

THE USE OF PRIVATE MARITIME SECURITY COMPANIES IN A HIGHLY UNCERTAIN REGULATORY ENVIRONMENT

Alessia Carbone

ABSTRACT

States have continuously tried to make waters secure for merchant ships to operate in. The problem of piracy has led to different types of cooperation between States but ultimately, merchant shippers found that these were better off protected by Private Maritime Security Companies (hereinafter referred to as 'PMSCs'). Even though these yield the desired result, their legitimacy is an issue of controversy which is yet to be settled at an international level. This article aims to establish the main legal issues relating to PMSCs and to highlight the possible solutions to the latter.

KEYWORDS: PRIVATE MARITIME SECURITY COMPANIES – PIRACY – MARITIME SECURITY – INTERNATIONAL LAW

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1. Introduction

The crime of Piracy has been with us since time in memorial. Despite States' efforts on an international level to decrease the occurrence of such a crime, over the years the coast of Somalia has seen an increasing number²³⁸ of piratical attacks. Consequently, States are finding it difficult to supervise large area of sea in the Gulf of Aden. Thus the ship owners are turning to PMSCs. Although the latter can be credited with the decrease in piratical attacks, the legitimacy of this practice is still highly debated. Human rights issues arise from the fact that such companies may be using excessive force against pirates possibly leading to the deprivation of life. Moreover, issues amongst States also arise on the carriage of weapons on board of vessel traversing territorial waters. This uncertain regulatory environment leads to lack of accountability and responsibility on the part of the PMSCs. Hence, the international community needs to find a rapid solution for the use of PMSCs as the latter are definitely here to stay.

Firstly, this article will discuss the cooperation efforts undertaken by the different States in order to try to find a solution to this problem. Even though such efforts have yielded significant results, piracy was still causing huge economical impacts and thus, merchant shippers started to use PMSCs for further protection. Hence, a discussion of what are PMSCs and how they came into being will ensue. The third section will highlight the various legal issues that the use of PMSCs brings about. Malta has always been a leader when it comes to maritime laws and thus, a look at the current Maltese legislation regulating PMSCs will give one an idea of how this leading platform is taking into consideration and regulating the various legal issues surrounding PMSCs as raised by the authors. This will lead to an analysis of the international efforts to regulate the activities of PMSCs. As a conclusion, the author will suggest a way forward in this respect.

²³⁷ *With special thanks to Dr. Felicity Attard, LL.B, LL.D., LL.M. (IMLI), M.A by Research (Lond.)*

²³⁸ IMO reports as viewed on < <http://www.imo.org/en/OurWork/Security/SecDocs/Pages/Maritime-Security.aspx> > accessed 8/09/2015.

2. Piracy and the Actions taken by States on an International Level to Suppress this Threat

Piratical attacks started to occur as soon as goods started to be transported from one country to another by sea. Between the 17th and 19th century, Barbary pirates sailed the Mediterranean Sea seizing cargo ships and their crew and asking for ransom. At that time, merchant shippers came to an agreement with States that they would pay higher taxes in order for the latter to provide them with warships with the aim of counter acting pirates. Warships, both American and European, were governed by the law of prize²³⁹ meaning therefore if caught pirate ships and everything upon them could be seized and forfeited.²⁴⁰

Rightly so, pirates have been labelled as “*hostes humani generis*”, meaning the enemies of all humanity.²⁴¹ This is particularly so in modern day piracy, as this is having devastating effects on the global economy.²⁴² Insurance premiums for voyages have increased dramatically leading to huge increases in shipping costs. The ultimate result is an increase in price for the producers and ultimately the final consumers.²⁴³ Piracy not only causes economic problems but it has also been linked to damage to the marine environment as well as the prevention of humanitarian aid and assistance to reach its intended destination, as seen in the case of Somalia.²⁴⁴

Piracy may manifest itself in different forms, mainly kidnapping and hijacking. Kidnapping was a common form of piracy in the Strait of Malacca.²⁴⁵ Here pirates would kidnap the crew members and take them as prisoners, disembarking them from the vessel they were on. Pirates would then ransom the seafarers to their employers or their families. However, this mode of piracy became less popular as the pirates became more technologically advanced. More recently, pirates have focused on hijacking entire vessels; this has now become the most common form of piracy.²⁴⁶ As happened in the case of *MV Alondra Rainbow*²⁴⁷, today in piratical attacks, crew members are taken prisoners, set adrift or killed, cargo is removed

²³⁹James Kraska and Brian Wilson, ‘Fight Pirates: The Pen and the Sword’ (Winter 2008/2009) 25(4) World Policy Journal 41.

²⁴⁰Ryan Attard, ‘Golden Age of Piracy’ (B.A. Criminology thesis, University of Malta 2013).

²⁴¹Tasmin Paige, ‘Piracy and Universal Jurisdiction’ 12 Macquarie Law Journal 131.

²⁴²David Marley, *Modern Piracy: A Reference Handbook* (ABC-CLIO, LLC 2011) 8.

²⁴³Sami Bensassi and Inmaculada Martinez-Zarzoso, ‘How costly is Modern Maritime Piracy to the International Community?’ (2012) 20(5) Review of International Economics 869.

²⁴⁴<<http://www.un.org/depts/los/piracy/piracy.htm>> accessed 11/04/2015.

²⁴⁵John F. Bradford, ‘Shifting Tides against Piracy in Southeast Asian Waters’ (May/June 2008) 48(3) Asian Surveys 473.

²⁴⁶ibid.

