

Business and Security Series N°4

Contracted Maritime Security - Are Current Models Accountable, Safe, and Sustainable?

Jon Huggins



About DCAF

DCAF – Geneva Centre for Security Sector Governance is dedicated to improving the security of states and their people within a framework of democratic governance, the rule of law, respect for human rights, and gender equality.

Since its founding in 2000, DCAF has contributed to making peace and development more sustainable by assisting partner states, and international actors supporting these states, to improve the governance of their security sector through inclusive and participatory reforms. It creates innovative knowledge products, promotes norms and good practices, provides legal and policy advice and supports capacity-building of both state and non-state security sector stakeholders.

Users may copy and distribute this material provided that DCAF is credited. Not for commercial use.

To cite this publication

DCAF – Geneva Centre for Security Sector Governance.
Contracted Maritime Security - Are Current Models Accountable, Safe, and Sustainable?

© DCAF, 2022.

Cover photo:

Jens Rademacher, @planstelle
unsplash.com

Contents

Executive Summary	2
Background	2
Main Points of the Paper	2
Oversight Challenges Discussed	3
Practical Challenges to Regulation and Oversight Action	4
Recommendations	4
Contracted Security – A Worst Case Scenario	6
Discussion: Oversight and Enforcement Weaknesses and Ambiguities	7
1. The Threat of Maritime Piracy and the Rise of Contracted Security	8
1.1 Defining the Threat	8
1.2 The Proliferation of Contracted Maritime Security and Quality Concerns	10
2. Regulatory Framework Across Stakeholders	13
2.1 Regulatory Framework and Flow Chart	13
2.2 Guidance/Laws/Qualifications	15
3. Jurisdictional Challenges	17
3.1 Maritime Zones and Innocent Passage	17
3.2 Contested Areas of Jurisdiction	20
4. Hybridization of Contracted Maritime Security	23
5. Practical Reporting and Enforcement Challenges	27
6. Conclusions and Recommendations	29
6.1 Conclusions	29
6.2. Recommendations	30
Annex: Case Studies	33
Case Study: The “Murder at Sea” Case	33
Case Study: The ENRICA LEXIE Case	35
Case Study: The Challenges of contracting Coastal State Security	37
Case Study: The Junction Rain Arrests	39
Glossary and Explanation of Terms	41

Executive Summary

Background

Concerned over the growing violence at sea, many shipowners and operators have resorted to hiring armed protection services to ensure the safety of vessels and seafarers. While this practice was initially discouraged by most maritime stakeholders, it has now become an accepted part of the commercial shipping industry. Because of the security successes attributed to these contracted guards in the waters off Somalia, their use has grown over time to incorporate larger geographic areas, and several different business models. Some Coastal States have also been keen to cash in on this lucrative market and have developed a menu of armed protection services that are offered to commercial shipping companies. However, due to the rapidly changing dynamics at sea, and the challenges associated with its complex governance environment, regulatory oversight has lagged behind the employment of these armed security services and remains largely reactionary.

As was true in the Indian Ocean, where the majority of armed teams are properly supervised and regulated, contracted security can play an important part in deterring pirate action groups and ensuring the safety of vessels. However, as the perceived threat of Somali-based piracy declined, market pressures have unfortunately created a “race to the bottom” in some geographical areas where cut-rate teams are operating without proper training, regulation, or oversight. There has also been a proliferation of largely unsupervised schemes that use government forces or facilities to exploit the maritime security market.

In spite of the success off Somalia, the use of contracted armed security has not always proven to be an effective use of scarce maritime assets. For example, in the Gulf of Guinea, there are a large number of contracted Security Escort Vessels (SEVs) serving private clients (up to 150–180 per day) in territorial waters, Exclusive Economic Zones (EEZs), and even out into the high seas. These vessels are manned with uniformed navy or law enforcement personnel and fly Coastal State flags.

Even with this very dense patrolling rate, the number of attacks has not diminished over the years and some shippers have speculated that these assets could be better used to protect shipping traffic lanes rather than individual clients. In other words, the extensive use of these SEVs may have diverted Coastal State Navy personnel from the important task of arresting and prosecuting the perpetrators.¹

This paper will attempt to describe the climate at sea that has created an expanding market for contracted security services and some of the main challenges of providing proper regulation and oversight of these services ranging from contested jurisdiction, rapidly evolving business models, a lack of transparency in Flag and Coastal State policies and the practical challenges of exercising oversight at sea. Finally, the paper suggests several policy recommendations that could help address these issues.

Main Points of the Paper

Violent Threats to Shipping. Piracy continues to threaten several of the world’s oceans requiring increased security protection for commercial vessels. In some cases, the perpetrators of this violence are well-armed and willing to press home attacks even in the face of armed defense. In recent years, the scope of maritime violence has increased to include state-sponsored seizures of neutral vessels, indiscriminate attacks on vessels using mines and explosives, remotely controlled boats and unmanned “suicide drones.” To better inform the shipping and insurance industries about these threats, high risk areas and JWC Listed Areas (War Risk Areas) have been created to mitigate financial risk and to better protect seafarers. These charted areas also have a direct impact on the use of contracted security because they have been used by the IMO and others to set regulation and guidance. However, all of these institutions have recommended against the use of contracted armed security for most threats beyond piracy and armed robbery at sea.

¹ Since this paper was written, the International Maritime Bureau has documented a significant decrease in piracy in the Gulf of Guinea since 2020. There is no consensus on the reasons behind this sharp decline.

Oversight Challenges Discussed

Regulatory Framework. There is a bewildering amount of hard and soft governance for the use of contracted maritime security. This includes guidance from the IMO and industry groups, legislation and regulation from Flag, Coastal and Home States, industry self-governance, and cooperative stakeholder groups. While an extraordinary amount of guidance has been developed across these stakeholders, relatively few Flag and Coastal States have officially adopted, published and/or implemented these recommendations. Part of the difficulty lies with large number of stakeholders involved in hiring, supplying, vetting, and providing regulation for armed teams. For example, the recently published Reference Document from the Montreux Document Forum identifies the obligation of three “States” but acknowledges that private persons are the main clients of PMSCs¹ and that both Flag and Coastal States can serve as “Territorial States.” Even though it is widely recognized that PMSC oversight cannot be resolved by nations alone, no multistakeholder effort has been created to address shortfalls. Consequently, each stakeholder group has developed their own regulations and practices to be applied.

The Proliferation of Armed Security at Sea. Since the early 2000’s the use of armed guards has expanded from the Indian Ocean to West Africa, South-East Asia and into the Caribbean and South America (e.g. Peru). Because of the guards’ success off the coast of Somalia, some of the more prominent maritime nations, notably including the US, now expect that industry should be increasingly responsible for their own security. The shipping industry disagreed and did not want to “institutionalize” the use of armed guards. This dispute delayed the development of oversight mechanisms until long after the teams were in regular use in the Indian Ocean and the Gulf of Aden. These delays in oversight policy development have continued even as new forms of hybridized armed security are offered by a variety of sources.

The lucrative market for maritime security has now enticed several Coastal States to enter the security market by offering armed security teams and contracted Security Escort Vessels (SEVs) that operate in high risk areas where little oversight or coordination exists between Flag States and Coastal States. These new business models are continuously evolving and expanding into different geographic areas before proper oversight mechanisms can be developed. Unfortunately, these new forms of security have been largely undocumented and are governed through confidential agreements. Consequently, new variants of Contracted Maritime Security will continue to go unsupervised until they are recognized and addressed by regulatory bodies.

Introducing the concept of “Contracted Maritime Security”

Since the height of the Somali crisis, several models of armed security for vessels have been developed to provide security alternatives for ship owners. Many of these models of armed security have involved different levels of government involvement in joint business ventures, offering the services of contracted armed vessels, or by leasing teams of armed and uniformed personnel. In light of this development, a new set of options are now being offered which do not have the same degree of understanding and oversight.

For the purposes of this paper, there are two general categories of security providers identified: Contracted Private Services and Contracted Governmental Services. Within these two broad categories, there are five basic models of contracted maritime security services that are further defined. Therefore, a new term is suggested: “Contracted Maritime Security” that can be used to incorporate the wide range of options for security. Additionally, this paper will suggest ways that could be used to define the new subsets of security, along with their capabilities and missions in an attempt to guide future efforts to ensure proper oversight.

Jurisdictional Challenges. While the United Nations Convention on the Law of the Sea (UNCLOS) is seen as the primary reference to determine oversight and responsibility for vessels, contested zones remain where Flag and Coastal States regularly disagree over which state has jurisdiction to enforce regulatory or legislative oversight for the provision of armed security. For example, some Flag States argue that vessels with armed security should be entitled to innocent passage through territorial waters, and private teams should be allowed to operate in Exclusive Economic Zones (EEZs). On the other hand, Coastal States have argued that they hold complete sovereignty in their territorial waters and, depending on their interpretation of UNCLOS, some Coastal States have even claimed extended jurisdiction over the use of armed security in the EEZ. These conflicting interpretations have created ambiguity in the oversight of armed teams (private and uniformed) operating within 200nm of regional coastlines.

