
EFFICIENCY OF PRIVATE MARITIME SECURITY COMPANIES IN COMBATING PIRACY

Aditya Bhatnagar, B.A. LL.B. (Hons.), School of Law, Raffles University, Neemrana, Rajasthan

ABSTRACT

Since the seafaring days began, in one form or the other, there existed an idea of piracy, due to lack of jurisdiction and enforceability of laws in the seas. The first reported piracy can be traced back to 1400 BCE and it has not spared us since, even after thousands of years today. Through the present paper, the author has tried to analyse the cause, emergence, rise and universal acceptance of the Private Maritime Securities Companies (PMSCs) and Privately Contracted Armed Security Personnel (PCASP) in combating piracy and armed robberies at sea, the legal framework surrounding them, the legal pitfalls in governing them and the very way ahead. The author has used the doctrinal method of research to find out the shortcomings of the world governments, militaries, legislators, international conventions and treaties in dealing with piracy and analysed how these inadequacies have resulted in the emergence and rise of the Private Maritime Security Companies as an organized sector. The author has also tried to analyse the international and national legal frameworks surrounding the legality of the PMSCs and how regulating them properly seems to be the only way ahead in dealing with piracy and armed robberies at sea.

Keywords: Maritime Security, Maritime Safety, Piracy, UNCLOS, Private Maritime Securities Companies (PMSC), Privately Contracted Armed Security Personnel (PCASP), Legal Framework

INTRODUCTION

Piracy has existed ever since seafaring began, from the first ever recorded piratical attack on Cyprus by The Lukkans in 1400 BCE to the brutal attack on boxship *Mozart* in the Gulf of Guinea last January, battling piracy has been baffling and a serious threat to humankind since time immemorial. Governments and the world navies while dealing with the issue have had to deploy ships, submarines and aircrafts for the purpose of undertaking surveillance, patrolling and even for escorting the merchant ships. This has proved to be a very troublesome method for the world governments. Besides, the incapability of the highest legal and juristic minds in dealing with the Pirates has allowed these barbarians to misuse the gaps in the International Maritime Law. With the set forth facts and arguments presented via this article, the author will try to prove that how this can be countered by Private Maritime Security Companies and Privately Contracted Armed Security Personnel exclusively in a very simpler and cost effective manner. Pirates in the present era have adopted state of the art methods as opposed to classic piracy which makes the United Nations Convention on Law of the Sea, 1982 (UNCLOS) piracy regime too narrow to be proved effective in combatting modern-day piracy. With the following article, the author will try to establish that how it is unfeasible for the governments and currently unachievable for the legislators of the world to keep a check on the modern-day piracy and how the emergence of the private industry has proved to cut this Gordian knot of piracy.

INEFFICACY OF THE GOVERNMENTS IN DEALING WITH PIRACY

As opposed to classical piratical methods, the contemporary piracy is not limited to merely robbery at sea but also includes hijacking the vessels and kidnapping the crew for ransom. At times, the intentions behind such acts of hijacking and kidnapping by the pirates is to discharge the cargo on to a sea port per their choice or for the purpose of transferring the cargo onto a different vessel. Contemporary pirates use weapons ranging from knives to AK-47, M-16 rifles to even rocket launchers¹, pertaining to which, in the Third United Nations Conference on the Law of the Sea (1973-82), piracy became one of the greatest concerns for the member states.

The acts that fall under the ambit of Piracy as decided by the member states in the Third Conference on the Law of the Sea² are:

¹ *Piracy in the Malacca Straits Special Press Summary*, VIRTUAL INFORMATION CENTRE, 7 (2005).

² The UNCLOS 1982, Art. 101.

- a) “Illegal acts relating to violence or detention, or acts leading to depredation, committed by the private crew, the passengers at a private ship or a private aircraft, against:
 - i) another ship or aircraft, or passengers or goods on board such ship or aircraft, on the high seas;
 - ii) a ship, aircraft, passengers or goods at a place outside the jurisdictional pervue of any state;
- b) Acts committed by a person voluntarily in the operation of a ship or that of an aircraft, along with the knowledge of fact of the impugned vessel being a pirate ship;
- c) Acts of incitement or that of intentionally facilitating another act as described under subparagraph (a) or (b).”