²⁴⁷For further reading consult Anindita Pattanayak and Kartikeya Dar, ‘Addressing Piracy Through the Indian Legal Framework’ (2013) Nalsar Student Law Review 1.

and the ship is either abandoned or modified in appearance in order for it to be used in other criminal activities - In this incident, the ship after being seized, was repainted, given another name and was flying the flag of Belize when it was detained by the Indian navy.²⁴⁸

This maritime security threat attracts universal jurisdiction^{249 250} and is defined in the United Nations Convention on the Law of the Sea (hereinafter referred to as 'UNCLOS' or the 'Convention')²⁵¹ in article 101 as the commission of "illegal acts of violence or detention" carried out for private ends committed by passengers and crew of one ship or aircraft against the passengers or crew of another vessel.²⁵² This has to be committed on the high seas or outside the jurisdiction of any State or by virtue of article 58(2) UNCLOS in the Exclusive Economic Zone (hereinafter referred to as the 'EEZ') of any State. Here it is important to note that article 101 does not speak of conspiracy to commit piracy, or aiding and abetting the commission of acts of piracy, or even accessory after the fact.²⁵³ Article 100 of the said Convention states that "[a]ll States shall cooperate to the fullest possible extent in the repression of piracy" and thus the United Nations General Assembly has continually encouraged States to cooperate with each other in order to neutralise this threat.²⁵⁴

²⁴⁸On 22 October 1999, this super tanker was sailing from Kuala Tanjung for Miike, carrying 7,000 metric tonnes of aluminium ingots. Shortly after the departure, the ship was hijacked by pirates who threatened to kill the crew. Later, the latter were put on another ship and set adrift. The crew was rescued by a Thai ship some 10 days later. IMB Piracy Reporting Centre started to inform ships at sea of the description of the missing ship and asked for their help if they sighted a ship with a similar description. On 14 November 1999, a master of a Kuwaiti tanker reported the sighting of a ship with a similar profile to the Alondra Rainbow in the Arabian Sea. Such information was transmitted to the Indian Coast Guard who immediately despatched a patrol aircraft to investigate. The aforementioned ship was named Mega Rama and was flying the flag of Belize. However, a quick check by the IMB Centre quickly resulted that no ship existed with such a name. Thus, the ship was then intercepted by the Indian Coast Guard. For further information consult Jayant Abhyankar, 'Piracy, Armed Robbery and Terrorism at Sea: A Global and Regional Outlook' in Graham Gerard Ong-Webb (ed), *Piracy, Maritime Terrorism and Securing the Malacca Straits* (Institute of Southeast Asian Studies 2006).

²⁴⁹Article 105 UNCLOS.

²⁵⁰Paige (n4) 131.

²⁵¹United Nations Convention on the Law of the Sea (Montego Bay, 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.

²⁵²Articles 102-107 UNCLOS.

²⁵³J. Ashley Roach, 'Countering Piracy off Somalia: International Law and International Institutions' (July 2010) 104(3) *The American Journal of International Law* 397.

²⁵⁴Examples: In UNSCR 1918, the Council called on States to criminalise the crime of piracy in their domestic laws; UNSCR 2020 urged the international community to deal with problem of piracy and its causes, mainly the instability in Somalia, in a comprehensive and unified manner.

The definition of piracy under UNCLOS leaves a lacuna, in the sense that, if the same acts are committed in the territorial sea of a particular State, this would not tantamount to piracy. The International Maritime Organization (hereinafter referred to as 'IMO') has thus termed this "armed robbery against ships" in its Resolution A. 922(22) which outlines the Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery against Ships. This was defined as "any unlawful act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, directed against a ship or against persons or property on board such a ship, within a State's jurisdiction over, such offences".²⁵⁵ This definition was further refined by Resolution A. 1025(26)²⁵⁶ as now it provides for the specific areas of national jurisdiction where armed robbery against ships can occur. Furthermore, it is worth mentioning that armed robbery against ships is also considered to be an offence under the 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (hereinafter referred to as the 'SUA Convention')²⁵⁷ and in certain instances, the 2000 United Nations Convention against Transnational Organized Crime²⁵⁸ (hereinafter referred to as 'CTOC').

IMO has also issued several circulars²⁵⁹ amounting to soft law which include several guidelines and recommendations on the prevention and suppression of piratical attacks. These are known as Best Management Practices (hereinafter referred as 'BMP') and the latest version of such guidelines is BMP 4 which provides ship protection measures such as watch keeping and enhanced

²⁵⁵IMO Assembly Resolution A. 922(22) Annex 2.2: Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery against Ships, November 29, 2001.

²⁵⁶IMO Assembly Resolution A. 1025 (26): Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery Against Ships, January 18, 2010.

²⁵⁷The SUA Convention as adopted on 10 March 1988 and came into force on 1 March 1992. In this multilateral treaty States agreed to prohibit and punish the behaviour of which threatens the safety of maritime navigation. Unlawful acts against ships include the "seizure by force or ships or acts of violence against persons on board of" such ships and even the "placing of devices onboard ships in order to destroy or at least damage it". under this convention, the

Contracting Parties undertake to prosecute the alleged perpetrators or extradite them. Supplementing the Convention, there is also the Protocol for the Suppression of Unlawful Acts Against the Safety of Fixed Platforms Located on the Continental Shelf, 1998 which also extends the provisions of the Convention to fixed platforms engaged in offshore oil and gas exploitation.

²⁵⁸This is main international instrument which the UN adopted in its fight against transnational organized crime. This as adopted on 15 November 2000 and came into force on 29 September 2003. The Convention is supplemented by various Protocols which deal with specific issues being prohibited by the Convention itself such as Trafficking of Persons. States here binded themselves to include the crimes established in this Convention and its Protocols into their national legislation and to provide mutual legal assistance when requested. Furthermore, it establishes law enforcement cooperation beteen the States and promotes the adoption of a swift extradition procedure in order to bring the perpetrators to justice.