UNCLOS Definitions	<div> <div>Territorial Waters (Out to 12nm)</div> <div>Exclusive Economic Zone (Out to 200nm)</div> <div>High Seas (Beyond 200nm)</div> </div>		
Armed Robbery vs. Piracy	Armed Robbery	Piracy	
Clarification Required	Coastal State Jurisdiction or Innocent Passage?	“Contested Zone” – 12-200 nm Coastal State vs. Flag State	Flag State Jurisdiction

Practical Challenges to Regulation and Oversight Action

While most of this paper will focus on governance and policy issues, it is important to understand that even if these are solved, severe shortfalls in the capability of Flag and Coastal States to investigate, arrest and prosecute violations of human rights will still remain. One area of weakness lies in the unclear reporting frameworks that are prevalent in high risk areas. This means that the presence of contracted security for individual vessels is often not reported to regional or international authorities and that there is no agreed repository to collect and investigate incident reports involving armed security. Additionally, the logistical challenges related to vessels operating globally make it impossible for most Coastal and Flag States to conduct law enforcement operations at sea. For these reasons, it is even more essential to ensure full transparency for Contracted Maritime Security and to further ensure that Coastal State policies, Flag State Policies and industry guidance are aligned and implemented prior to employing contracted security at sea.

Recommendations

The following table summarizes the main recommendations in the paper. (These are further clarified in the Recommendations Section).

Challenge: Lack of a multistakeholder venue to consider contracted maritime security governance and gain consensus across relevant stakeholders.

- Recommendation 1:** Using the three-fold structure described in the recently published MDF Reference Document² an appropriate multistakeholder group should consist of:

Home States – This would include both PMSC Company States and Coastal States offering security services.

² Reference Document, Elements for a Maritime Interpretation of the Montreux Document, Chairs Document of the Maritime Working Group.

Territorial States – Jurisdiction in which Contracted Security is operating (could be Flag or Coastal State).

Contracting States – Those “States” that hire PMSCs to operate at sea (In this case, this category would include the shipping industry)

The objective of this body would be to develop consensus on the best approaches to obligations and best practices related to Contracted Maritime Security.

Challenge: Unclear Jurisdictional Boundaries between Flag and Coastal States and the limits of Innocent Passage.

- **Recommendation 2:** A legitimate legal advisory body must be engaged to clarify contested areas of jurisdiction. These may include 1) determining jurisdictional primacy for security employed outside of TTW but within a recognized EEZ and 2) how/if the right of innocent passage applies to contracted maritime security.

Possible venues for referral could include:

- The Division for Oceans Affairs and Law of the Sea (DOALOS) – at IMO request
- The International Tribunal for the Law of the Sea (ITLOS)
- The IMO Legal Committee³

Challenge: Hybridized forms of contracted security are not transparent and are therefore not subject to proper oversight.

- **Recommendation 3:** Organizations that are involved in promoting better oversight of contracted armed security should seek to document the ever-morphing models of private security in order to be properly addressed by regulatory agencies. Additionally, these contracted services should be subject to certification and vetting by Contracting States, Coastal States and Flag States, especially if the services are provided in International Waters or the High Seas.

Challenge: Flag and Coastal State policies are often not transparent and do not adhere to IMO Guidance.

- **Recommendation 4:** Flag and Coastal States should adopt national policies reflecting IMO Interim Guidance on private security:
 - Coastal States should publish their requirements related to private security in accordance with IMO (MSC-FAL.1/Circ.2)
 - Flag States should publish clear guidance for registered vessels in line with IMO Guidance and that are compatible with Coastal State policies.

As a model, regulations could be modeled after the security guidance developed by the Marshall Islands (Flag State) and Benin (Coastal State).

Challenge: Flag and Coastal States are challenged to apply oversight and investigate use of armed force by Contracted Maritime Security.

- **Recommendation 5:** Since it is not practical for most Flag and Coastal States to actively investigate and enforce policies and guidance, further emphasis should be placed on ensuring due diligence procedures are adhered to by Flag, Home and Territorial States. Additionally:

³ Accessed at IMO Legal Committee Homepage. See: <https://www.imo.org/en/OurWork/Legal/Pages/LegalCommittee.aspx>
The Legal Committee is empowered to deal with any legal matters within the scope of the Organization. The Committee consists of all Member States of IMO. It was established in 1967 as a subsidiary body to deal with legal questions which arose in the aftermath of the Torrey Canyon disaster. The Legal Committee is also empowered to perform any duties within its scope which may be assigned by or under any other international instrument and accepted by the Organization

- Trusted reporting mechanisms should be in place to report the presence of armed security on vessels and facilitate incident reporting.
- Clear reporting frameworks, involving both Flag and Coastal States should be established in high-risk areas to ensure that the armed actions by security teams can be better assessed.

Contracted Security – A Worst Case Scenario

As an example of the myriad problems discussed above, the case of the MV JAEGER demonstrates the need to reconsider and refine regulation and oversight of armed maritime security. The case provides a look at everything that can go wrong – even in this case, where the team is seemingly well managed and responsible Flag states are involved.

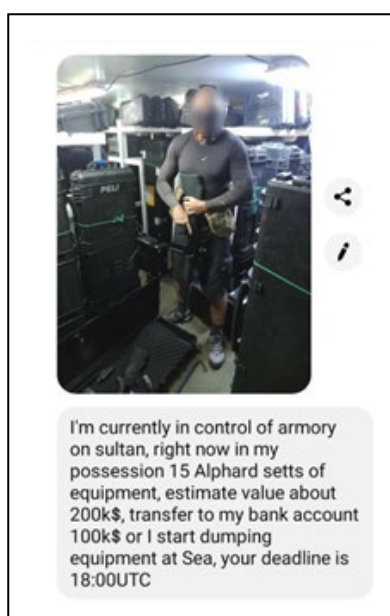


Photo Credit: Splash 247.com

On 21 July 2020, the team leader of a 3-man private security team boarded the Marshall Islands flagged MV JAEGER as it steamed through the Gulf of Aden toward the Red Sea. Once on board, the guard refused to surrender his weapon to the vessel master and instead took control of the vessel, demanding that the vessel deviate from course and head in an easterly direction (the other two guards did not participate in the action). The guard complained that his private maritime security company (PMSC) had not paid him in several months and he demanded money be transferred to his bank account before he would relinquish command of the vessel. He also robbed the ship's safe of a large amount of cash.

The disgruntled guard was eventually talked down and disarmed. He then disembarked the MV JAEGER on 24 July and was taken to a floating armory (MV GOLDEN PALM) in the Red Sea. But the story did not end there. The guard proceeded to break into the weapons locker on the floating armory, enabling him to hijack the Mongolian-Flagged MV GOLDEN PALM. This turned out to be a more visible event, where he publicly made demands for payment while throwing weapons into the sea. All this was captured in real time as he live-streamed the events through social media.

As this was happening, the Marshall Islands requested support from international navies operating in the Gulf of Aden. They specifically asked the United States, which has a treaty obligation to defend Marshall Islands territory under a Compact of Free Association. However, the U.S. argued that this action constituted a "labor dispute" requiring law enforcement and declined to act. INTERPOL's Maritime Security sub-Directorate was also directly informed during the incident but declined to take any action. UKMTO also declined assistance because they felt it was a law enforcement issue and were unclear whether the incident technically constituted "piracy" under the UNCLOS definition.

Eventually, the rogue guard was once again disarmed and taken ashore for eventual transport back to his home country of Ukraine. While he was not initially charged, the U.S. shipowner, Eagle Shipping International (USA) LLC, did file a civil lawsuit against the PMSC, and the Marshall Islands worked with Ukrainian authorities to take legal action against the perpetrator. (Update: The Security Service of Ukraine investigated and eventually arrested the perpetrator in July 2021. He became the first person in history to be charged in Ukraine for the crime of piracy, namely "the use of violence, robbery or other hostile actions against the crew of a sea vessel.")

Discussion: Oversight and Enforcement Weaknesses and Ambiguities

Vetting: The incident shows the limitations of vetting security team personnel. The guard in this case was disgruntled well ahead of the incident and had complained about lack of pay during his excessively long time at sea. The PMSC evidently had vetting measures in place, but these were conducted before the guard faced personal challenges while on a 5-month deployment and there were no procedures in place to monitor his fitness for duty, nor authorities that could declare him unfit.

Pressures on Armed Teams: According to Dryad Global “The Eagle Bulk and Golden Palm incidents aren’t isolated; they are just underreported in the public domain. What the PMSCs are facing is a pressure cooker of factors that are putting unacceptable levels of pressure on crew and guards.”⁴

Jurisdiction: Because the event occurred in international waters, the Flag State would have the primary responsibility to arrest and prosecute the offender. However, there are no armed personnel on board the vessel and the Marshall Islands does not have the ability to arrest and prosecute on the high seas. (As discussed, they did request assistance from the United States through the Compact of Free Association). Mongolia, the Flag State of the MV GOLDEN PALM had primary jurisdiction for prosecution in that case, but also lacked enforcement capability. The Home State of the PMSC (Alphard Maritime Pte. Ltd) registered in Singapore also was unable to prosecute.

Unusually, this incident did have a positive outcome because Marshall Islands authorities requested that Ukraine take legal action due to the citizenship of the armed guard. In their correspondence, the Flag Administration waived jurisdiction in favor of Ukraine, which eventually led to a successful arrest and prosecution.