The Article per se is quite ambiguous in its very nature. Any laymen, by the *prima facie* look of the definition may point out numerous amounts of voids that are notoriously filled with the infamous activities of the pirates. For instance, the legislation is extremely vague about situations where threatened violence and clandestine theft tactics are used without actually inflicting any harm or violence to the ship or their crew or in cases when piracy is committed by certain insurgent groups to raise funds for their own rebellious activities³ or in cases of terrorist attacks done in order to attract international attention which are more common in the field are nowhere to be found in the above definition⁴.

Furthermore, when we dive deep into the facts of the piracy and incapability of the governments and legal structures in dealing with piracy, focus may be laid upon the very “‘reputable” ‘Somali Piracy’ where piracy cost more than 18 billion USD per annum pushing the global trade costs up by billions. There were nearly 42 vessels that were hijacked and around 111 reported incidents of piracy in the year 2008, the stats of which doubled the very next year.⁵ When talked about Asia, in the year 2020, Asia, itself faced a total of 97 cases of piracy that in

³ Stefan Eklöf Amirell, *Political Piracy & Maritime Terrorism: A Comparison between the Southern Philippines and the Straits of Malacca*, ISEAS CONFERENCE: MARITIME SECURITY, MARITIME TERRORISM AND PIRACY IN SOUTHEAST ASIA (2004).

⁴ Eduardo Ma R. Santos, *Piracy and Armed Robbery against Ships in the Philippines*, Graham Gerard Ong-Webb (ed.), PIRACY, MARITIME TERRORISM AND SECURING THE MALACCA STRAITS, 38-39 (2006).

⁵ Factbox - Ships held by Somali pirates, REUTERS (Feb 10, 2010), <https://www.reuters.com/article/uk-somalia-piracy-incidents-idUKTRE6184X020100209>.

itself is a 32% hike as compared to the year 2019⁶. The Gulf of Aden experiences a transit of around 42,000 vessels every year. The governments and the navies of the world are not able to protect each and every vessel. The deployment of ships, submarines and aircrafts in the High Risk Areas along with the military forces in order to undertake patrolling, surveillance and even for the purpose of escorting the merchant ships cost governments a fortune.

At the home front, it is projected that India could become the world's single largest oil importer close to the year 2050, as the mercantile trade in the country constitutes 41% of its GDP with a value of 77% and 90% being sea-borne. India's trade volume through the Gulf of Aden is predicted close to USD 110 billion per annum with an influx and outflux of nearly 24 Indian-flagged merchant ships every month⁷. Adding feather to the cap, the International Maritime Organisation (IMO) in the past decade, revised the High Risk Area (HRA) for commercial ships from 65° East Longitude to 78°⁸. From a technical point of view, it is nearly 35nm from the baseline and an unjustifiable intrusion into India's Exclusive Economic Zone (EEZ). That being said, almost all of Arabian Sea was declared as piracy infected area which resulted in the international maritime traffic density almost hugging Indian coastline, thus jeopardizing maritime safety in India.

A very obvious question then arose. How will India or in-fact any country will deal with this escalating problem of piracy?

Thus, to counter the above risks, incapability of the governments and ambiguities in the legislations, the shipping and merchant companies started hiring private security personnel in order to protect their vessels which did not take long to emerge as a trend pertaining to their success and thus stimulating the trust on the private industry in this fight against piracy.

RISE OF THE PRIVATE INDUSTRY AGAINST PIRACY

One cannot deny the fact that during the first score of the century, seas adjoining Somalia, Gulf of Aden and the Horn of Africa attracted the world's attention due to the escalating piracy they

⁶ *Piracy and Armed Robbery Against Ships in Asia, Annual Report (January-December 2020)*, RECAAP INFORMATION SHARING CENTRE, <https://www.recaap.org/resources/ck/files/reports/annual/ReCAAP%20ISC%20Annual%20Report%202020.pdf>.