²⁵⁹Circular IMO MSC.4/Cir. 1334 and Circular IMO MSC.4/Cir. 1333.

vigilance; enhanced bridge protection; the use of physical barriers around the ship such as the use of razor wire and equipping the ship with fire hoses and foam monitors.²⁶⁰

Most of the attacks during the 1990s occurred in Southeast Asia, more specifically in the Strait of Malacca and Singapore. Initially, piracy incidents in this region were uncommon, in fact Governments of States in the region failed to acknowledge that this problem even existed.²⁶¹ It was the hijacking of *MV Alondra Rainbow*, owned by Japanese shareholders and registered in Panama that triggered discussions on the issue of piracy in this regional area. This led to the adoption of a new instrument to deal with piracy in Southeast Asia. The Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia was adopted in 2004 and currently has 20 States parties.²⁶² Besides ensuring that these States cooperate between them in a joint effort to reduce piracy in this area, the central feature of this Agreement was the creation of the Information Sharing Center (hereinafter referred to as 'the Center'). Apart from collecting information and data provided by the States, the Center also performs other tasks which are necessary in order to prevent and suppress piracy and armed robbery. Moreover, State parties agreed to assist victim ships and rescue victims of such attacks.²⁶³

In the later 2000s, piracy incidents in Southeast Asian region began to decline; however more recently pirate attacks started to occur just off the coast of Somalia. This resulted mainly from the political and economic instability in the country. Somalia is considered to be a failed State as it lacks any form of policy both on land and along its coastline. Thus Somali pirates were finding a safe-haven in their own State, as they knew that if they were to hijack a ship and take it into the territorial waters of Somalia, they would not be apprehended. Pirates

²⁶⁰<<http://www.imo.org/OurWork/Security/PiracyArmedRobbery/Documents/1339.pdf>> accessed 17/4/2015

²⁶¹Bradford (n 8) 473.

²⁶²Until the time of writing, the signatories to such agreement are: Australia, the People's Republic of Bangladesh, Brunei Darussalam, the Kingdom of Cambodia, the People's Republic of China, the Kingdom of Denmark, the Republic of India, Japan, the Republic of Korea, the Lao People's Democratic Republic, the Republic of the Union of Myanmar, the Kingdom of the Netherlands, the Kingdom of Norway, the Republic of the Philippines, the Republic of Singapore, the Democratic Socialist Republic of Sri Lanka, the Kingdom of Thailand, the United Kingdom, the United States of America and the Socialist Republic of Viet Nam <<http://www.recaap.org/AboutReCAAPISC.aspx>> accessed 8/9/2015.

²⁶³Moritaka Hayashi, 'Introductory Note to the Regional Cooperation Agreement on Combating Piracy and armed robbery against ships in Asia' (July 2005) 44(4) International Legal Material 826.

would normally have a mother ship afloat along with high-speed skiffs which they would use to board the commercial ships, armed with heavy weaponry.²⁶⁴

IMO has actively been trying to promote the safety of ships and their crews whilst transiting off the coast of Somalia. Incidents like the seizure of the super tanker *MV Sirius Star*²⁶⁵ were unprecedented, signalling to the international community how technologically sophisticated pirates were becoming. In light of such events, the IMO Secretary-General Kofi Annan urged the UN Security Council to adopt measures to address the issue of piracy in this region. IMO Resolution A. 1002(25)²⁶⁶ requested the Somali Transitional Federate Government (hereinafter referred to as 'TFG') to allow entry into its territorial waters when engaging in operations against pirates or suspected pirates which were endangering ships carrying humanitarian aid to Somalia or leaving such country after discharge of such cargo.²⁶⁷ However, it should be noted that this Resolution only applies with respect to the piracy situation off the coast of Somalia, and with the insistence of Indonesia, it also states that this is not to be taken as creating any new customary international law.²⁶⁸

Following the Regional Agreement between the Southeast Asian States, States in the region of the Western Indian Ocean, the Gulf of Aden and the Red Sea entered into an agreement known as the Djibouti Code of Conduct concerning the Repression of Piracy and Armed Robbery against Ships in Western Indian Ocean and the Gulf of Aden. Here the Contracting Parties bound themselves to carry out investigations and to ensure the arrest and prosecution of perpetrators of such crimes. Furthermore, they agreed to be duty bound to seize any ships suspected of engaging in piratical activities and armed robbery and also to provide care for the victims of these crimes.²⁶⁹ States are also under the obligation to share and report information about attacks as well as to collaborate during shared security

²⁶⁴Christopher Spearin, 'Private Military and Security Companies v. International Endeavours v. Somali Pirates, A security Studies Perspective' (September 2012) 10(4) Journal of International Criminal Justice.

²⁶⁵In November 2008, *MV Sirius Star*, a 300-metre Saudi owned vessel, was carrying 2 million barrels of crude oil and 25 crew members when it was hijacked by pirates in an unpatrolled area 450 nautical miles south-east of Mombasa (Kenya). The pirates then anchored the ship off the coast of Somalia until the owners exceeded to the pirates' demands of a 3 million dollars ransom payout. The pirates released the supertanker in January 2009. For further information see Brian Wilson, 'Effectively Confronting a Regional Threat: Somali Piracy' Conflict Trends.

²⁶⁶IMO Assembly Resolution A. 1002(25): Piracy and Armed Robbery Against Ships in waters off the Coast of Somalia, December 6, 2007.

²⁶⁷Jane G. Dalton, J. Ashley Roach and John Daley, 'Introductory note to United Nations Security Council: Piracy and Armed Robbery at Sea – Resolutions 1816, 1846 and 1851' (2009) 48(1) International Legal Materials 129-132.

²⁶⁸Roach (n 17) 397.

²⁶⁹Attard (n 3) 104.

operations. Another important tool which States and ship-owners and shipmasters can use is the 'Best Management Practices for Protection against Somalia based Pirates'²⁷⁰ which provide guidelines on how to deal with piratical attacks and armed robbery. Furthermore, such management practices advise all merchant ships which are travelling through pirate infested waters to communicate with naval forces in the surroundings.

Recently, waters off the coast of Nigeria (Africa's largest oil producer) have emerged as a new piracy hot-spot.²⁷¹ Pirates are targeting fuel cargo and unloading it onto their ships in order to sell it on the black market.²⁷² This type of piracy is especially dangerous in terms of safety of seafarers as in this case, the pirates have no motive to keep the hostages alive and thus, their lives could be put easily in a precarious situation.²⁷³ As piracy is extending to the coasts of east Africa, States are finding it more difficult to patrol the vast areas using military vessels.