Enforcement: As discussed above, even if jurisdiction can be determined, there is limited ability for Territorial States and/or Home States to arrest and detain suspects at sea. The only possible force which could have apprehended the suspect at sea (the US) declined the request from Marshall Islands. Consequently, the guard was not arrested or detained, but he was convinced to voluntarily disembark onto the floating armory. He was not properly detained on the MV GOLDEN PALM and he managed to easily take control of a second vessel. Once again, he was not arrested or detained, but was allowed to depart for Ukraine without any consequence for his actions.

⁴ Dryad Global, Hiring ship security personnel and armed guards – What you Need to Know. 13, September 2020. Available at: <https://channel16.dryadglobal.com/hiring-ship-security-personnel-and-armed-guards-what-you-need-to-know>

1. The Threat of Maritime Piracy and the Rise of Contracted Security

1.1 Defining the Threat

Piracy and Armed Robbery Against Ships represent a significant threat to both the crew and the vessel. Piracy peaked off Somalia around 2010-2011 where over 150 attacks occurred each year. During attacks, Somali pirates would hijack the vessel and crew and drive them to safe havens on the Somali coast where lengthy ransom negotiations would take place over an average of 6-9 months. Piracy in the Gulf of Guinea was initially focused on oil theft (transfer) which involved holding the crew hostage on board the vessel for multiple days while the oil was transferred to other vessels. The targets of these West African pirates have since shifted to the kidnapping and removal of seafarers who are held for ransom in deplorable conditions in the Niger Delta and other remote locations. Other forms of piracy prevalent in South East Asia involve the theft of equipment and cash from the vessel and personal belongings of seafarers.

Violence associated with Maritime Piracy

Attacks are often initiated with gunfire to intimidate the crew and cause the vessel to stop. According to shipping industry Best Management Practices to Deter Piracy and Enhance Maritime Security off the Coast of West Africa (BMP WA):

*Attackers may use small arms fire and Rocket Propelled Grenades (RPGs) during attacks; the bridge and accommodation tend to be the main targets for these weapons. Attackers may use long lightweight ladders, knotted climbing ropes or long hooked poles to climb up the side of the ship.*⁵

Somali pirates have generally avoided direct confrontation with armed security on vessels. Often, armed guards simply make their presence known by standing on the rails with guns held over their heads. Piracy groups in the Gulf of Guinea, however, are not as easily deterred. Some of these groups have engaged in lengthy gun-battles with armed government teams and have sometimes been able to overcome the armed guards.

Danger to Seafarers

Seafarers have been killed or injured during these attacks while others have been terrorized while locked in safe rooms (citadels) waiting for law enforcement forces to arrive. The fate of those captured is even worse, with large-scale torture common in the case of Somali hostages⁶, some of whom were held for years in deplorable conditions. While hostages taken on the West Coast are generally held for shorter amounts of time, they are still held in appalling conditions.⁷

Emerging Threats – Limits of Armed Guards

Over the last few years, new violent threats to shipping have emerged, often with origins in state-on-state conflict and terrorism-related attacks. State threats to vessels include several recent seizures of

⁵ BMP West Africa, Best Management Practices to Deter Piracy and Enhance Maritime Security off the Coast of West Africa including the Gulf of Guinea. BIMCO, ICS, INTERCARGO, INTERTANKO, OCIMF. Found at: <https://www.ics-shipping.org/publication/best-management-practices-to-deter-piracy-and-enhance-maritime-security-in-the-red-sea-gulf-of-aden-indian-ocean-and-arabian-sea/>

⁶ Gettleman, Jeffrey, Freed Sailors Recount Years of Torture at the Hands of Somali Pirates, (24 Oct 2016) New York Times. Available at: <https://www.nytimes.com/2016/10/25/world/africa/freed-sailors-recount-years-of-torture-at-the-hands-of-somali-pirates.html>

⁷ Ponniah, Kevin, The day the pirates came, BBC News (10 May 2020). Available at: <https://www.bbc.com/news/world-asia-52295222#:~:text=It%20was%2019%20April%2C%202019,businessmen%20seeking%20a%20swift%20fortune.>

vessels by well-armed government and/or paramilitary forces. Other threats include explosives attached to ship hulls (limpet mines), remotely controlled drone boats, floating mines, UAV attacks, and unlawful vessel seizures. In other areas, developing threats include politically motivated attacks against shipping in the Red Sea and national tensions between Coast Guards and armed fishing vessels in the South China Sea. In recent years, maritime security threats have also been rapidly increasing in South America, the Caribbean, and Mexico.

The use of armed guards to address these emerging threats is generally not advised. According to a recent advisory put out by the Roundtable of Shipping Associations: “The use of force against threats recently encountered in the Gulf of Oman carries significant risk and has the potential to escalate security situations to the detriment of the safety of ship and crew⁸”.

The inability of contracted teams to counter emerging threat is perhaps best illustrated by the tragic events of 30 July 2021, where two people, including a UK-based security guard were killed in a drone strike on a tanker off the coast of Oman⁹. The tanker appeared to be caught up in a rift between two nations and was tragically targeted.

Defining Risk Areas: High Risk Areas and War Risk Areas

In response to the threat of piracy and other dangers, the shipping industry and other stakeholders have identified specific areas where significant threats exist in order to allow shipowners and operators to better assess risk to voyages. Some of these areas co-exist and overlap. Of special note for this paper, some of the areas also have a direct impact on policies related to the use and oversight of armed guards.

- **High Risk Area (HRA):** The geographic coordinates of this area were developed by the shipping industry in response to the high number of piracy attacks occurring in the Indian Ocean and Gulf of Aden. The High Risk Area defines itself by where pirate activity and/ or attacks have taken place.¹⁰ A High Risk Area is an industry defined area within the VRA where it is considered that a higher risk of attack exists, and additional security requirements may be necessary.
- **Warlike and High Risk Areas:** Warlike and High-Risk areas are defined maritime areas where there is a high level of exposure to safety and life risks due to a war, military tension, hostilities, pirate activity and other circumstances causing immediate danger to visiting vessels and their crews.¹¹
- **Listed Areas (JWC):** JWC Listed Areas - are areas where owners are required to notify underwriters of voyages and additional premiums may be charged. JWC Listed Areas are set for business reasons and are not the same as the UKMTO or BMP areas but in part serve a similar purpose, to alert ships to the potential dangers.¹²

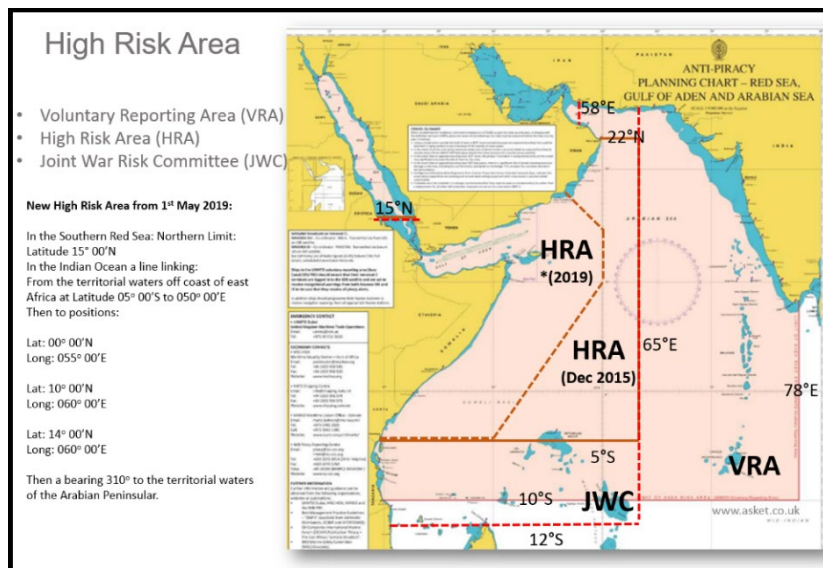
⁸ Saul, Jonathan, Reuters, July 12, 2019. Found at: <https://www.reuters.com/article/us-mideast-iran-tanker-security/merchant-ships-urged-to-avoid-using-private-armed-teams-in-mideast-gulf-idUSKCN1U722W>

⁹ Dempsey, Harry, Sheppard, David, Manson, Katrina, Financial Times, Two Killed in Suspected Drone Attack on Tanker Near Yemen, July 30, 2021. Available at: <https://www.ft.com/content/a9385fd6-6479-4e11-9a2c-3dce389b1cf7>

¹⁰ BMP5, Best Management Practices to Deter Piracy and Enhance Maritime Security in the Red Sea, Gulf of Aden, Indian Ocean, and Arabian Sea. BIMCO, ICS, INTERCARGO, INTERTANKO, OCIMF. Found at: <https://www.ics-shipping.org/wp-content/uploads/2020/08/bmp5-hi-res-min.pdf>

¹¹ ITF Warlike and High Risk areas, ITF Website. Found at: <https://www.itfseafarers.org/en/your-rights/itf-warlike-and-high-risk-areas>

¹² Lloyd's Market Association, Joint War Committee, found at: <https://www.lmalloyds.com/lma/jointwar>



