that this should be covered by insurance. The exposure to liability claims and criminal charges influenced the global call for a proposal to amend SOLAS to give a limited degree of transactional immunity to “any person who in good faith injures a putative pirate to protect the lives aboard”<sup>127</sup>. GUARDCON under the “knock-for-knock” principle embraces the mutual allocation of risk approach where each party is responsible for loss, damage to, and death of and injury to any of its own property without recourse to the other party.

124. *Op. cit. supra* footnote 123.

125. T. Fedeli, *supra* footnote 80.

126. *Ibid.*

127. J. Carter, “Call for Changes to SOLAS to Suppress Piracy at Sea”, <http://www.marinelink.com/news/changes-combat-piracy338392.aspx>, accessed on 23 August 2012.

## SECTION 5 CONCLUSION

The deployment of PAG on board vessels, though gaining wider acceptability, is still being approached with great caution, largely due to the legal and regulatory complexities involved. As it stands, there has been no valid endorsement or proposal for institutionalization by the IMO and other major players. While the selling point for the PAG arrangement remains that no vessel with PAG on board has ever been hijacked, the reality is that it lacks the capacity to solve the piracy problem. This is because the arrangement has not been designed to address the root cause of piracy. The possibility of mistaken identity of innocent fishermen for pirates and egregious conduct by PAG have generated public outcry and regarded as condemnable<sup>128</sup>. In addition, the potential escalation of violence, possibility of explosion when inflammable cargo is on board and consequent environmental damage are equally worrisome.

**Paragraph 1 Emerging Trend/Recommendations/the Way Forward**

The above concerns coupled with other challenges suggest that concerted efforts of all players are still required. It is recommended that all ongoing initiatives on the suppression of piracy should be sustained. Regional co-operation resulting in the Djibouti Code of Conduct for East Africa should be mirrored for the West African region in view of the upsurge in violence and attacks on vessels at the Gulf of Guinea.

With specific reference to PAG, it is recommended that maritime strategy, which will fast track the proposed global standards for PMSC/PAG with robust legislations at the national level, be adopted as a matter of urgency; this is without prejudice to current efforts. It is further proposed that with effective standardization and international certification akin to the seafarer, the quality of PAGES can be guaranteed.

Considerations can also be given to the under listed proposals as a way forward and future research:

- Adoption of an international convention providing a required legal/regulatory framework.
- PAG to act under licences and supervision by Government; this may be a form of reactivation of outlawed Letters of Marques.

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<sup>128</sup> Th. T. Richard, "Reconstructing the Letter of Marque: Utilizing Private Security Provider against Piracy", *Public Contract Law Journal*, 39, No. 3, pp. 411-464.

- Refine and adopt the Montreux Document for the maritime environment. Collaborations with local authorities for embarking and paying for shipriders from the local coast-guards or naval forces during transits through their waters is appropriate noting the multitude of laws PAGs are subjected to<sup>129</sup>.
- Proposal for a robust legal framework for African ports that play host to vessels.

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129. M. Tempest, “Legal Considerations for Private Naval Company Armed Anti-Piracy Escorts”, in C. Berube and P. Cullen (eds.), *Maritime Private Security: Market Responses to Piracy, Terrorism and Waterborne Security Risks in the 21st Century*, London, Routledge, 2012, pp. 139-149.