3. The Rise of Private Maritime Security Companies

States have undertaken all possible efforts in an attempted to decrease piracy through legislative intervention and cooperation operations. However, with today's increase in trade and the increase in the level of activity in the shipping industry, States' navies are finding it increasingly difficult to protect such cargo ships. Another reality which States have to face is that military vessels sometimes prove too costly to use when it comes to monitoring vast areas of ocean space.

Ship-owners and shipping companies are thus turning to PMSCs for assistance. Essentially, PMSCs are companies which offer security services to cargo ships travelling through potentially dangerous areas. There can be two types of protection, namely ship borne armed protection teams and escort vessels.²⁷⁴ In the former case, these teams of trained individuals which would be carrying firearms in order to deter any attack directed towards the vessel will embark either at the port or by motor launch, only when the vessel is traversing a particular area as set out in the contract of employment and later they would

²⁷⁰MSC.1/Circ 1339 of September 2011.

²⁷¹ < <http://shipsandports.com.ng/nigeria-records-7-attacks-in-q1-as-southeast-asia-becomes-new-piracy-hotspot/>> accessed 8/9/2015.

²⁷²'Gulf of Guinea: Tackling Piracy, Africa Research Bulletin: Political, Social and Cultural Series' (2013) 50(6) John Wiley and Sons Ltd.

²⁷³John P. Pitney Jr and John-Clark Levin, *Private Anti-Piracy Navies: How warships for Hire are changing maritime security* (Lexington Books 2013) 15.

²⁷⁴Petrin Jr and Levin (n 37) 10

disembark.²⁷⁵ On the other hand, if escort vessels are employed, these would normally be smaller vessels escorting the cargo vessel with limited capabilities. In the latter situation, such vessels offer a much closer protection than military vessels would as the latter would not possibly be able to escort every merchant vessel through high risk areas.²⁷⁶

However, PMSCs do not come without any strings attached and there has been much controversy regarding activities of these companies. This has been fuelled by incidents such as the Blackwater USA scandals in the Abu-Ghraib prison in Iraq²⁷⁷ and the *Nisour Square* incident, where a particular PMSC had opened fire on Iraqi civilians.²⁷⁸ Such incidents make the legalisation of these companies highly debated.²⁷⁹ More so, ship-owners are wary of such services as they are concerned about both the liability that these may give rise to their companies and the harm that could be done to the ship-owners' reputation if such PMSC were to use force negligently.²⁸⁰ A case in point was the *Enrica Lexie*²⁸¹ incident where two Indian fishermen who were thought to be pirates were shot by two Italian marines on board of the *Enrica Lexie* oil tanker. Here the marines were contracted by the Italian State and formed part of a Private Contracted Armed Security Personnel. Thus the situation which arose here was different from one where the personnel would have been part of a PMSCs team. In the latter case, it would have been likely that the ship master or the shipping agency would have been held liable for the individual's actions.²⁸²

Another concern which may arise in relation to the employment of PMSCs is that crew members may begin to demand the use of such protection which will thus increase the cost of voyages which will lead to less profit for shipping companies.²⁸³ Ship owners have also shown their concern about the escalation of

²⁷⁵ Spearin (n 28).

²⁷⁶ *ibid.*

²⁷⁷ George R. Mastroianni, 'A War Examined: Allies and Ethics, Looking Back: Understanding Abu Ghraib' <http://www.strategicstudiesinstitute.army.mil/pubs/Parameters/issues/Summer_2013/6_Mastroianni_Article.pdf> accessed 17/04/2015.

²⁷⁸ Anastasia Frolova, 'International Regulation for Private Military and Security Companies: Back to Fundamentals as a Possible Way Forward' (2013) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2225368> accessed on 17/04/2015.

²⁷⁹ Alice Priddy and Stuart Casey-Maslen, 'Counter-piracy Operations by Private Maritime Security Contracts, Key Legal issues and challenges' (2012) 10(4) *Journal of International Criminal Justice* 839.

²⁸⁰ Spearin (n 28).

²⁸¹ <<http://www.ejiltalk.org/jurisdictional-and-immunity-issues-in-the-story-of-enrica-lexie-a-case-of-shoot-scoot-turns-around/>> accessed 12/04/2015.

²⁸² James Kraska, 'Regulation of Private Maritime Security Companies in International Law' in Myron H. Nordquist, John Norton Moore, Robert C. Beckman, Ronan J. Long (eds) *Freedom of Navigation and Globalization* (Koninklijke Brill NV Leiden, 2015).

²⁸³ Bradford (n 8) 473.

violence on the part of the pirates which may lead to the loss of life, cargo and damage to the vessels themselves, resulting in the loss of millions of dollars. Thus, ship owners have gladly welcomed the Best Management Practices to Deter Piracy off the Coast of Somalia and the Arabian Sea Area which provide non-lethal measures which could be used instead of employing PMSC teams.²⁸⁴ However, such practices are non-binding. Hence, they are not as effective as employing PMSCs, making the latter the obvious solution.

4. Legal Issues arising from the use of PMSCs and State Practice

Although no ship with PMSCs on board has ever been hijacked by pirates²⁸⁵, States remain concerned over the legitimacy or otherwise of the use of PMSCs. It is argued that this could lead to further escalation of violence in an already very dangerous area due to the lack of accountability and lack of control being exercised over these companies. The international community has taken different approaches in dealing with PMSCs. Some States have outright banned the use of PMSCs, while other States, which have a large ship registry, such as Cyprus, encourage ship owners to take up such services. The middle way between these two approaches is the one adopted by some States such as Norway where although the use of PMSCs is allowed, the onus of responsibility is placed on the ship owner.²⁸⁶ Thus here there exists no international harmonization in the regulation of the activities of such companies which could possibly create confusion amongst States.²⁸⁷

Both under customary international law and under UNCLOS, States have an obligation to prevent and repress piratical acts whilst having the right to seize the suspected pirate ships and confiscate everything upon them. This is not the case with respect to PMSCs which are only employed to deter any piratical attack. From this obligation of deterrence, two main issues arise, namely whether the privately contracted security guards are able to carry weapons on board commercial vessels and whether they can use deadly force in self-defence or the defence of the crew on board.²⁸⁸

Until the time of writing, deadly force was only used by a PMSC when *MZ Almezaan* was under a piratical attack. In this case, the commercial vessel *MZ Almezaan* was sailing to Mogadishu when it was attacked by pirates travelling in

²⁸⁴ Spearin (n 28).