Example: Overlapping Risk Areas in the Indian Ocean. Picture Credit: Asket LLC

1.2 The Proliferation of Contracted Maritime Security and Quality Concerns

Encouragement of Contracted Security by the Shipping Sector

At the height of the crisis off the coast of Somalia, shipowners were encouraged to engage armed teams as a way of providing protection that neither the Flag State nor international navies could provide. According to Assistant Secretary Andrew J. Shapiro of the US State Department:

... we must also recognize that best management practices do not guarantee security from pirates. Pirates operate in too large of an area for naval forces to respond quickly. The reality is that international naval forces simply might not be there to respond. The problem of piracy is one that can't simply be solved by national governments. Therefore, we have also supported industry's use of additional measures to ensure their security – such as the employment of armed security teams. To date, not a single ship with Privately Contracted Armed Security Personnel aboard has been pirated. Not a single one.¹³

Secretary Shapiro later commented:

But perhaps the ultimate security measure a commercial ship can adopt is the use of privately contracted armed security teams. These teams are often made up of former members of various armed forces, who embark on merchant ships and guard them during transits through high-risk waters. The use of armed security teams has been a potential game changer in the effort to combat piracy. To date, not a single ship with armed security personnel aboard has been successfully pirated.¹⁴

Shipowner Reaction

¹³ Remarks, Andrew J. Shapiro, Assistant Secretary, Bureau of Political-Military Affairs, Remarks to the U.S. Chamber of Commerce, Washington, DC, March 13, 2012. Available at <https://2009-2017.state.gov/t/pm/rls/rm/185697.htm>

¹⁴ Andrew J. Shapiro, Assistant Secretary, Bureau of Political-Military Affairs, Remarks to the Atlantic Council, Washington, DC, October 26, 2012. Available at: <https://2009-2017.state.gov/t/pm/rls/rm/199927.htm>

In spite of the increased threat from piracy and other violent acts over the last 15 years, shipowners are generally not in favour of hiring armed guards on board their vessels. They strongly feel that national and international navies are responsible to provide protection for international trade as a core mission. Therefore, when guards became more prevalent, shipowners initially did not want to accept the responsibility of hiring armed guards as a normal practice in dangerous areas. They felt that the presence of the armed guards would cause issues related to increased costs and liability for shipowners and potentially increase the violence involved in attacks. Their reluctance to accept armed guards as the “new normal” reality is reflected in the statement by the Chairman of the International Chamber of Shipping, Mr. Spyros M Polemis:

“The eradication of piracy is the responsibility of governments. Frustratingly, politicians in those nations with the largest military navies in the region show little willingness to increase resources to the extent that would be necessary to have a decisive impact on the problem of piracy. Western governments, at least, appear to give the impression that this otherwise unacceptable situation can somehow be tolerated. Sadly, until we can persuade governments otherwise, the use of armed guards by ships is very likely to continue increasing.”¹⁵

The Fear of Institutionalizing the Presence of Armed Guards

As the number of armed guards involved in the Indian Ocean and Gulf of Aden increased, there was a noticeable gap in oversight and standardization. The IMO, which can only act at the behest of its members, was reluctant to get involved in creating standards unless there was consensus for action from Flag States (and the industry). The primary concern was that by creating a framework for oversight, the IMO would, in a sense, be accepting and “institutionalizing” the use of armed guards on vessels as the new normal for shipping. In other words, industry would be held responsible for protecting their own vessels instead of looking to international navies as their protectors.

However, by 2012, a large percentage of vessels were carrying armed guards and stories began to spread about abuses by some of these armed teams. In response, the IMO published “Interim Guidance on the Use of Armed Guards” but insisted that the interim guidelines were not intended to institutionalise the use of armed, privately contracted security staff on ships and that they did not address all the legal issues that could be linked to their use.¹⁶

Illustration: Evolving Stance of the IMO on the use of Armed Guards

Based on the danger of prompting an escalation of violence and reprisals, the possible capture of weapons carried on board by pirates, and liability concerns related to injuring or killing local nationals made the risks outweigh the possible benefits. However, over time, the IMO stance on weapons and armed guards began to change as the situation in the Indian Ocean became more dire.

- “the carrying and use of firearms for personal protection or protection of a ship is strongly discouraged” (MSC/Circ.623, annex paragraph 40 (June 18, 1993)); to
- “flag States should strongly discourage the carrying and use of firearms by seafarers for personal protection or for the protection of a ship” (MSC.1/Circ.1333, annex, paragraph 5 (June 26, 2009) – Updated and revoked by MSC.1-Circ.1333-Rev.1 in June 2015), to
- the current position of tacitly acknowledging that the deployment of armed security personnel on board ships has become an accepted industry and flag state practice in certain circumstances

¹⁵ Shipping Industry Changes Stance on Armed Guards, PUBLISHED MAR 11, 2011, 11:04 AM BY THE MARITIME EXECUTIVE. Available at: <https://www.maritime-executive.com/article/shipping-industry-changes-stance-armed-guards>

¹⁶ BBC News. Piracy: IMO guidelines on armed guards on ships, Published 21 May 2011. Available at: <https://www.bbc.com/news/world-africa-13486015>

Price Competition and Compromised Quality of Teams

A recent Oceans Beyond Piracy Report¹⁷, showed that increasing competition amongst contracted security firms has resulted in the provision of teams that are often smaller than minimum recommendations¹⁸ from industry and Flag States and the quality of training has also been affected. As a result, there are a growing number of incidents that can be attributed to these mounting pressures. According to Emma Mitchell of ASKET, “Some security companies are employing sub-standard contractors or illegally sharing weapons to allow them to maintain margin,” noting how her company has rejected three security companies via its vetting process, despite their attainment of ISO 28007¹⁹, which specifies industry standards and guidelines for PMSCs²⁰.

Price competition has clearly affected the quality of personnel on the teams, as well as the viability of the company that is employing them. Both of these seem to be at fault in the incident described in the introduction to this report. (The MV JAEGER incident of 2020). According to James Wilkes from Gray Page: “At the macro-level, armed guarding is too cheap. To get the price to the level where it’s at now, compromises have been made, short-cuts taken, standards lowered, blind-eyes turned, ignorance and indifference ingrained on both sides of the supply and demand equation.”²¹

According to some industry experts, the price for armed guards has now dipped below where it is profitable for firms to employ quality teams. Some of these teams (which often include only two members) are not even associated with licensed PMSCs, but jump from boat to boat to stay employed. This has been particularly prevalent in the fishing industry in the Indian Ocean.

For these reasons, security professionals agree that proper oversight and transparency are critical to ensuring that contracted security is a safe and effective tool to supplement national capabilities in the maritime domain.

¹⁷ Pigeon, Maisie et al, State of Maritime Piracy Report 2016, ppg 19. Published by One Earth Future

¹⁸ Taken from GUARDCON Contract Guidance for Employment of Security Services. Available at: <https://www.ics-shipping.org/wp-content/uploads/2020/08/bmp5-hi-res-min.pdf>

¹⁹ Splash247.com, ASKET: As rates for PMSCs hit rock bottom, quality concerns reemerge, July 2, 2015. Available at: <https://splash247.com/asket-as-rates-for-pmscs-hit-rock-bottom-quality-concerns-reemerge/>

²⁰ The full title of the ISO standard is: 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). For brevity, it will be referred to as ISO 28007.

²¹ Armed guarding shouldn’t be cheap. It should be expensive. Splash247.com, 6 August 2020. Accessible at: <https://splash247.com/armed-guarding-shouldnt-be-cheap-it-should-be-expensive/>

2. Regulatory Framework Across Stakeholders

Introduction

Because of the many jurisdictions and interests at sea, development of effective oversight mechanisms for Contracted Maritime Security has been extremely difficult to harmonize across stakeholders. As an example, the IMO has produced separate guidance for: 1) Ship Owners, Operators and Masters, 2) Flag States, 3) Private Maritime Security Companies (PMSCs) and 4) Port and Coastal States. While some of these entities have developed effective guidance for a specific sector, there has been little effort to align these policies across sectors. This paper argues that a multi-stakeholder approach would harmonize efforts, increase transparency and improve oversight for the myriad forms of Contracted Maritime Security.

2.1 Regulatory Framework and Flow Chart

Because of the complexities associated with governance at sea, the oversight of contracted security has been challenging. What has emerged is a system of international guidance and policies, Flag and Coastal State laws and policies, industry best practices, and business practices that that guide, rather than govern the use of contracted maritime security.

Difference Between Land-Based PMSC models and Contracted Maritime Security

On land, the Montreux Document advocates for the “three state model” that delineates the due diligence and oversight responsibilities for (1) the Home State of the PMSC, (2) the Contracting State that has contracted the security team and (3) the Territorial State where the PMSC is operating. This system benefits from the fact that all three states have clearly defined roles that include obligations to *“investigate and, as required by international law, or otherwise as appropriate, prosecute, extradite or surrender persons suspected of having committed other crimes under international law”*.

As described in this paper, the three-state model needs further clarification when applied to operations at sea. This includes the expansion of the model from multilateral to multi-stakeholder representation. While the Home State plays a similar function as on land, the Contracting State is normally a shipowner or operator. There is also ambiguity in determining the Territorial State, which can change from the Flag State or a Coastal State depending on the location of the vessel. The other main difference lies in the fact that few Flag or Coastal States are in a position to prosecute, extradite or compel states to surrender contracted security personnel suspected of committing crimes.