⁷ Rear Adm. Daya Dharmapriya, *Countering Maritime Piracy: A South Asian Perspective*, REGIONAL COUNTER-PIRACY WORKSHOP, COLOMBO, SRI LANKA, (Sep. 27-28, 2012).

⁸ Michele Vespe, et al, *The Declining Impact of Piracy on Maritime Transport in the Indian Ocean: Statistical Analysis of 5-year Vessel Tracking Data Marine Policy* Volume 59, 9–15 (Sept. 2015).

faced. In an attempt to combat these attacks by the pirates, the governments have had to deploy ships, submarines and aircrafts for the purpose of undertaking surveillance, patrolling and even for escorting the merchant ships. Governments' role did not end there, they had to combat the attacks, provide risk assessment, advise, train and equip the seafarers with adequate anti-piracy training and equipments as well. This had proved to be a very monotonous and troublesome method for the world governments. What cost a fortune to the governments and navies of the world would be achieved significantly by privatizing the industry of maritime security.

1. PRIVATE MARITIME SECURITY COMPANIES (PMSCs)

The model of Private Maritime Security Companies was amongst the private pioneers to succeed and emerge as an organized sector against piracy. The main reason being, the affordability and success rate of the PMSCs. Vessels travelling with PMSCs shockingly brought down the number of pirate attacks and armed robberies in the high risk areas to almost **zero**. Due to these certain reasons, the demand for PMSCs was at a boom. Almost a quarter of the approximate 40,000 ships that crossed the Gulf of Aden, travelled with PMSCs on board. And surprisingly no cases of piracy and armed robbery have been reported with PMSCs on board with them. Following to which almost all of merchant vessels wanted to have PMSCs on board. PMSC businesses of UK and Northern Europe earned approximately \$52 million from 1500 escorted journeys per month.⁹

In India, following the *MT Enrica Lexie* case¹⁰ (the shooting of two Indian fishermen), *MV Seaman Guard Ohio* case¹¹ (security vessel with arms and ammunition without adequate documents), and the 2008 attacks on Mumbai forced not only the government, but the shipping and merchant companies to look for ways to combat these situations and at the same time to reduce risk involved in conducting their businesses. As a result, the rise of the PMSCs was quite apparent. And, with the deployment of the PMSCs on-board, there were no reported cases of similar context thereafter. Even the Supreme Court in *State of Tamil Nadu vs. Mariya Anton Vijay*¹² took judicial notice of the fact that “there are Private Maritime Security Companies that provide security for merchant vessels while they traverse through pirate infested locations”.

⁹ Dr. Bimal Patel, *Maritime Security Companies – Legal Framework*, FINS INDIA (July 12, 2015), <https://finsindia.org/maritime-security-contractors-legal/>.

¹⁰ Italy v. India, ITLOS Case No. 24 (Official Case No), ICGJ 499 (ITLOS 2015).

¹¹ *Mariya Anton Vijay v. State*, 2014 SCC OnLine Mad 3819; 2015 Cri LJ 107.

¹² (2015) 9 SCC 294; (2015) 3 SCC (Cri.) 779; 2015 SCC OnLine SC 583.

2. PRIVATELY CONTRACTED ARMED SECURITY PERSONNEL (PCASP)

In order to tackle the scourge of “Piracy and Armed Robbery of Ships”, the employment of PCASPs by PMSCs was another response by nation states. Armed private security teams were hired which soon became a norm rather than a mere exception in order to curb the gaps in maritime security. There was an evident rise in the deployment of the armed guards on the merchant vessels. The percentage of ships employing armed guards have grown from a minimal 10% to an estimation of 50% in the previous years.¹³ Maritime Safety Committee has adopted interim guidance for the purpose of ship owners, operators and masters¹⁴ and for flag states¹⁵ on the use of PCASP. IMO too, on 8th March 2012, issued an inscription by the title “*Piracy and Armed Robbery against Ships*” and urged the Member states to deliberate upon the utilization and regulation of firearms and PCASP under the purview of their domestic laws.¹⁶ Maritime Safety Committee has also progressed upon provisional guidelines for the services provided by PMSC in the High Risk areas in the form of PCASP.¹⁷

Thus, from private merchant and shipping business owners to the world governments, from relevant international organizations to the applicable international conventions and treaties, they have all recognized the existence, importance and need of the Private Maritime Security Companies and Privately Contracted Armed Security Personnel in this fight against piracy and armed robbery at sea which is the pivotal reason why we can see the emergence of these private maritime security contractors as an organized sector.

