

PRIVATE MARITIME SECURITY CONTRACTORS AND LEGAL FRAMEWORK

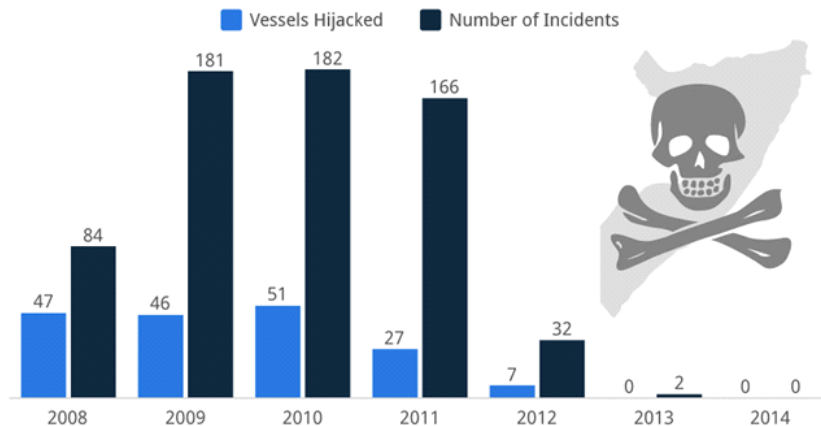
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Introduction

The last decade had drawn the world's attention to seas adjoining Somalia, Gulf of Aden and the Horn of Africa due to the menace of piracy at sea. Though regional in its visible activity, Somali piracy has had a negative impact costing the global economy almost \$ 18 billion annually.¹ Apart from individual actions on the part of merchant ships plying through the affected areas, governments, which had the capacity to contribute directly or indirectly towards security on the seas did so through deployments of ships, submarines and aircraft.² The ensuing result was a progressive reduction in the acts of piracy in the region since 2011 as seen below:-³

Somali Piracy Has Almost Been Eradicated

Vessels hijacked and pirate related activity* off the coast of Somalia from 2008 to January 2014



* Vessels fired upon/attempted boarding



@StatistaCharts Source: U.S. Navy Office of Information

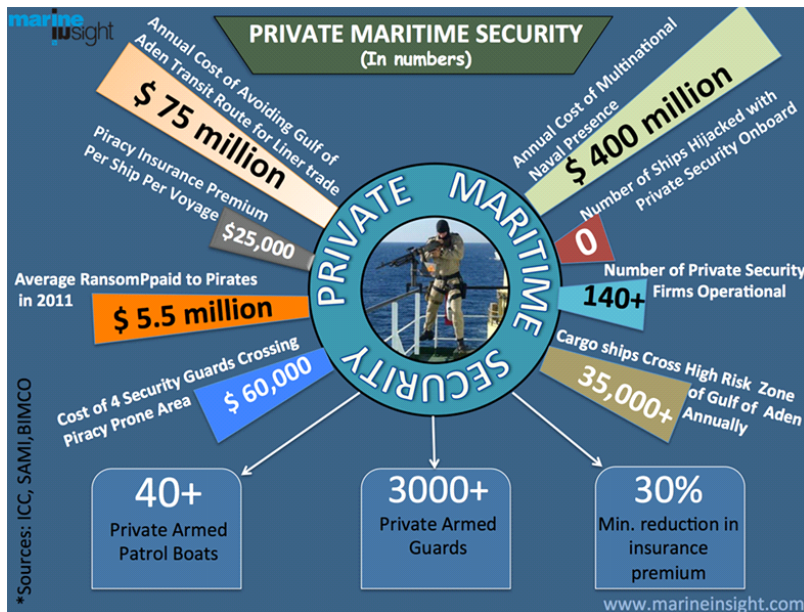
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¹Teo Kermeliotis, "Somali pirates cost global economy '\$18 billion a year", CNN.com, 12 Apr 13 accessed on 30 Jul 14, <http://edition.cnn.com/2013/04/12/business/piracy-economy-world-bank/>

²International Maritime Organization "Piracy and armed robbery against ships" accessed on 30 Jul 14, <http://www.imo.org/OurWork/Security/PiracyArmedRobbery/Pages/Default.aspx>

³Niall McCarthy, "Somali piracy has almost been eradicated" statista.com, 07 Jan 14 accessed on 30 Jul 14, <http://www.statista.com/chart/1752/somali-piracy-has-almost-been-eradicated/>

The year 2013 saw zero successful hijackings in the Horn of Africa region.⁴ A number of governments deployed forces to undertake surveillance, patrolling and even escort of merchant ships. Simultaneously, in the background other private agencies too were actively involved. Significant among such private entities were the numerous Private Maritime Security Contractors (PMSC) who have emerged as an organised industry. And now, there is an evident rise in demand for such private security. While a number of factors have ensured the demand, they can be narrowed down to two main ones. First, no ship to date having PMSC onboard has ever been hijacked.⁵ Second, the financial savings accrued from hiring PMSC. To summarise the costs involved, the following graphic is an indicator:-⁶



The appeal of PMSC is unmistakable and at first glance very desirable. However, past incidents and likely future ones raise several questions on the framework under which PMSC currently operate.