Additionally, the lack of potential witnesses and possible intimidation of seafarers at sea often discouraged “whistle blowers” and other by-standers that play a critical role on land to ensure that contracted security abuses are reported.

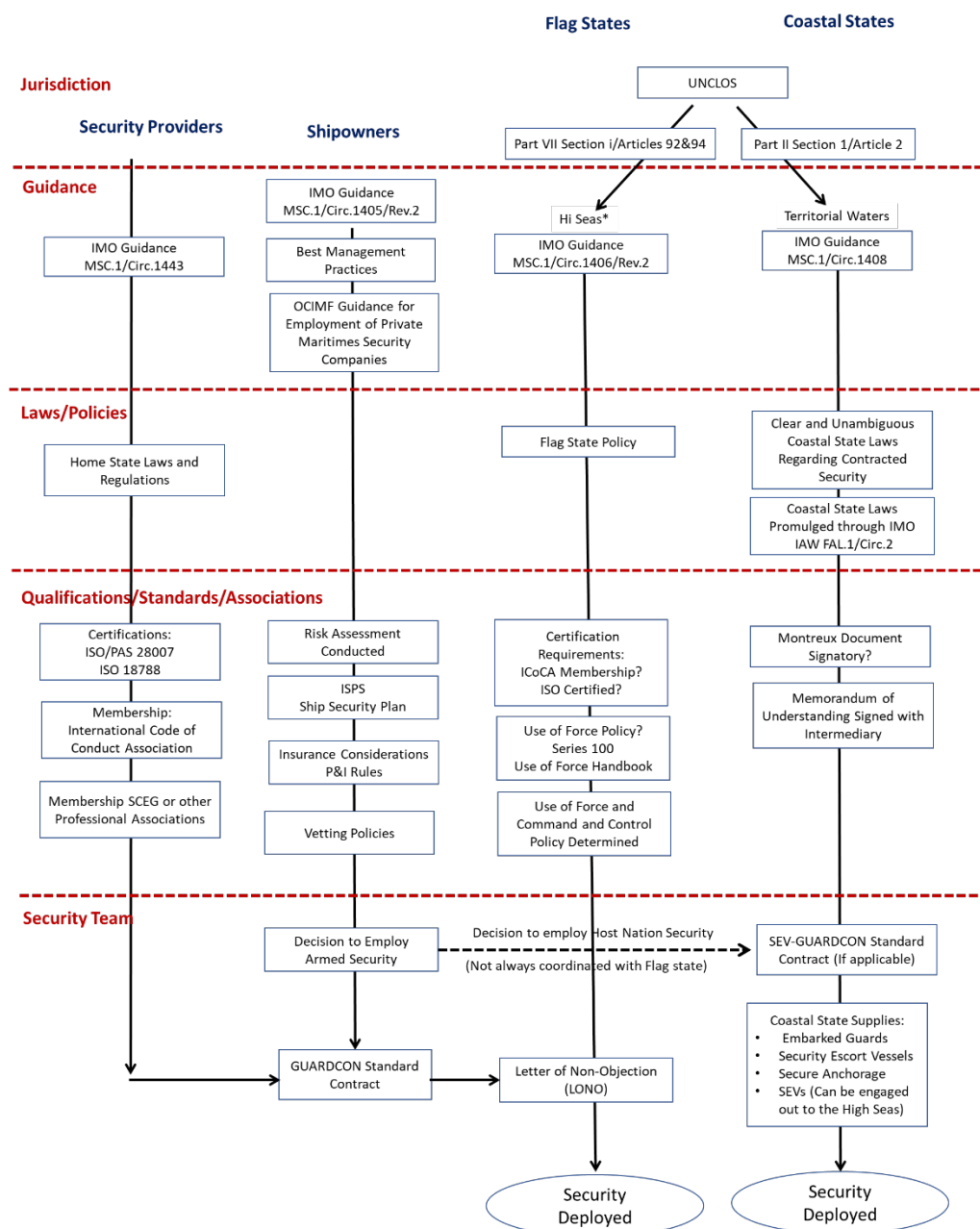
This has essentially created a climate where ship owners/operators sometimes avoid notifying regulatory authorities of the presence of contracted security or look to avoid enforcement by migrating to those structures that do not adopt or enforce standards. In the first case, they may hire security services without informing the Flag State. In the second case, they may search for Flag States with weak policies, weak oversight and lack of enforcement capabilities. This is compounded by a lack of communication and trust between Coastal and Flag States where many of these teams operate.

The following section details some of the oversight mechanisms and frameworks that are in place to regulate contracted security. However, the reader should be aware that the existence of regulatory documents and policies does not mean that these practices are actually followed or enforced. Instead, as with other industries, there are responsible companies and Flag States that have enacted effective oversight regimes, while irresponsible actors have managed to hide in the lack of scrutiny at sea to avoid proper oversight.

How Does this Guidance Fit Together?

The following flow chart gives an example of the complex regulatory and legal framework associated with contracted security. Further information on the considerations represented here is described below and in the Glossary section.

Figure: Flow Chart for Jurisdiction, Guidance, Laws, and Qualifications for Contracted Security



2.2 Guidance/Laws/Qualifications

Guidance

International Maritime (IMO) Guidance. The IMO is a specialized agency of the UN that is tasked with creating a regulatory framework for the safety, security, and environmental protection of the maritime domain. However, the IMO acknowledges that while it can create policy recommendations, it does not have the power to enforce them²². Instead, the IMO states that the recommendations agreed at the IMO should be “universally adopted and universally implemented” by Member States. While the IMO has positioned itself as the preeminent organization for maritime oversight, recent criticism points out that the culture within the IMO can sometimes prevent the formulation of effective and proactive policies.²³

Best Management Practices (BMP) Guidance. The series of geographic BMPs, which are published by the shipping industry to enhance maritime security, do not recommend or endorse the use of contracted security. Rather, they are clear that this is a decision taken by individual ship operators after carrying out a thorough risk assessment and in conjunction with permissions from the ship’s Flag State, the hull and cargo insurance, P&I club and any littoral states. Other advice, such as the Oil Companies International Marine Forum’s OCIMF’s Guidance for Employment of Private Maritimes Security Companies, as well as contracted advisory services from numerous private companies are also available to provide guidance on the use of contracted security.

Laws/Policies

Coastal State Laws and Policies for Contracted Security. Most Coastal States in high risk areas have not clarified their policies regarding contracted security and embarkation and debarkation policies for weapons through ports, anchorages or offshore terminals. This is in spite of numerous requests by the IMO for Coastal States to “disseminate information on the relevant national legislation, policies and procedures.”²⁴

Without a clear understanding of Coastal State policies on the use of armed security, Flag States cannot enforce policies for their vessels, and in most cases are not able to issue a Letter of Non-Objection or other authorization to officially acknowledge the use of contracted security.

Benin’s Guidance

As an example of a clear Coastal state policy regarding the use of contracted security, the country of Benin published an Interministerial Decree Concerning Means of Protection of Ships in the Territorial Waters of Benin in 2020.

Notably, this document:

- Requires the use of an “Armed Protection Team” on all vessels entering Benin Territorial Waters.
- Contains authorization procedures for security teams.
- Describes procedures for weapon storage.

²² IMO’s website states: “IMO was established to adopt legislation. Governments are responsible for implementing it. When a government accepts an IMO Convention it agrees to make it part of its own national law and to enforce it just like any other law.” Available at: <https://www.imo.org/en/About/Pages/FAQs.aspx>

²³ Apuzzo, Matt and Hurtes, Sarah, Tasked to Fight Climate Change, a Secretive UN Agency Does the Opposite. New York Times, 3 June 2021. Available at: <https://www.nytimes.com/2021/06/03/world/europe/climate-change-un-international-maritime-organization.html>

²⁴ IMO Circular MSC-FAL.1/Circ.2, Questionnaire on Information on Port and Coastal State Requirements Related to Privately Contracted Armed Security Personnel on Board Ships.

Flag State Policies. Flag States are encouraged to adopt IMO policies and implement them for vessels flying their flag ²⁵. As stated in the Marshall Islands policy for PCASP employment, “the guidelines provided in IMO Circular MSC.1/Circ.1443, IMO Circular MSC.1/Circ.1405, Rev.2, and all other guidance developed by the IMO relating to the prevention and suppression of piracy and armed robbery against commercial vessels, shall be closely followed.”²⁶

The Marshall Islands provides policy on:

- High Risk Areas and threats to shipping
- Use of the Ship Security Plan (SSP) and BMP Guidelines
- Rules for the Use of Force (RUF)
- Issuance of Letters of Non-Objection (LONO)
- Accreditation requirements (ISO 28007:2015) Minimum PCASP Team Size
- Firearm and Ammunition limits
- Reporting and Notification Requirements

Qualifications/Standards/Associations

Over time, several administrative standards, guidance documents and associations have been developed to guide PMSCs and other maritime security actors. These policies are voluntary, but in some cases they are required by insurers, the ISPS Code and Flag State policies.