LEGAL FRAMEWORK SURROUNDING PMSCs AND PCASP

By the initial looks of it, we can be rest assured that UNCLOS under its Articles 100-107,

¹³ *Small Arms Survey 2012: Moving Target*, SMALL ARMS SURVEY, <https://www.smallarmssurvey.org/sites/default/files/resources/Small-Arms-Survey-2012-Chapter-08-Annexe-8.1-EN.pdf>.

¹⁴ *Revised Interim Guidance To Ship-owners, Ship Operators And Shipmasters On The Use Of Privately Contracted Armed Security Personnel On Board Ships In The High Risk Area*, INTERNATIONAL MARITIME ORGANIZATION, [https://static.mycoracle.com/igpi_website/media/article_attachments/MSC.1-Circ.1405-Rev.2%20Revised%20Interim%20Guidance%20To%20Shipowners%2C%20Ship%20Operators%20And%20Shipmasters%20On%20The%20Use%20Of%20Privately%20Contr...%20\(Secretariat\).pdf](https://static.mycoracle.com/igpi_website/media/article_attachments/MSC.1-Circ.1405-Rev.2%20Revised%20Interim%20Guidance%20To%20Shipowners%2C%20Ship%20Operators%20And%20Shipmasters%20On%20The%20Use%20Of%20Privately%20Contr...%20(Secretariat).pdf).

¹⁵ *Revised Interim Recommendations For Flag States Regarding The Use Of Privately Contracted Armed Security Personnel On Board Ships In The High Risk Area*, INTERNATIONAL MARITIME ORGANIZATION, <https://www.register-iri.com/wp-content/uploads/MSC.1-Circ.1406-Rev.3.pdf>.

¹⁶ European Committee on Crime Problems (n 3), at 64.

¹⁷ *Interim Guidance To Private Maritime Security Companies Providing Privately Contracted Armed Security Personnel On Board Ships In The High Risk Area*, INTERNATIONAL MARITIME ORGANIZATION, <https://www.register-iri.com/wp-content/uploads/MSC.1-Circ.1443.pdf>.

UNSC Resolution 1918 (2010)¹⁸, and the IMO Guidelines¹⁹ in a synergy may cover the entirety of piracy. But when scrutinized profoundly, it can be found that this brand new accepted concept of private contractors which has been ironically used for a long time now in combating piracy has not been covered by UNCLOS, neither by the UNSC Resolution 1918 (2010) nor by the IMO Guidelines. The provisions of the UNSC Resolutions and UNCLOS mainly govern the actions of the governments and militaries of the world and not the actions of the Private Maritime Security Companies. The actions of Private Maritime Security Companies are governed by a regional charter, Montreaux Document²⁰. Montreaux Document provides a framework on the working of the PMSCs but the scope of it is also limited to an extent where the document is only applicable to the areas of internationally recognized war zones and in cases of recognized armed conflicts.

While analysing the national legal frameworks, it can be pointed out that UK was amongst the pioneers in issuing guidelines²¹ for PMSC operating on the UK flag bearing ships, allowing them to use lethal force only in cases of self-defence and in defence of others where there was a plausible risk to human life. The USA, via its 33 US Code 383: Resistance of Pirates by Merchant Vessels, grants the ships right to use force to prevent pirate attacks and armed robberies on the US flag bearing ships using private contractors.