⁴David Yanofsky, Quartz, "There were zero Somali pirate hijackings this year" *thewire.com* 27 Dec 13 accessed on 30 Jul 14, <http://www.thewire.com/global/2013/12/there-were-zero-somali-pirate-hijackings-year/356519/>

⁵James Bridger, "The World's Most Violent Pirates", *USNI.org*, 12 May 14 accessed on 31 Jul 14, <http://news.usni.org/2014/05/12/worlds-violent-pirates>

⁶Raunek, "Private Security", *marineinsight.com* 04 Oct 13 accessed on January 22, 2014 <http://www.marineinsight.com/wp-content/uploads/2013/09/private-security.png>

International Provisions

Anti-piracy actions by the multinational forces were within the stipulation of UNCLOS articles 100-107,⁷ as also United Nations Security Council Resolution 1918, which was adopted on 27 April 2010,⁸ specifically to address issues of piracy off the Horn of Africa. However, these regulations and provisions are applicable to platforms operated by the government/ military and not to private military or security firms according to the Montreux Document⁹ that provides a framework for private military and security firms. This document, though legally binding, is applicable only in case of recognised armed conflicts or in simple terms in internationally recognised war zones. Thus, the Montreux Document is not applicable to PMSC embarked on ships operating in areas not declared/ recognised as 'region of armed conflict.' The only internationally promulgated document is the one from International Maritime Organization (IMO) through its '*Interim guidance to private maritime security companies providing privately contracted armed security personnel on board ships in the high-risk area*' vide MSC.1/Circ 1443 dated 25 May 12.¹⁰ The guidance though undermines itself with a disclaimer. 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.”

Thus, currently there is no legally binding and/ or internationally applicable document that requires PMSC to follow regulations. The only restrictions that PMSC, therefore, face in their conduct or practices would be the regulations of individual countries in respective territorial and contiguous zones. Similarly, there are no legal requirements for reporting of incidents when any firing of weapons is undertaken by such PMSC, except those imposed by coastal states within their territorial waters.

⁷United Nations, “*The Law of the Sea, Official Texts of the UNCLOS*”, (New York, United Nations Publications, 2001) 57-58

⁸United Nations, “UNSCR 1918”, 27 Apr 10 accessed on 31 Jul 14, <http://www.un.org/News/Press/docs/2010/sc9913.doc.htm>

⁹International Council on Red Cross, “*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*”, (Geneva, Switzerland, ICRC 2009)

¹⁰International Maritime Organisation, “*Interim Guidance to PMSC*”, 25 May 12 accessed on 30 Jul 14 <http://www.imo.org/OurWork/Security/SecDocs/Documents/Piracy/MS-Circ.1443.pdf>

Masters of vessels are required to furnish details of their crew, cargo and other such information as stipulated by IMO through its '*Guidance to Masters, Companies and duly authorised officers on the requirements relating to the submission of security related information prior to the entry of a ship into port*' vide MSC/Circ.1130 dated 14 Dec 04.¹¹ This circular supplements the International Ship and Port Facility Security (ISPS) Code. Non-submission of such information may result in denial of entry to the ship. However, nowhere in the present format promulgated by the circular *ibid* is there a requirement to provide details of weapons carried onboard by the security firm, or if any security company carried such weapons at any point in time during the immediately preceding voyage of the ship.