²⁸⁵ Priddy and Casley-Maslen (n 43).

⁵⁰ Roach (n 17) 397.

²⁸⁷ James Kraska, 'International and comparative regulation of private maritime security companies employed in counter-piracy' in Douglas Guilfoyle (ed), *Modern Piracy: Legal Challenges and Responses* (Edward Elgar Publishing Limited 2013).

²⁸⁸ Kraska (n 51).

high-velocity skiffs. After having been engaged in an exchange of fire with the suspected pirates, the PMSCs managed to repel the first attack. However, a second attack was carried out by the suspected pirates and again gunfire was exchanged leading to the death of one of the suspected pirates. Even though such suspected pirates were then captured by the EU NAVFOR²⁸⁹ and their paraphernalia was destroyed, no investigation was made on the use of force which was exercised by the PMSC team on board. This highlights the lack of accountability that such companies are subjected to.

In this light, it is important to be reminded that PMSC personnel are common citizens and therefore have no special rights and obligations. In general, the force which is lawfully used is that which is allowed by law under the self-defence or defence of other regimes. Thus, if excessive use of force is exercised, such personnel will be liable to criminal prosecution. In such cases, matters could become very complicated as this could lead to a number of States having jurisdiction over such personnel, such as the flag State, the State of victims, and the coastal State if such incident occurred in territorial waters or the EEZ of a particular State. What is particularly worrying for such personnel is that the lawful use of force varies from one State to another.

Taking the United Kingdom (hereinafter referred to as 'UK') as an example, in its interim guidance released in 2011, the British Department for Transport stated that PMSC teams must use "minimum force" in order to deter pirates and to protect the crew on board. More so, such force must be graduate and reasonable and proportionate at all stages of the attack. Unfortunately, no guidance is given as to what constitutes a gradual, responsible and proportionate response to a piratical attack.²⁹⁰ The Guidance also suggests that measures which are able to show the possibility of use of force have to be employed by the team such as showing the firearms and giving verbal warnings. Warning shots are also allowed, however these may not be seen as an act of aggression.²⁹¹ Under English law, the use of lethal force can only be justified if there was grave danger.²⁹² However, the definition of lethal force is also not consistent in the UK itself as under the law of England, Wales and Northern Ireland, a person is allowed to use reasonable force in circumstances as they genuinely believe them to be.²⁹³ On the other hand, Scots law requires that for the claim of self-defence to be utilised, there must have been an imminent danger and that there were

²⁸⁹European Union Naval Force.

²⁹⁰Department for Transport, United Kingdom of Great Britain and Northern Ireland, Interim guidance to UK flagged shipping on the use of armed guards to defence against the threat of piracy in exceptional circumstances, version 1.1, November 2011, updated June 2012.

²⁹¹Kraska (n 51) 135.

²⁹²IMO Doc. MSC-FAL/Circ. 2 (United Kingdom)

²⁹³ibid.

reasonable grounds to believe this.²⁹⁴ This seems to be in line with the judgment pronounced by the European Court of Human Rights (hereinafter referred to as the 'ECHR') in the case of *Avsar v. Turkey*²⁹⁵ whereby the Court held that where there is deprivation of life the accused must be scrutinised not only by taking into account the acts in question but also all circumstances surrounding them.²⁹⁶

United States' (hereinafter referred to as 'US') law seems to be more lenient as non-lethal force is also allowed in cases where the vessel itself needs protection or where the cargo which it is carrying is in risk of being stolen or damaged.²⁹⁷ More so, non-lethal force could include the use of fire hoses and launching of sonic blasts. Furthermore, it provides that lethal force is allowed in cases of self-defence or the defence of others provided that there is imminent danger of death or grievous bodily harm. Self-defence is defined as "the act of thwarting an attack upon oneself, another person, or both by using force, up to and including deadly force."²⁹⁸ Here it should be noted that under US law, warning shots are not considered a use of force.²⁹⁹ This is in line with the reasoning adopted by the International Tribunal for the Law of the Sea (hereinafter referred to as 'ITLOS') in the *MV Saiga* case³⁰⁰ where it seems that the Tribunal is implying that a warning shot does not constitute use of force.³⁰¹

The use of weapons by the PMSC team is also an issue as rules relating to such practice varies dramatically from one State to another. For example, the US itself has various pieces of legislation regulating different guns.³⁰² Hence, licensing of firearms varies from State to State. Even more complicated is the issue of whether States allow weapons to be carried through their territorial sea. UNCLOS does not make reference to this issue. ISO/PAS 28007³⁰³ encourages

²⁹⁴ *ibid.*

²⁹⁵ *Avsar v. Turkey* [2001] EHRR 1014

²⁹⁶ <<http://caselaw.echr.globe24h.com/0/0/turkey/1996/10/14/avsar-v-turkey-3325-25657-94.shtml>> accessed 12/04/2015.

²⁹⁷ IMO Doc. MSC-FAL/Circ. 2 (United States)

²⁹⁸ US Coast Guard, Dep't of Homeland Security, Port Security Advisory (3-09, Guidance on Self-Defence and Defence of others by US Flagged Commercial Vessels Operating in the High Risk Waters, June 18, 2009, par. 2

²⁹⁹ *ibid.*

³⁰⁰ *MV Saiga (No. 2) case (Saint Vincent and the Grenadines v Guinea)* [1999] ITLOS Judgment.

³⁰¹ <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_2/merits/Judgment.01.07.99.E.pdf> accessed 12/04/2015.