While analysing the legality in the home front, The Anti-Maritime Piracy Bill, 2019, is one such legislation that deals with the pitfalls in piracy but still isn't sufficiently exhaustive nor does it deal with each and every piracy threat that the country could face. The bill is pending to be ratified ever since it has been introduced in the Lok Sabha in 2019.

There still remain certain pitfalls in the regulation of PMSCs and PCASP in terms of enforcement and jurisdiction. Like, there is no system of checks and balance on the ratio of force that is to be used by these private contractors. There is also no chain of command, no

¹⁸ *Security Council, Unanimously Adopting Resolution 1918 (2010), Calls on All States to Criminalize Piracy under National Laws*, UN SECURITY COUNCIL (April 27, 2010), <https://www.un.org/press/en/2010/sc9913.doc.htm>.

¹⁹ *Guidelines to Assist in the Investigation of the Crimes of Piracy and Armed Robbery Against Ships*, INTERNATIONAL MARITIME ORGANIZATION (May 23, 2011), <https://wwwcdn.imo.org/localresources/en/OurWork/Security/Documents/MSC.1Circ.1404.pdf>.

²⁰ *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*, ICRC, file:///C:/Users/HP/Documents/0996_002-ebook.pdf.

²¹ *Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend Against the Threat of Piracy in Exceptional Circumstances*, DEPARTMENT OF TRANSPORT (November 2011), <https://www.ohchr.org/documents/issues/mercenaries/wg/law/uk/useofarmed.pdf>.

hierarchy over them. They can work in their individual capacity even in the presence of a ship's captain. There are also issues of human rights and torture convention in some cases. What if some pirates surrendered, or what if when PMSCs or PCASP captured the pirates, to what extent they can torture the pirates? Some questions like these still remain open to individual and judicial interpretation.

CONCLUSION

Piracy has been a threat to humanity ever since people began to navigate through the seas and it still remains one of the most tragic menace to international community. Governments of the world have taken numerous steps to curb it but it is apparent that contemporary international law of the sea conventions are not efficient in order to counter piracy and neither are the governments of the world. No government of the world has the resources to look out for each vessel or ship that goes out in the waters. Pirates have adopted new trends and employed state of the art methods and it is high time that the governments and shipping businesses did so too.

Henceforth, in order to counter piracy, the most effective way, like the rest of the industries, has been to privatize the industry of maritime security. The emergence and rise of the PMSC and PCASP is a result of the ever-lasting, over the odds measures taken by the governments and militaries which still remains ineffective to the date. Many may argue that these private contractors are self-regulated and lacks accountability but no one can deny the fact that since the emergence of PMSCs and PCASP, the number of hijacking and armed robberies have shockingly struck down to almost zero. The governments and international organizations must come forward with stricter regulations and frameworks to regulate and govern the actions of these private maritime security contractors not only in the domestic jurisdictions and high risk areas but also in the high seas and all parts of the oceans to ensure accountability on their part. Stricter and clearer regulations must be made to held these private contractors responsible and accountable for their actions, the rationality of the force to be used should be set, the limit to the use of firearms should be set, the hierarchy and the command should be set, humanitarian grounds should be applied to their actions and then we can say that the emergence of the Private Maritime Security Companies and Privately Contracted Armed Security Personnel as an organized sector in this fight against piracy is a huge success.

It is evident from the set forth facts that after the deployment of PCASP & PMSC on vessels and ships, the number of hijacks have struck down to almost zero and it has by-far been the

most efficient method to curb piracy. It is also evident from the mentioned facts that the demand for such services is at a peak and presently and in the near future, almost all vessels and ships would like to have such security personnel on-board with them. Hence, the only way ahead is to come up with stricter and dependable national and international framework and legal structures to make the actions of these private contractors more accountable and more binding on them rather than to cease them from operating. It was because of these private players only that this problem of piracy and armed robberies at sea could be curbed down drastically and preventing them from getting on-board with the crew or banning them would only result in the rise of piracy and armed robbery at sea. Thus, rather than banning the operations of PMSCs and PCASPs, the most logical way seems to maintain the status quo and properly govern and regulate the actions of these private players.