Some of these requirements and recommendations include certification to the ISO 28007:2015 standard, adherence to Best Management Practices, adoption of standardized RUF policies, and use of BIMCO’s standard GUARDCON contract when hiring security teams. Voluntary stakeholder collaboration initiatives include the Montreux Document Forum and its associated Maritime Working Group, which is a multilateral group focusing on government participation. On the other hand, industry groups such as the Security in Complex Environments Group (SCEG) also attempt to raise global standards.

Membership in certain organizations can also provide documentation of standards. For example, the SCEG invites membership only from companies that are well regulated and compliant, embracing international security standards and protecting human rights is at the core of their business.

²⁵ According to IMO Circular MSC.1/Circ.1405, Rev.2, Revised Interim Recommendations for Flag States Regarding the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area, “Member Governments are also urged to take any necessary action to implement, as appropriate, the revised interim recommendations given in the annex”

²⁶ Republic of the Marshall Islands, Piracy, Armed Robbery, and the Use of Armed Security MN-2-011-39, April 2019

3. Jurisdictional Challenges

Introduction

Contracted Maritime Security is actively employed in inland waters, territorial waters and on the high seas. As a vessel employing this service moves between these maritime zones, there are profound jurisdictional impacts for the oversight of these services. Some of these zones fall under the primary jurisdiction of Coastal States, while other areas are under the primary jurisdiction of Flag States. In between there are contested zones, where further legal clarification is required in order to ensure effective oversight.

Freedom of the Seas

The world's oceans are often considered part of the global commons where vessels are free from most types of government scrutiny that is common on land. According to many observers in the shipping industry, this freedom from bureaucratic control and regulation has played an important part in driving the world's expanding economy – where up to 90% of the world's goods are moved on board ships. In fact, freedom of the seas and freedom of navigation have been themes championed by the world's largest economies – especially the United States and its allies.

However, this freedom from regulation and oversight has created challenges for ensuring the protection of maritime transportation. Since there is no longer a direct link between the largest navies and the largest Flag States, the merchant fleets of the largest Flag States, which do not have corresponding large navies, must look to international navies to provide protection.

To compound the situation, new threats to international shipping have emerged that may require nations to reconsider whether the current system of oversight and governance offers adequate tools to protect shipping and seafarers from violence, and to ensure that vessel protection measures, including armed guards, comply with human rights obligations.

Advent of Open Registries

While some nations only register vessels with ties to the country through ownership or crewing, open registries allow foreign-owned or controlled vessels to use their flag. The concept of open registries has been around since the beginning of the 20th century. There are several reasons why owners may wish to flag their vessels with open registries, including the protection offered by geopolitical neutrality, reduced bureaucratic red tape, favourable taxation rates, avoidance of certain laws and restrictions, and in some cases, there may be benefits of less stringent regulatory scrutiny.

Currently, the three largest Flag States in the world are Panama, the Marshall Islands and Liberia – all of them open registries. As of 2021^{??}, open registries represent approximately 73% of the global merchant vessel tonnage (cite?). As discussed above, none of these nations have international navies that can protect vessels. This means that other means of protection, including contracting public or private security services may be necessary.

3.1 Maritime Zones and Innocent Passage

UN Convention on the Law of the Sea (UNCLOS) Maritime Zone Definitions.

The agreed framework to determine jurisdiction at sea is found within UNCLOS. Unfortunately, however, the definitions of the different maritime zones given in the text are not adequate to answer questions of oversight and jurisdiction in the case of contracted security arrangements overall and for embarked teams in particular. The table below shows the relevant UNCLOS definitions of Territorial Seas, the Exclusive Economic Zone (EEZ) and the High Seas. Also included is relevant language

associated with the concept of Innocent Passage, which has been used to argue against Coastal State oversight

Part II, Section 1, Article 2 Legal status of the territorial sea of the air space over the territorial sea and of its bed and subsoil

1. The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.
2. This sovereignty extends to the air space over the territorial sea as well as to its bed and subsoil.
3. The sovereignty over the territorial sea is exercised subject to this Convention and to other rules of international law.

***Territorial
Waters***

Section 2. LIMITS OF THE TERRITORIAL SEA

Article 3 Breadth of the territorial sea. Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.

Article 56 Rights, jurisdiction and duties of the coastal State in the exclusive economic zone

1. In the exclusive economic zone, the coastal State has:
 - (a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil, and with regard to other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds;
 - (b) jurisdiction as provided for in the relevant provisions of this Convention with regard to: (i) the establishment and use of artificial islands, installations and structures; (ii) marine scientific research; (iii) the protection and preservation of the marine environment;
 - (c) other rights and duties provided for in this Convention.
2. In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal State shall have due regard to the rights and duties of other States and shall act in a manner compatible with the provisions of this Convention.
3. The rights set out in this article with respect to the seabed and subsoil shall be exercised in accordance with Part VI.

***Exclusive
Economic
Zone (EEZ)***

Article 57 Breadth of the exclusive economic zone. The exclusive economic zone shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured.

Article 58 Rights and duties of other States in the exclusive economic zone

1. In the exclusive economic zone, all States, whether coastal or land-locked, enjoy, subject to the relevant provisions of this Convention, the freedoms referred to in article 87 of navigation and overflight and of the laying of submarine cables and pipelines, and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines, and compatible with the other provisions of this Convention.
2. Articles 88 to 115 and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with this Part.
3. In exercising their rights and performing their duties under this Convention in the exclusive economic zone, States shall have due regard to the rights and duties of the coastal State and shall comply with the laws and regulations adopted by the coastal State in accordance with the provisions of this Convention and other rules of international law in so far as they are not incompatible with this Part.

HIGH SEAS SECTION 1. GENERAL PROVISIONS

Article 86 Application of the provisions of this Part

The provisions of this Part apply to all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State. This article does not entail any abridgement of the freedoms enjoyed.

High seas

Article 19. Meaning of innocent passage.

1. Passage is innocent so long as it is not prejudicial to the peace, good order or security of the coastal State. Such passage shall take place in conformity with this Convention and with other rules of international law.
2. Passage of a foreign ship shall be considered to be prejudicial to the peace, good order or security of the coastal State if in the territorial sea it engages in any of the following activities:
 - (a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
 - (b) any exercise or practice with weapons of any kind;
 - (c) any act aimed at collecting information to the prejudice of the defence or security of the coastal State;
 - (d) any act of propaganda aimed at affecting the defence or security of the coastal State;
 - (e) the launching, landing or taking on board of any aircraft;
 - (f) the launching, landing or taking on board of any military device;
 - (g) the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State;
 - (h) any act of willful and serious pollution contrary to this Convention;
 - (i) any fishing activities;
 - (j) the carrying out of research or survey activities;
 - (k) any act aimed at interfering with any systems of communication or any other facilities or installations of the coastal State;
 - (l) any other activity not having a direct bearing on passage.

*Innocent
Passage*

3.2 Contested Areas of Jurisdiction

In addition to the definitions of the maritime zones for jurisdictional purposes, the limits of Territorial Waters and the High Seas are also very important for addressing Piracy and Armed Robbery Against Ships. This is important for our discussion in that it sets boundaries for actions that can be taken against perpetrators. In short, piracy is a crime of Universal Jurisdiction, where all states are obligated to repress piracy while Armed Robbery Against Ships is normally the responsibility of the Coastal state. As we can see, there is another jurisdictional gap that exists in the waterspace between 12 and 200 nm.

Piracy vs Armed Robbery Against Ships

Territorial Limits of Piracy as defined in UNCLOS Article 101:

- (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;*
- (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State; High Seas,*

Territorial Limits of Armed Robbery Against Ships, as defined by Resolution A.1025(26) (Annex, paragraph 2.2)6 of the 'Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships' of the International Maritime Organization (IMO),

within a State's internal waters, archipelagic waters and territorial sea;

These definitions have left a legal gap between 12nm (where Territorial Waters end) and 200nm (where the High Seas begin).

According to the Legal Framework for the Repression of Piracy Under UNCLOS (Updated 09 September 2010), the Division of Ocean Affairs and the Law of the Sea stated:

UNCLOS provides that all States have an obligation to cooperate to the fullest possible extent in the repression of piracy (art. 100) and have universal jurisdiction on the high seas to seize pirate ships and aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board (art. 105). Article 110, inter alia, also allows States to exercise a right of visit vis-à-vis ships suspected of being engaged in piracy.

These provisions should be read together with article 58(2) of UNCLOS, which makes it clear that the above-mentioned articles and other pertinent rules of international law apply to the exclusive economic zone in so far as they are not incompatible with the provision of UNCLOS relating to the exclusive economic zone.

Reading these definitions together, it is clear that crimes of Piracy can be addressed by all states outside the 12nm Territorial Sea of a Coastal State. However, this determination has not been specifically addressed regarding the oversight of armed teams within the 12-200nm "Contested Zone" - within the EEZ but outside Territorial Waters (TTW).

In the case of the waters off Somalia, most embarked teams stayed exclusively in the area defined as the High Seas. Therefore, the Flag State had sole jurisdiction of the vessel and Flag State policies were in effect. However, in the Gulf of Guinea, contracted security is actively used in the EEZs and TTWs of Coastal States. As will be described later, the use of contracted government services or hybridized models of contracted security brings up questions of whether these government contractors are subject to Flag State policies if embarked or engaged outside of TTWs or within the EEZ.