³⁰² *National Firearms Act* [1934]; *Omnibus Crime Control and Safe Streets Act* [1968]; *Gun Control Act* [1968]; *Firearm Owners Protection Act* [1986]; *Undetectable Firearms Act* [1988]; *Gun-Free School Zones Act* [1990]; *Brady Handgun Violence Prevention Act* [1993]; *Protection of Lawful Commerce in Arms Act* [2005].

³⁰³ 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) Paragraph 4.2.4(b)(3).

ships carrying firearms and PMSCs teams to be in compliance with the applicable laws governing the procurement and carriage of firearms.³⁰⁴ The IMO guidance of 2012 provides that PMSC have to be aware of the legal responsibilities that these might have under the flag State, the State where the PMSC is registered and the countries in which the PMSC will transit.³⁰⁵

Here issues relating to the right of innocent passage also arise. Under article 17 of UNCLOS, the right of innocent passage is enjoyed by ships traversing the territorial sea of a coastal State. Kraska argues that if PMSC individuals are carrying firearms on board of vessels which are exercising their right of innocent passage, this does not constitute a breach of such a right and the vessel would also be in adherence to article 19 of UNCLOS (which explains the elements needed for innocent passage), provided that such weapons are used only for self-defence in case of a piratical attack.³⁰⁶ He continues to argue that article 27 of UNCLOS, which allows the coastal state to exercise jurisdiction of the coastal State over foreign vessels travelling through the territorial sea, is also adhered to, even if the simple carriage of firearms is an offence in the coastal State as such a crime does not extend to the coastal State or brings about lawlessness in the territorial sea.³⁰⁷ However, Kraska admits that it is the minority of States that have this perspective.³⁰⁸

Due the variety of practices being employed by the different States, the Facilitation Committee (hereinafter referred to as 'FAL')³⁰⁹ of the IMO issued a questionnaire asking States what requirements are in place for ships to be able to carry firearms on them when exercising their right of innocent passage.³¹⁰ Statistics show that, every State requires notification to be made to it upon the

³⁰⁴ < http://www.iso.org/iso/catalogue_detail?csnumber=42146 > accessed 15/09/2015.

³⁰⁵ Revised Interim Guidance to Shipowners, Ship Operators, and Shipmasters on the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area, IMO Doc. MSC.1/Circ. 1405/Rev. 2, May 25, 2012 and Revised Interim Recommendations for Flag States Regarding the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area, IMO Doc. MSC.1/Circ. 1406/Rev.1, Sept. 16, 2011.

³⁰⁶ Kraska (n 51) 128.

³⁰⁷ *ibid.*

³⁰⁸ *ibid.*

³⁰⁹ FAL's main purpose, as stated in the Facilitation of International Maritime Traffic Convention, is that of facilitating maritime transport in order to achieve the most efficient and smooth transit of ships, cargo and passengers in and out of ports. Efficiency is the key to trade growth. This Committee, in conjunction with the Member States, work in order to simplify transit of ships from port to port and to reduce the unnecessary paperworks and formalities. For further information consult: <<http://www.imo.org/OurWork/Facilitation/Pages/Home.aspx> > accessed 17/04/2015.

³¹⁰ IMO Doc. MSC-FAL/Circ. 2, Questionnaire on information on port and coastal State requirements related to privately contracted armed security personnel on board ships(2011).

vessel entering the port or its territorial seas.³¹¹ However, States have different rules when it comes to ships exercising the right of innocent passage. Brazil replied that for a ship carrying firearms to exercise its right of innocent passage it must file a report with the public authorities, who must subsequently issue a license ensuring that the carriage of such firearms is legitimate.³¹² In Egypt, the situation is more precarious as shipping agencies are required to provide authorities a list of armaments and ammunition on board. These have to be kept in a locked box under the shipmaster's authority, which box is to be presented to the Port Security officials for inspection who would in turn deliver this back before the ship leaves port. Failure to comply with this procedure would lead to criminal prosecution.³¹³

India places a requirement on all ships traversing through its territorial sea or EEZ to secure firearms and ammunition in a locked space prior to their arrival in such designated areas.³¹⁴ Furthermore, ninety-six hours before the arrival of such ship in these waters, a report has to be given to the regional coast guard detailing the types of weapons on board and all the personal information of the PMSC team on board.³¹⁵ Liberia requires strict embargo of the weapons on board ships entering Liberian territorial waters.³¹⁶

A more liberal approach in this area is adopted by France and the UK, whereby the carriage of firearms by foreign ships exercising their right of innocent passage is allowed provided that all ammunition and weapons are stored safely aboard the ship and that prior notification is given to the concerned authorities.³¹⁷ Spain and Israel seem to be the most lenient jurisdictions since they require no prior notification.³¹⁸

Another legal issue which needs to be addressed is that after an attack is repelled by a PMSC and the pirates' mode of transportation is unseaworthy, the master of the ship is duty bound to rescue them as they become "people in distress at sea".³¹⁹ Serious human rights issues may arise at the moment when pirates are arrested. In such situations, one would have to see whether the law of the flag

³¹¹ IMO Doc. MSC-FAL/Circ. 2, Questionnaire on information on port and coastal State requirements related to privately contracted armed security personnel on board ships (2011).

³¹² IMO Doc. MSC-FAL/Circ. 2 (Brazil).

³¹³ Information on Port and Coastal Requirements Related to Privately Contracted Armed Security Personnel on board ships, Maritime Transport Sector, Government of Egypt(2012).

³¹⁴ IMO Doc. MSC-FAL/Circ. 2 (India).

³¹⁵ *ibid.*

³¹⁶ IMO Doc. MSC-FAL/Circ. 2 (Liberia).

³¹⁷ IMO Doc. MSC-FAL/Circ. 2 (France) and IMO Doc. MSC-FAL/Circ. 2 (United Kingdom).

³¹⁸ IMO Doc. MSC-FAL/Circ. 2 (Spain) and IMO Doc. MSC-FAL/Circ. 2 (Israel).

³¹⁹ Article 2.1.9 and 2.1.10.

