



## IN ACCORDANCE WITH INTERNATIONAL MARITIME LAWS, SHOULD MARITIME POLICING ACTIVITIES BE PRIVATIZED?

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In the past ten years, the threat of piracy has grown around the world. Despite being mostly confined in the Somalia region, it had a significant influence on the global economy. As a response, governments of several states provided assistance to Somalia in suppressing and eliminating piracy by a variety of means, including the deployment of their fleets, submarines, and warships in the region and the instruction of Somali nationals in anti-piracy warfare. As a result, there was a significant decrease in incidents of piracy in the area.

Around 2013's several nations sent out their armed forces to patrol, observe, and even accompany commercial ships. In the background, other private agencies were also actively engaging at the same time. The various Private Maritime Security Contractors (PMSC), which have grown into an organised business, were noteworthy among such private companies. A clear increase in demand for such private protection is currently present. There are other variables that have contributed to the demand, but there are only two primary ones. First off, no ship with PMSC on board has ever been taken over. The second is the financial savings realized by using PMSC.

### International Provisions for or Against Private Maritime Security Contractors

1. The UNCLOS articles 100–107,<sup>1</sup> as well as UN Security Council Resolution 1918, which was passed on April 27, 2010, were both in compliance with the multinational forces' anti-piracy operations.

2. **The Montreux Document**, which offers a framework for private military and security organizations, states that these rules and clauses only apply to platforms run by the government or military, not to private military or security companies. Despite being legally binding, this agreement is only relevant in cases of acknowledged armed conflicts, or to put it simply, in areas that have been designated as war zones internationally. Therefore, the Montreux Document does not apply to PMSC aboard ships operating in regions that have not been designated as "regions of armed conflict" or recognized as such.

3. **The International Maritime Organization (IMO) issued its "Interim guidance to private maritime security companies providing privately contracted armed security personnel on board ships in the high-risk area" via MSC.1/Circ 1443 on May 25, 2012, which is the only international document that has been officially promulgated as a guideline for Private Maritime Security Contractors.**<sup>2</sup>

4. Para 1.5 of its Annexure states thus, "This interim guidance is not legally binding and is not in itself a set of certifiable standards. It does, however, provide minimum recommendations on the competencies and



abilities a professional PMSC is expected to have.”

**As a result, PMSC is not currently required to adhere to rules by any legally enforceable or globally applicable document. The laws of the several nations in their separate territorial and adjacent zones would thus be the only limitations on PMSC's behaviour or activities.**

**4. According to the IMO's MSC/Circ.1130 of December 14, 2004,**<sup>3</sup> vessel masters must provide information on their crew, cargo, and other relevant matters. The International Ship and Port Facility Security (ISPS) Code is supplemented by this circular. If such information is not provided, admission to the ship may be refused. However, there is no necessity in the current format established by the circular aforesaid to submit information about the weapons carried onboard by the security firm or to indicate if any security firm carried such weapons at any stage during the ship's most recent journey.

**Does practice of private policing corresponds/complements to international laws?**

It is vital to ascertain if the growing use of private resources and crew in maritime law enforcement is compliant with international law. Prior to addressing the issue of how such law enforcement should be carried out in accordance with international law, it is necessary to determine whether coastal States are permitted to use private agents for maritime law enforcement objectives.

**A] Are coastal states entitled to use PMSC's for enforcement objectives that**

**are primarily the duty of state and its government actors?**

The International Tribunal for the Law of the Sea's (ITLOS) verdict in the **Panama v. Guinea Bissau case involving the M/V Virginia G**<sup>4</sup> is pertinent to this debate. Regarding the claim made by the Applicant was that only warships are permitted to use enforcement powers under the UN Convention on the Law of the Sea (UNCLOS) (in this specific instance, against an oil tanker bunkering fishing vessels in Guinea-Exclusive Bissau's Economic Zone). **"In its clarification, ITLOS opined that Article 110 of the Convention cannot be understood to indicate that it creates a principle establishing that under the Convention enforcement actions in the exclusive economic zone can only be conducted by a warship".**

The Convention leaves it to the coastal State to decide and define which national law authorities will be in charge of carrying out enforcement actions in accordance with article 73, paragraph 1, of the Convention in conformity with the fundamental principles of international law. As a result, it totally depends on the coastal State in question to determine who has the power to enforce its national law at sea. Therefore, the coastal State may likewise provide such authority to non state organizations. This is accepted in the framework of international liability law, namely under the guidelines for attributing certain actions to States. From the perspective of international law, it is irrelevant whether a State uses its own police to patrol a certain territory or delegates this



responsibility to independent organisations to a greater or lesser extent.<sup>5</sup>

In keeping with this, the International Law Commission (ILC) acknowledged that possibility in Article 5 of its Draft Articles on "the Responsibility of States for Internationally Wrongful Acts (ARSIWA)," which deals with attributing conduct to the State of bodies that are not State organs but are nonetheless permitted to exercise governmental authority. "The article is meant to take account of the increasingly prevalent phenomena of parastatal entities, which exercise components of governmental authority in place of State organs". The primary criterion is that these organisations have the "capacity to execute only certain components of governmental authority, even if only to a limited extent or in a particular context."<sup>6</sup>

Consequently, a coastal State may legitimately delegate policing authority within its EEZ to NGOs or marine security firms. Furthermore, while the phrase "empowered by the law of that State" may imply that Article 5 requires a specific law to be passed in order to grant a private entity the authority to exercise certain governmental functions, the more realistic interpretation is that "a delegation or authorization by or under the law of the State" suffices.<sup>7</sup>

Therefore, it is solely up to each State to decide how to assign State duties to its agencies and other "parastatal organisations," such as NGOs or private security firms.