Definitions of Maritime Zones as described within UNCLOS.

The Second part of determining jurisdiction lies in the duties and responsibilities of Flag and Coastal states, which are defined as (UNCLOS):

Article 92:

Ships shall sail under the flag of one State only and, save in exceptional cases expressly provided for in international treaties or in this Convention, shall be subject to its exclusive jurisdiction on the high seas. A ship may not change its flag during a voyage or while in a port of call, save in the case of a real transfer of ownership or change of registry.

Article 94:

1. Every State shall effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag.
2. In particular every State shall: (a) maintain a register of ships containing the names and particulars of ships flying its flag, except those which are excluded from generally accepted international regulations on account of their small size; and (b) assume jurisdiction under its internal law over each ship flying its flag and its master, officers and crew in respect of administrative, technical and social matters concerning the ship.
3. Every State shall take such measures for ships flying its flag as are necessary to ensure safety at sea with regard, inter alia, to: (a) the construction, equipment and seaworthiness of ships; (b) the manning of ships, labour conditions and the training of crews, taking into account the applicable international instruments

***Jurisdiction of
Flag States***

Part II, Section 1.

The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea.

***Jurisdiction of
Coastal States***

Section 2. LIMITS OF THE TERRITORIAL SEA

Article 3 Breadth of the territorial sea. Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.

Contested Areas for PMSC Contracted Maritime Security Oversight

Clearly, the language within UNCLOS was not developed with the thought of contracted security oversight in mind. This leaves several contested areas for oversight of armed security. The areas are described below to illustrate the challenge of determining primary jurisdiction in these areas.

Water Area	Primary Jurisdiction	Ambiguities Regarding Contracted Security Regulation and Oversight
Ports and Internal Waters	Coastal State	<ul style="list-style-type: none">• Coastal State laws and policies apply.• In accordance with IMO guidance, Coastal State laws should be transparently published. (Most are not)
Territorial Waters (12nm)	Coastal State	<ul style="list-style-type: none">• Many Coastal States have claimed jurisdiction over contracted security transiting through Territorial Waters.• Ship Owners have claimed that the right of Innocent Passage should apply to vessels with armed teams as long as it is not “prejudicial to the peace, good order or security of the coastal State.”
EEZ (Outside 12nm) (Includes the “Contested Zone”)	Flag State	<ul style="list-style-type: none">• Some Coastal States have unpublished policies forbidding privately contracted armed security from operating within the EEZ.• Flag States have argued that they should be able to employ security teams of their choice and have oversight responsibility for contracted security in the EEZ outside TTW.
High Seas	Flag States	<ul style="list-style-type: none">• Flag State policies have primacy.• In some cases, Host Nation contracted security (SEVs or Teams) have operated on the High Seas without regard to Flag State policies.

4. Hybridization of Contracted Maritime Security

Introduction

In order to bring more transparency to the types of maritime security being offered to merchant vessels by private and public actors, the following chart is included to show some of the concepts and limitations of the types of contracted services that can be found at sea. This paper will build on the work begun at Oceans Beyond Piracy to define new models of contracted security that were described in a series of information papers which were issued in 2016 – 2017.²⁷ In the years since the publication of these documents, several new types of contracted maritime security are being offered, and others have been modified to better fit with current models.

The table below attempts to identify some of the more common types of Contracted Maritime Security, but new business models have continued to be created. The lack of transparency and documentation of these hybridized forms of security continues to stay ahead of the oversight and regulation. As new forms of Contracted Maritime Security are offered by private and/or government sources, Flag and Coastal State regulations should be continually updated to provide guidance on oversight responsibilities.

Contracted Maritime Security (CMS)

As described in the Introduction to this paper, there is no universally held definition of the term Contracted Maritime Security (CMS) and the term may have different implied meanings for the variety of stakeholders active in the area of maritime security. Therefore, the following definition is suggested:

Contracted maritime security services include all instances where the ship owner, Flag State or other party enlists personnel or services to protect a ship, crew and cargo. This could include either privately contracted personnel or the use of uniformed armed personnel from Coastal States (either embarked or in accompanying vessels) to protect vessels or accomplish other specific tasks for a fee.

Within this intentionally broad term are two general categories of providers: Contracted Private Services and Contracted Governmental Services. Within these two categories, we identify five basic models of contracted maritime security service provision in the definitions below. (However, these hybrid forms are ever-expanding and this list may not incorporate the most recent variations.)

The Importance of Defining Contracted Maritime Security Models

In building the initiative to better regulate armed security solutions at sea, Oceans Beyond Piracy (OBP) and other organizations within the maritime community desired to increase transparency and oversight of maritime security operations. However, differences in function, applicable national jurisdiction, and types of services offered by maritime security providers makes assessing operational scope and designing uniform global policy for this sector a challenging endeavor.

Until the activities of these armed maritime security teams can be fully transparent and understood, they will remain largely ungoverned. Additionally, the actions of some of these unaccountable actors could increase incidents of violence at sea and possibly hinder efforts to pursue sustainable rule of law solutions to maritime criminality. Importantly, most of the contracted teams listed here do not have the authority, capability or mandate to arrest and detain suspected criminals making a legal finish unlikely.

²⁷ The Five Issue Papers were Titled: Defining Contracted Maritime Security, Vessel Protection Detachments, Coastal State Embarked Guards, State Affiliated Escorts, and Privately Contracted Armed Maritime Security. While these papers are no longer accessible, the author would like to recognize the contributions of Sean Duncan, Simon Williams and Jerome Michelet in developing these concepts.

Categories of the Table Explained

- Type of Contracted Maritime Security

This is the general descriptor for the type of service offered. As stated above, there are two general categories for publicly and privately provided services. The names for Vessel Protection Detachment (VPD), Privately Contracted Armed Security Personnel (PCASP) and Security Escort Vessel (SEV) are generally accepted and published terms. The term “Local Embarked Security Guards” has been suggested by the author. (other terms have been Host Nation Embarked Guards)

- Team Composition

This describes where the team was sourced (e.g. uniformed guards from the Coastal State, or internationally recruited guards) as well as the average size of team. There are some minimum standards that are suggested here from Flag States and others requiring that embarked teams should have a minimum of three members²⁸. However, it should be noted that Host Nation Embarked Guard Teams generally have more personnel.

- Authority

This generally applies to the command authority during security situations. For example, on most merchant vessels the vessel master has ultimate authority for the safety of the vessel. However, there may be times during security incidents where the team has freedom of action to respond using the concept of self-defense.

The issue of authorities for embarked teams from Coastal States is a bit more complex. Often this is undefined because there are no formal policies or Coastal State regulations. Therefore, the merchant vessel can find itself in an ambiguous situation where the locally contracted team follows the local commander’s policies regarding rules of engagement.

In the Nigerian MOU signed for the contracting of Security Escort Vessels. The Command and Control section states that *“The Navy shall be in charge of the Operational Command and Control of the Company’s vessels and the deployment of naval personnel, equipment, arms and ammunition.”*²⁹

- Geographic Areas

Listed are the geographic areas where these types of contracted security are known to be operating. This frequently changes along with changes in national policies, degrees of threat, and established High Risk Areas.

- Use of Force/Law Enforcement

While it is clear that private teams do not have the authority to arrest, they are generally understood to have the authority to detain persons who may represent a threat to the crew or to render medical assistance. Contracted uniformed personnel, on the other hand, normally would have the authority to detain and arrest suspected pirates. However, those forces acting under contract to private shipowners normally do not have the mandate or motivation to arrest offenders.

²⁸ According to the Marshall Islands, the size of a PCASP team utilized for protection on an RMI-registered vessel transiting an HRA shall not fall below three (3) team members. Republic of the Marshall Islands Maritime Administrator, Piracy, Armed Robbery, and the Use of Armed Security, MN-2-011-39, April 2019.

²⁹ Memorandum of Understanding Between Nigerian Navy and (Company Name Withheld) for the Provision of Maritime Security in Nigeria’s Maritime Environment

Type of Contracted Maritime Security	Team Composition	Authority	Geographic Areas	Use of Force/Law Enforcement
Privately Contracted Armed Security Personnel (PCASP). Embarked private security force personnel hired by the shipping industry. This model is most prevalent in the Indian Ocean High Risk Area. This model uses Private Maritime Security Companies (PMSC) who employ PCASP.	Civilians (staff) hired by the Private Maritime Security Company (PMSC) and assigned to the PCASP.	The Vessel Master retains ultimate authority over the use of force. However, the PCASP can exercise authority for situations related to self-defence.	Gulf of Aden/Indian Ocean/ South East Asia.	Private security providers may use force in self-defence or defence of others where it is necessary against the imminent threat of death or serious injury. (Series 100 Rules) PMSCs have very limited authority to detain and no authority to arrest.
Vessel Protection Detachments (VPDs). VPDs are uniformed military personnel embarked on a vessel with explicit approval of the Flag State. VPDs most commonly match the nationality of the Flag or are procured and regulated through a Memorandum of Understanding (e.g World Food Program Vessels).	Uniformed personnel authorized by Flag State.	Team Leader exercises military authority for security situations. Example: (Italian authorities claimed, during Enrica Lexie proceedings, that VPDs are State Officials exercising official functions. ³⁰)	Gulf of Aden/Indian Ocean Persian Gulf Autonomous VPDs have operated under EUNAVFOR through MoUs with Flag States to protect World Food Programme shipments into Somalia.	VPDs have ultimate decision- making authority for the use of force. Normally, VPD's legal basis for use of force is self-defense and cannot be used for detention. However, arrest authority lies with State policies related to the use of VPDs.
Security Escort Vessels (SEVs). Escort by a State military asset or asset operated as part of a Public-Private Partnership (PPP) under contract from the shipping industry. Examples include escort vessels, or contracted protection in Secure Anchorages and other designated Safe Areas. ³¹	Vessel crew is comprised of uniformed personnel from the Coastal State. However, specialists from the PMSC may also be embarked.	The corresponding Navy exercises Operational Command and Control of the Company's vessels and the deployment of naval personnel, equipment, arms and ammunition. ³²	Various countries within the Gulf of Guinea. Operate within Territorial Waters and EEZs.	SEVs are considered to be under the operational control of Navy and follow the Rules of Engagement for the country While SEVs have not previously done so, they are considered to be in the Nigerian Navy chain of command and have the authority to arrest and detain suspects.