State empowers the ship master or the PMSC personnel to arrest and detain such individuals. Furthermore, if the ship master or the PMSC personnel decide to release the pirates back to the pirates' homeland flag-States must comply with their obligations under the Convention relating to the Status of Refugees.³²⁰ In principle, the rule of *refoulement*³²¹ only applies to States but the latter can keep hold PMSCs personnel or ship masters criminally liable for having disembarked pirates in a dangerous place.³²²

5. Malta's Legislation on PMSCs

Malta, being one of Europe's largest shipping registries, had to legally address the question posed by Ship owners whose ships are registered in Malta, as to whether PMSCs could be employed on commercial ships.³²³ Up until 2011, Transport Malta followed IMO's policy meaning therefore that no vessels flying the Maltese flag were permitted to carry arms on board. However, the situation changed when IMO issued their interim guidance on the use of PMSC on board of merchant ships. In fact, Legal Notice 19 of 2013³²⁴ established that if a ship owner decides to place a PMSC team on board, prior authorisation must be acquired from the competent authority that being the Merchant Shipping Directorate within Transport Malta (hereinafter referred to as 'TM').³²⁵ ³²⁶ An application as provided by TM must be submitted by the PMSC and this application has to be accompanied by a Voyage Plan and a Crew List of all the PMSC personnel on board, for the duration of the employment contract. When this authorisation is obtained, the ship-owner has to make sure a Ship Security Plan (hereinafter referred to as 'SSP')³²⁷ has been put into place and that a Ship

³²⁰Whilst being an obligation under customary international law, this is also enshrined in several conventions. Example: Article 33(1) of the Maritime Search and Rescue Convention, article 98(1) of UNCLOS.

³²¹Article 33(1) of the *Convention Relating to the Status of Refugees*, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137.

³²²Matteo Tondini, 'Some Legal and Non-Legal Reflections on the Use of Armed Protection Teams on Board Merchant Vessels: An Introduction to the Topic' (2012) 51/1 *Military Law and the Law of War Review*.

³²³<<http://www.timesofmalta.com/articles/view/20130321/business-comment/Private-maritime-security-licence-rules-are-another-notch-for-Malta.462375>> accessed 12/04/2015. ³²⁴General Authorisation (Protective Security Measures on board Ships) Regulations 2013.

³²⁵<http://www.transport.gov.mt/admin/uploads/media-library/files/Notice%20106%20-%20Placement%20of%20PCASP%20on%20board%20Maltese%20ships.pdf_20130308143034.pdf> accessed 12/04/2015.

³²⁶Schedule of S.L. 480.04 General Authorisation (Protective Security Measures on board Ships) Regulations.

³²⁷This has to be in accordance with the provisions of the ISPS Code and SOLAS. Such a plan is to take into consideration the SSA and provide measures which have to be undertaken in the different security levels in order to protect the persons on board, cargo, cargo transport units, the ship's stores and the ship itself.

Security Assessment (hereinafter referred to as 'SSA')³²⁸ is undertaken. More so, it is the master of the ship that remains responsible for the safety and security of the ship and thus has to ensure that all firearms and ammunitions are removed from the ship when the PMSC team disembark.³²⁹ Furthermore, such weapons and ammunitions must be kept in a safe place when the ship traverses waters which are not considered to be high risk. Ship-owners need to ensure compliance with the rules and regulations on firearms and ammunition of the coastal and port States that the ship intends to visit. The law also requires that the PMSC personnel are qualified accordingly.³³⁰

On the basis of the fact that various companies started to look at Malta to register their companies Malta issued Legal Notice 110 of 2013³³¹ which deals with the licensing of PMSC. This interest in Malta was fuelled by the fact that Malta is a Member the European Union and due to its user-friendly legislation, both with respect to licensing and incorporation of companies. More prominently, Malta has an excellent geographical position as it is the ideal port from where PMSCs teams can embark on ships heading to the Straits of Gibraltar to Suez.³³² This piece of legislation lays down the criteria which a PMSC should satisfy in order for it to obtain a licence under Maltese law. These criteria are very detailed and intricate, thus ensure that licensed PMSCs are truly up to standard both in capability and accountability. Such criteria include risk management assessment procedures, insurance policies, details of each of the personnel to be employed by the company and their experience in such a field.

³²⁸This is essential for a SSP to be developed as it highlights all the security assessments which the ship can face during its voyage. Such an SSA include the identification and evaluation of key shipboard operations which entail additional care whilst being carried out; identification of the existant security measures and procedures; identification of weak points in the policies, procedures and infrastructure; identification of human factors that can be a threat to the safety and the security of the ship; identification of potential threats and the probability of them occuring. Even though the ISPS Code provides that a fleet security plan can be put forward, TM requires that a SSP is undertaken for every ship reflecting the ship-specific information. This has to be carried out by by professional personnel and it has to be done by an on-scene security survey on-board. A copy of this is to be held onboard and the Master/Security Consultant of the ship is to keep it safe from unauthorised access.

<<http://www.transport.gov.mt/admin/uploads/medialibrary/files/Technical%20Notices%20-%20Consolidated%20Version%20-%207%20February%202013.pdf>> accessed 17 Apr 2015.

³²⁹Schedule of S.L. 480.04 General Authorisation (Protective Security Measures on board Ships) Regulations.

³³⁰Tondini (n 78).

³³¹Licensing of Private Maritime Security Companies Regulations 2013.

³³²<<http://www.timesofmalta.com/articles/view/20130321/business-comment/Private-maritime-security-licence-rules-are-another-notch-for-Malta.462375>> accessed 12 Apr 2015.