Private Maritime Security Personnel - Merchant Vessels

Not all security personnel onboard merchant ships are private. Only a few countries such as Italy and Japan¹² have in the past provided military personnel who embarked merchant ships to provide them onboard security against piracy. Since such security personnel are government employees, they could be expected to be under stricter regulations and oversight. With increasing government budgetary constraints, the numbers of PMSCs have only increased. As of 01 May 2013, there were at least 630 such companies¹³ and the figure is only rising. Almost all private maritime security companies rely on a substantial number (but not all) of retired military personnel. In addition, other civilian employees form up such security teams.¹⁴ Thus, the composition of PMSC is varied, and the only oversight that they would have is by their parent company. An initiative from the industry itself to standardise practices by such PMSCs was taken up in the form of the International Code of Conduct for Private Security Companies (ICOC).¹⁵

¹¹United 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>

¹²BIMCO, "*Comparison of Flag State Laws on Armed Guards and Arms on Board*", accessed on 30 Jul 14, https://www.bimco.org/en/Security/Piracy/Guidance_on_piracy/~/_media/Security/Piracy/Private_Armed_Guards_Flag_State_Laws_June_2012.ashx

¹³Ioannis Chapsos, "*PMSC and Concerns for the Near Future*", *The Maritime Executive*, 04 Jun 13 accessed on 30 Jul 14 <http://www.maritime-executive.com/article/Private-Maritime-Security-Companies-and-Concerns-for-the-Near-Future-2013-06-04/>

¹⁴Andrew Edwards, "*Private Contracted Armed Security Personnel (PCASP) – The need for International Regulation*", *linkedin.com* 22 Apr 14 accessed on 30 Jul 14, <http://www.linkedin.com/today/post/article/20140422220938-70430765-private-contracted-armed-security-personnel-pcasp-the-need-for-international-regulation>

¹⁵Mark Lowe, "*Lost in translation*", *Maritime Security Review*, 11 Apr 12 accessed on 30 Jul 14 <http://www.marsecreview.com/2012/04/lost-in-translation-2/>

While PMSCs may be signatories to the ICOC and promise to abide by them, there is no auditing or evaluation of their actual practices. Again, the ICOC is not a legally binding code for the signatories.¹⁶

Similarly, the methodology adopted by these PMSCs in transporting arms and ammunition is of also of concern as each follows a practice convenient to it. Some firms embark weapons for the entire duration of the ship's passage while others do it only for a certain part of the passage. Some may embark weapons outside the territorial waters or contiguous zones of a coastal state and may disembark the weapons in a similar manner.¹⁷ There have also been reports of alleged inappropriate disposal of weapons by the contractors just before entering the territorial waters of a port country to avoid being caught in legalities after entering the port.¹⁸ Floating detachments too complicate the issue. In one instance, the Nigerian Navy intercepted a Russian security vessel with hundreds of rifles onboard.¹⁹ The possibilities of such floating armouries being exploited to achieve unscrupulous ends are limited only by imagination.

Incidents in the Indian Ocean Region

Two recent incidents involving armed security guards onboard ships off the Indian coast have drawn considerable attention in the Indian media. The first is the case of the MT Enrica Lexie involved in the shooting of fishermen mistaken for a suspected Pirate Action Group (PAG), and the second was that of MV Seaman Guard Ohio, a security vessel with arms and ammunition without adequate documentation.

MT Enrica Lexie. On 15 Feb12, MT Enrica Lexie an Italian flagged oil tanker was undertaking a passage from Singapore to Egypt. During the passage, it passed through the Indian Contiguous Zone. At approximately 20.5 nm from the Indian baseline, Italian Naval Marines embarked onboard MT Enrica Lexie, fired warning shots at a fishing vessel (as claimed by the firing personnel), taking the

¹⁶Jon Huggins and Matt Walje, "Challenges of Maritime Security Oversight", *Global Policy Forum*, Dec 12, accessed on January 09, 2014 <http://www.globalpolicy.org/pmscs/52135-the-challenges-of-maritime-private-security-oversight.html>

¹⁷Oscar Rickett, "Piracy fears over ships laden with weapons in international waters", *theguardian.com*, 10 Jan 13 accessed on 30 Jul 14 <http://www.theguardian.com/world/2013/jan/10/pirate-weapons-floating-armouries>

¹⁸Nick Roscoe, "Quality Reassurance", *Maritime Security International*, Spring 2013, 42

¹⁹Jack Murphy, "The Hidden World of Maritime Security", *SOFREP*, 07 Apr 13 accessed on 30 Jul 14 <http://sofrep.com/18922/hidden-world-of-maritime-security-1/>

fishing vessel to be part of a pirate action group. Two fishermen onboard the fishing vessel were killed in the incident. The fishing vessel and its 11 men crew were genuine fishermen who had no connection with piracy. The ship continued its passage and the firing incident was not reported to any authority. Two hours later, when intercepted and questioned by an Indian Coast Guard (ICG) vessel, the crew admitted to the firing incident. The vessel was subsequently escorted to Kochi for further investigation.²⁰ While the case is still being debated in Indian courts, there are aspects of the case which make the issues related to PMSC relevant. First is the fact that the vessel did not report a firing incident since there is no mandatory regulation. Guidelines issued by the Indian Ministry of Shipping, SR-13020/6/2009-MG (pt.) dated 29 Aug 11 make it mandatory for all Indian and foreign commercial merchant vessels with armed guards and military weapons to obtain a Pre-Arrival Notification for Security (PANS) clearance prior to entrance and transit through the Indian Exclusive Economic Zone (EEZ) and / or the Indian Search and Rescue Region (ISRR).²¹ The lack of compliance with regulations set by a coastal state even as a vessel passed through its contiguous zone may not be the first or last in a geographical region.