### **B] How should the PMSC's carry out such law enforcement activities?**

Both State organs and private actors are subject to the same legal framework governing law enforcement at sea. UNCLOS and ordinary international law grant warships or "other properly authorised ships or aircraft clearly identified and recognised as being on Government service" the right to use enforcement powers at sea, including the authority to board, search, and seize a vessel.<sup>8</sup>

In the M/V Virginia G case, ITLOS emphasised that "general international law specifies unambiguous conditions that must be met with by all States during enforcement actions, including those carried out according to article 108, paragraph 1, of the Convention [relating to fisheries]". These rules specifically state that only officially authorised, easily recognisable officers of a coastal State may undertake enforcement actions, and that their vessels must be prominently identified as being in government service.<sup>9</sup>

Any enforcement operation conducted by a vessel other than a warship, whether it is State-owned or State-authorized, must, therefore, comply with the following requirements: a) the vessel must have "due authorization" from the State in question to exercise law enforcement powers; and b) the vessel and the boarding team must be "clearly marked and identifiable" as being on such governmental service.

In order to properly interfere with the passage of another vessel and exercise enforcement jurisdiction, such as boarding, inspection, diversion, and crew custody, the vessel must be clearly identified and recognised as being on government duty (in this context, law enforcement at sea). Such police enforcement



ships often sail certain ensigns and have recognisable national marks.<sup>10</sup>

Contrary to the UNCLOS's definition of warships, neither government ownership nor "the presence of a commissioned officer" is specifically mandated. Therefore, it follows that a private vessel that has been chartered and authorised by the coastal state will satisfy these requirements, provided that it has distinctive markings that would enable people to identify it as being in the government, and more specifically, in the law enforcement, service. Any vessel is exempt from having to halt and face at-sea enforcement action if it does not have these markers.<sup>11</sup>

### Potential Unscrupulous Exploitation

The transportation of illegal weapons under the guise of anti-piracy patrol boats, floating detachments, or armouries. Ignorance of the graded response/law of proportionality while dealing with alleged pirates (not real ones), resulting in preventable fatalities, as in the instance of the *Enrica Lexie*. It would be challenging for states with poor self-policing capacities to stop PMSCs from exploiting their waters illegitimately. As in the instance of the *MV Seaman Guard Ohio*, floating armouries may turn become "guns for hire" without providing any justification other than the owning firm claiming that it was in fact its ship.

There have been two recent occurrences involving armed security personnel on ships. The first is the *MT Enrica Lexie*, which is accused of firing at fishermen who were mistaken for members of the Pirate Action Group (PAG). The second involves the *MV*

*Seaman Guard Ohio*, a security vessel with undocumented weapons and ammunition.

### Proposals

(A) The present IMO guidelines for PMSC ought to be made legally obligatory in accordance with UNCLOS. However, it would depend on other member countries for everyone to agree and for the IMO to elevate even the current recommendations to a legally binding position - something that may need a lengthy lead time.

(b) The ISPS regulations might be changed to require ships carrying weapons or PMSC, having disembarked with weapons or PMSC, or planning to embark with weapons or PMSC to inform the port authorities prior to arrival/departure.

(c) Port websites may make the information sent by ships via ISPS internet accessible. Such information could only be available to international law enforcement organisations and other ports.

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### References

#### Footnotes

1. United Nations, "The Law of the Sea, Official Texts of the UNCLOS", (New York, United Nations Publications, 2001) 57-58.
2. International Maritime Organisation, "Interim Guidance to PMSC", 25 May 12 accessed on 30 Jul 14 <http://www.imo.org/OurWork/Security>



- y/SecDocs/Documents/Piracy/MSC.1-Circ.1443.pdf
3. United Nations, “Guidance to Masters, Companies and Duly Authorized Officers”, 14 Dec 04 accessed on 30 Jul 14, 2014,  
<http://www.un.org/en/sc/ctc/docs/bestpractices/1130.pdf>
  4. M/V ‘Virginia G’ (Panama/Guinea-Bissau) (Judgment) [2014] ITLOS Reports 2014 p. 4
  5. League of Nations, Conference for the Codification of International Law, Bases of Discussion for the Conference drawn up by the Preparatory Committee, vol. III: Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners (document C.75.M.69.1929.V), p. 90 (as cited in the ILC, Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, Yearbook of the International Law Commission 2001, vol. II, Part Two, p. 43) (ARSIWA Commentary).
  6. ARSIWA Commentary (n 24) 43
  7. J Crawford, ILC, First Report on State Responsibility, 3, U.N. Doc. A/CN.4/490/Add. 6 (24 July 1998); see also Schatz (n 4) 370.
  8. UNCLOS (n 22), arts 107, 110 (5), 111 (5), 224 (5)
  9. M/V ‘Virginia G’ (n 21) para 342
  10. UNCLOS (n 22), arts 107, 110 and 111
  11. UNCLOS (n 22), arts 101, 107