6. International Efforts to Regulate the Activities of PMSCs

After years of failing to recognise the legitimacy of PMSCs due to its belief that this would lead to an escalation of violence, in 2009, IMO published the Maritime Safety Committee³³³ Circular 1333³³⁴, giving basic recommendations on the use of PMSCs. In addition, IMO issued a guidance to ship-owners which put emphasis on the latter's awareness that their ship will be subject to the Coastal State's legislation once this has entered its waters and thus the PMSCs on board may be subject to different rules and regulations.³³⁵ These recommendations led to the development of an international standard and certification process for PMSCs established in ISO/PAS 28007,³³⁶ which sets out criteria PMSCs have to follow in order to become certified. These criteria include licensing of firearms, vetting of security personnel, rules on use of force and command and control of security personnel. Moreover, for a company to become certified, this has to be audited and inspected by Certified Bodies established in the different States.³³⁷

Following extensive consultation with the shipping industry, the Security Association for the Maritime Industry issued the 100 Series Rules³³⁸ which are an international model set of maritime rules on the use of force. These Rules are heavily based on the principle of self-defence. Prior to having such rules, PMSCs were obliged to have a detailed graduated defensive response plan as part of their procedures.³³⁹ However, these were a concern as different flag States have different rules as to what they consider acceptable. It is important to note that adherence to these rules does not in any way provide immunity to the PMSC team however, having said that, these rules do provide evidential basis for the claim of defence provided that the PMSC acts lawfully during the deterrence of an attack.

³³³ This is the IMO's leading technical body on matters relating to safety. This has developed and adopted various collision regulations and global standards for seafarers. It has also worked on multiple international conventions relating to search and rescue operations, the facilitation of international maritime traffic and also to carriage of hazardous material. For further information consult: <<http://www.imo.org/OurWork/Safety/Pages/Default.aspx>> accessed 17 Apr 2015.

³³⁴ IMO DOC. MSC.1/Circ. 1333, Recommendation to Governments for preventing and suppressing piracy and armed robbery against ships, June 26, 2009.

³³⁵ Frolova (n 42).

³³⁶ 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)

³³⁷ ISO 28007-1:2015 <<https://www.iso.org/obp/ui/#iso:std:iso:28007:-1:ed-1:v1:en>> accessed 17/4/2015

³³⁸ <<https://100seriesrules.com/>> accessed 12 Apr 2015.

³³⁹ Rule 103, Note 3 of the 100 Series Rules.

Furthermore, the International Code for Private Security Service Providers (hereinafter referred to as 'ICoC')³⁴⁰ was promulgated as a result of a multi-stakeholder initiative. Its' main purpose is to set international standards for PMSC employed to deal with high risk environments and to ensure accountability and proper monitoring of such companies. This code was signed by a number of companies coming from all over the world. Moreover, at the time of writing, there is also a draft Charter under consultation.³⁴¹

Regrettably these instruments leave much to be desired as there is no universally binding legislation on this issue. Proper legislation would bring to PMSCs certainty regarding their modus operandi and moreover ship owners would dispel any doubts which may arise in relation to the accountability of such teams. Even human rights activists would welcome such an initiative as it would also take into account the fundamental human rights which pirates also enjoy. Anastasia Frolova³⁴² argues that the international regulation of this private business should be done through a multi-stakeholder initiative. Through this method, various stakeholders would participate in the establishment and enforcement of standards to be adhered to by the PMSCs. This has numerous advantages out-weighting the convention model or the self-regulation model as the multi-stakeholder model takes into consideration a number of scenarios which others leave out. States may enforce their obligations under a convention to the letter until they themselves become clients of a PMSC. If the latter makes a mistake when the State itself is the client, the State will most likely try to keep this secret and do away with an investigation as this could attract bad publicity and damage the reputation of the State with the international community. The same could be said with respect to industry organizations as the latter would perform the duties accordingly until a conflict of interest arises. This is why Frolova suggests this multi-stakeholder approach as this introduces a system of "checks-and-balances".³⁴³ This approach allows the various stakeholders to give their input during the drafting, implementation and enforcement of the standards. Thus ensuring all capabilities, resources and expertise are exhausted, creating regulations favourable to all the stakeholders. It will more likely ensure a more widespread usage and effectiveness of the regulations as most probably all these stakeholders will agree to a small number of obligations but this will ensure more compliance. In the light of this, compared to a Convention which would require a number of signatories, the multi-stake holder approach would have a better chance of reaching the level of customary international law. For this model to be implemented properly extensive research is required and the

³⁴⁰ <http://www.icoc-psp.org/uploads/2010.10.08_-_International_Code_of_Conduct_final.pdf > accessed 17/4/2015.

³⁴¹ Priddy and Casey-Malsen (no 43) 853.

³⁴² Frolova (n 42).

³⁴³ *ibid.*

pattern with maximum State involvement is to be chosen as this will give stakeholders access to government law-enforcement apparatus.³⁴⁴

7. Conclusion

The use of PMSCs is on the increase.³⁴⁵ This is due to the fact that the services of these companies are being used extensively to deter pirates who are conquering the east of the African horn. Thus the international community should attempt to establish some form of universal regulation that would govern the activities of these PMSCs. In particular, uniform regulation as to what constitutes acceptable use of force is deeply in need as this seems to be in limbo. If no universal regulation can be achieved at the moment, States should imminently give specific guidance as to what is the allowable use of force. It can be argued that there exists a fine line between self-defence and homicide as it was seen in the *Enrica Lexie* incident discussed above. Thus investigations need to be carried out between States in order to ensure that PMSCs are using reasonable force without putting in jeopardy lives of innocent individuals or even violating pirates' human rights.

At the moment, ship owners are only requested to report incidents to the International Maritime Bureau. However this is totally up to their discretion.³⁴⁶ To ensure transparency, it is thus recommended that all piratical attacks in which PMSCs are involved are to be reported as is required of signatories to the ICoC.³⁴⁷ As to the requirements of the reporting of the use of PMSCs and the carriage of weapons on board and PMSCs, different states have different requirements; this situation creates uncertainty for all stakeholders in the industry. As suggested by Frolova, these lacunae may be remedied by applying a multi-stakeholder approach which will yield rules which are acceptable to all by taking into consideration all the stakeholders in this situation.

³⁴⁴ *ibid.*

³⁴⁵ < <http://www.sipri.org/research/armaments/production/researchissues/pmsc> > accessed 15 Sep 2015

³⁴⁶ Priddy and Casey-Maslen (n 43) 856.

³⁴⁷ Article 63 ICoC.