MV Seaman Guard Ohio. MV Seaman Guard Ohio, a Sierra Leone flagged, American private firm owned, private security patrol vessel was detained and its crew arrested on 12 Oct 13 off Tuticorin within the Indian contiguous zone. The vessel was carrying 35 automatic weapons and nearly 5,700 rounds of ammunition at the time of arrest.²² Violation of the PANS apart, the vessel did not have any authorisation from the flag nation to carry out duties of armed escort. The crew did not have appropriate documentation regarding the weapons carried onboard or the logs of duties performed.²³ After nine months of detention and investigation, the multinational crew was set free by the Madras High Court, which declared it an unintentional, accidental act and not one of criminal

²⁰IBN Live, "Fishermen killed: India summons Italian envoy" 16 Feb 12 accessed on 30 Jul 14, <http://ibnlive.in.com/news/indians-killed-italy-says-ship-was-attacked/230861-3.html>

²¹Adani Ports, "Trade Notice – Pre Arrival Notification of Security (PANS)", 12 May 12 accessed on 30 Jul 14, <http://www.adaniports.com/pdfs/99.pdf?f=99.pdf>

²²Nirmal George, "MV Seaman Guard Ohio Arrests: Crew Of U.S. Owned Ship Held In India For Illegally Transporting Weapons" *Huffington Post*, 18 Oct 13 accessed on 30 Jul 14 http://www.huffingtonpost.com/2013/10/18/mv-seaman-guard-ohio-arrests_n_4121537.html

²³Anupama Chandrasekaran, "India charges 33 aboard armed US anti-piracy ship", *Reuters*, 19 Oct 13 accessed on 30 Jul 14 <http://www.reuters.com/article/2013/10/19/us-india-ship-arrest-idUSBRE99I02Q20131019>

conspiracy.²⁴ However, the incident brought to light how vessels could easily violate regulations set by the coastal state; it also highlighted the fact as to how vessels with inadequate documentation could easily carry a large number of weapons with little or no oversight.

Possible Unscrupulous Exploitation by PMSC

With lax regulations currently in place and no binding legalities, exploitation of loopholes by unscrupulous elements is certain. The following is by no means an exhaustive list of how the present circumstances could be exploited, but merely an indication of possibilities:-

- (a) Illegal arms trans-shipment under the pretext of anti-piracy patrol vessel / floating detachments / armouries.
- (b) Disregard for the law of proportionality/ graduated response while dealing with suspected pirates (not actual) leading to avoidable deaths like in the Enrica Lexie case.
- (c) States with weak self-policing capabilities could find it difficult to prevent PMSCs from using their waters illegally.
- (d) Floating armouries could become ‘guns for hire’ without submitting any explanation except for the owner company to claim that it was indeed its ship as in the case of MV Seaman Guard Ohio.
- (e) Boats from the vessels could be launched for a wide variety of nefarious activities citing anti-piracy operations or training procedures.
- (f) Since there are no legal limitations on the type of arms, weapons ranging from small arms to shoulder-launched missiles could be carried in the name of anti-piracy operations onboard these vessels. Thus, they could be illegally shipped around by passing internationally laid down regulations for such weapons sales.

²⁴A Subarami, “Court sets free crew of armed US Ship, says they came for food, fuel”, *thetimesofindia.com*, 11 Jul 14 accessed on 30 Jul 14, <http://timesofindia.indiatimes.com/city/chennai/Court-sets-free-crew-of-armed-US-ship-says-they-came-for-food-fuel/articleshow/38155179.cms>

Recommendations

The following recommendations that could ensure greater transparency in the world of PMSCs and reduce the unscrupulous exploitation of the present circumstances:-

- (a) **IMO Directives.** The current IMO directives on PMSC should be made binding on the lines of UNCLOS. However, for all countries to agree and IMO to escalate even the existing guidelines to a legally binding status would depend on other member nations – something that could involve long lead time.
- (b) **ISPS Modification.** ISPS regulations could be modified so that ships entering or leaving harbour with weapons/ PMSC, or having disembarked apons/ PMSC, or who intend embarking weapons / PMSC should notify the port authorities prior to arrival/ departure.
- (c) **Port Notification Data Availability.** The data notified by ships through ISPS could be made available online on port websites. Accessibility of such data could be restricted to other ports and law enforcement agencies throughout the world.
- (d) **Regulations - Boats Onboard.** Regulation on the use of boats including carriage of weapons and PMSC could be promulgated, preferably under the IMO framework.
- (e) **Weapons Carried On Board.** The number of weapons and the calibre of such weapons for the purpose of security duties could be restricted. Shoulder launched missiles and similar weapons must be excluded from the permissible list of weapons. If indeed there arises a situation of pirates having higher calibre weapons than those promulgated by this proposed restriction, perhaps such an area would require military intervention and would in any case be unsafe for navigation by merchant vessels with or without PMSC.
- (f) **Number of Private Security Guards.** While typically ships have been carrying not more than six guards onboard, there is no upper limit for carrying security guards. Restrictions could be imposed on the number of

guards onboard a ship to prevent human smuggling/ safe passage for offenders in the garb of PMSC.

(g) **Regulations on Floating Detachments.** Regulations on floating detachments that carry a large cache of arms and/ or large numbers of security personnel onboard may be promulgated including what kind of authorisation they must carry from their flag state and other logs/ documentation.

(h) **Immediate Reporting of Use of Weapons.** Regulation requiring any vessel that carries out firing, whether against confirmed pirates or suspected pirates or for practice, to render a report immediately to the Search and Rescue Authority of the region.

(j) **Mandatory Notification on AIS.** Any vessel that carries weapons/ PMSC onboard may be directed to mandatorily display the information on its Automatic Identification System (AIS).

(k) **Oversight Responsibility.** Countries offering vessels FoCs often have little or no oversight or capabilities to ensure oversight. Special regulations concerning PMSC onboard FoC vessels for the purpose of accountability could also be promulgated.

(l) **PANS Review.** PANS in its current form requires that carriage of weapons in the entire Indian EEZ and Indian Search and Rescue Region be reported.²⁵ However, there is no wherewithal at the disposal of the Indian Navy (IN) or Indian Coast Guard (ICG) to detect such a violation unless the vessel is boarded or prior intelligence is available. Thus, such inability could encourage vessels to continue violating the regulations, especially when merely transiting the region. Over a period, the image that may build up could be that it is safe to violate the law in the Indian EEZ or Search and Rescue Region. Inability to prevent violations despite laying down regulations may even be construed by PMSC and shipping companies as a sign of acquiescence by *IN* and *ICG*. It is therefore recommended that the transit area stipulated for obtaining PANS

²⁵Adani Ports, "Trade Notice – Pre Arrival Notification of Security (PANS)", 12 May 12 accessed on 30 Jul 14, <http://www.adaniports.com/pdfs/99.pdf?f=99.pdf>

may be reviewed and a smaller area in which the regulation can be enforced by various agencies be promulgated to deter potential violations.

Conclusion

The advent of PMSCs is perhaps the most effective measure in recent times against piracy at sea, both in terms of operational effectiveness as well as cost savings. With defence budgets shrinking around the world, the number of military assets that would be deployed for anti-piracy operations is likely to reduce further. Thus, it must be realised that PMSCs are here to stay and also grow in numbers. For various governments, too, the PMSC route may perhaps be a sustainable solution instead of tasking navies or Coast Guard. However, if left unregulated without legal boundaries, the sector could create greater legal complications, which would then be solved in a reactive mode. Regulations at the international level may only be promulgated under the UN framework and will thus take a long time to be framed and implemented. However, regulations within the purview of Indian agencies may be framed on a 'capability to implement' basis. Adequate awareness of such regulations amongst the implementing agencies including *IN* and *ICG* personnel as well as ships transiting through our regions could enhance the overall effectiveness of these regulations.



About the Author



Commander Gurudeep Bala, an alumnus of 60th Naval Academy Course and US Naval War College, Rhode Island, USA, was commissioned on 01 Jul 01. As a non-specialist, the officer carried out duties of GO-II Vinash, Flag Lt to FOGA and Commanding Officer, INFAC T 83. A specialist in Communication and Electronic Warfare, he has served as EWO Ranvir and SCO Rajput and Delhi. He is currently the Training Coordinator at Signal School. The author can be reached at gbalaindia@gmail.com