³⁰ ARBITRATION UNDER ANNEX VII OF THE UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, PCA Case No. 2015-28. Available at: <http://www.pcacases.com/pcadocs/Request/Italys%20Request%20for%20Provisional%20Measures.pdf>

³¹ BIMCO has recently published SEV-GUARDCON a standard contract for Security Escort Vessel employment in harmonizing terms and conditions for the use of SEVs.

³² Derived from Memorandum of Understanding Between Nigerian Navy and (Company Name Withheld) for the Provision of Maritime Security in Nigeria's Maritime Environment

<p>Host Nation Armed Security Guards.</p> <p>Embarked armed personnel originating from the Coastal State, based on arrangements between industry and the providing national authorities – not specifically endorsed by the Flag State.</p>	<p>Team composed of a team leader and uniformed military personnel of the coastal state.</p>	<p>The Senior Member of the embarked team exercises authority over the team, and therefore the use of force.</p>	<p>Gulf of Guinea (e.g. Togo, Benin, Nigeria) Somalia SE Asia (Malaysia, Indonesia, Philippines)</p> <p>Possibly Caribbean and South America (Venezuela, Peru)</p>	<p>Governed by Rules of Engagement (ROE) from the Coastal State (Host Nation) providing the team.</p> <p>Ability to arrest and detain has not been clarified in most cases. However, because the embarked teams normally are affiliated with law enforcement agencies, they should have the authority to detain and arrest.</p>
--	--	--	--	---

5. Practical Reporting and Enforcement Challenges

Introduction

In addition to the challenges of developing policies for the myriad forms of Contracted Maritime Security, there are larger challenges to actually enforcing oversight at sea. For example, most ships do not have detention facilities, law enforcement personnel are not normally found on the high seas and Flag and Coastal States are often not in a position to arrest and prosecute potential offenders. Therefore, a premium should be placed on oversight and vetting procedures that can be applied *before* the employment of security services, and oversight at sea should be supported by transparent reporting and documentation of contracted armed security and a consolidated reporting structure that could provide a comprehensive assessment of incidents involving contracted security.

Reporting Challenges

There are a variety of places where vessels can report violent encounters at sea. These include Coastal State Authorities at national Maritime Operational Centres and regional frameworks such as the Yaoundé Architecture for Maritime Security (YAMS) in the Gulf of Guinea. Incidents can also be reported to International Centres such as the United Kingdom Maritime Trade Operations (UKMTO) or the global reporting centre for the International Maritime Bureau (IMB). Additionally, all incidents are normally reported to the ship owner or operator. What is lacking is a consolidated reporting system to better track the impact and actions of contracted security which could, in turn, help inform policy and ensure that incidents can be investigated and recorded for statistical and risk assessment purposes.

As indicated below, there are several challenges and concerns that have prevented full reporting of the presence or employment of Contracted Maritime Security and incidents involving teams that have been employed.

Enforcement Challenges

As stated earlier, the largest Flag States are Open Registries that do not have sufficient naval or law enforcement capability to arrest and detain perpetrators at sea. Additionally, most Coastal States located in high risk areas are unable to react and investigate incidents involving Contracted Maritime Security (as noted in the case studies, India and Nigeria are exceptions). Building an effective incident reporting framework could enable and encourage more Coastal and Flag States to better meet these challenges.

Lack of Trust

As indicated in the table below and in the case studies included in this report, there is an overwhelming lack of trust that affects the relationship between the maritime industry and many Coastal State authorities. This must be solved through increased transparency, multistakeholder dialogue and the creation of trusted frameworks that protect stakeholder interests.

Table Showing Practical Challenges for Oversight of Contracted Maritime Security

Issue	Reason(s) that these are violated
Lack of Proper Vetting and Administration of Armed Teams	<ul style="list-style-type: none"> - Shipowners have not reviewed or imposed vetting procedures. - Expense of hiring qualified and vetted companies. - Lack of Flag State oversight has removed motivation to comply. - PMSC is not providing adequate administrative and/or financial support to employed guards. - Coastal States may not provide information
Failure to Report Presence of Security Personnel	<ul style="list-style-type: none"> - Team does not meet Flag State Requirements. - Ambiguous Coastal State laws discourage Flag State engagement. - Service does not meet insurance or P&I Club standards. - Vessel master has hired teams without proper notification to ship owners.
Lack of Clear Jurisdiction	<ul style="list-style-type: none"> - Unresolved jurisdictional issues related to Right of Innocent Passage. - Disputed location of incidents. - Unresolved territorial waters claims (e.g. excessive TTW claims or using disputed baselines to define). - Coastal State claims of jurisdiction in the EEZ (outside TTW).
Lack of Incident Reporting	<ul style="list-style-type: none"> - Team has used illegal or unreasonable force. - Vessel fears Coastal State detention and investigation that could severely delay ship movement. - Vessel/Shipowners have not properly notified insurance companies of the presence of teams. - Team or PMSC does not want to invite scrutiny of operating practices, administrative procedures or vetting policies. - Reputational concerns of shipping company or Flag State. - No legal requirement for Flag States to report incidents to international reporting centres or the IMO. - Crew intimidated by armed personnel.
Inappropriate Use of Force	<ul style="list-style-type: none"> - Untrained team. - Lack of oversight or clearly defined lines of authority for security incidents. - Use of Force Policy not clearly defined.
No Investigation of Serious Incidents	<ul style="list-style-type: none"> - Incident not reported to Flag State. - Incident not reported to Coastal State. - Flag State has no ability to investigate incident. - Coastal State does not have the ability to investigate incidents.
No Detention or Arrest of Suspected Perpetrators	<ul style="list-style-type: none"> - Most Coastal States have no capability to intercept and detain suspects. - Crew intimidated by armed personnel. - No detention facilities on vessel. - No law enforcement officials are available at sea.
No Prosecution of Perpetrators	<ul style="list-style-type: none"> - Most Flag States do not have the ability to prosecute violations. - Most Coastal States do not have the ability to detain and prosecute suspects. - Some vessels and/or Flag States do not want to cooperate with Coastal States due possible long-term repercussions.
Potential Conflict of Interest for Coastal State Navies	<p>Coastal State navies and law enforcement agencies can derive significant income from participating in contracted security operations. This could create a disincentive for Coastal States to provide adequate maritime security services for those vessels not employing contracted security.</p>

6. Conclusions and Recommendations

6.1 Conclusions

Based on the challenges documented in this report, there is a lack of oversight for the myriad types of Contracted Maritime Security. Many of these challenges are associated with the unique governance aspects of the maritime domain, but this has been compounded by certain Coastal States that have begun to offer the services of their maritime law enforcement branches and uniformed military personnel to private companies. The main impediments to developing effective oversight are listed here.

1. **Lack of a Proper Forum to Address Contracted Security Oversight.** The problem must be addressed by all the legitimate stakeholders that are involved in this process. Based on the recently published Reference Document from the MDF Maritime Working Group, these stakeholders must include public and private actors representing all three “States” that are involved: the Contracting State, the Territorial State and the Home State.
2. **Lack of Jurisdictional Clarification.** UNCLOS and other maritime legal frameworks do not adequately explain jurisdictional frameworks necessary to provide oversight. This weakness is mainly seen in determining Territorial State jurisdiction between Flag States and Coastal States.
3. **Lack of Transparency on Coastal State Policies.** Most Coastal States have neglected to define and publish laws related to contracting uniformed Coastal State assets or private teams. This lack of transparency prevents Flag States and shipowners from exercising due diligence in vetting and approving Contracted Maritime Security for their registered vessels. Accordingly, most Flag States have refused to issue Letters of Non-Objection and other screening methodologies because they do not understand the non-published laws and regulations for these services. To fill this gap, private companies have developed their own screening procedures and other security services have provided informal screening information to fill the void.
4. **Lack of Understanding of Contracted Security.** Because of the lack of transparency associated with the contracted security industry, regulatory bodies have been slow to recognize the new hybridized forms that are being offered. Accordingly, the oversight mechanisms have focused on regulating a “traditional” model of contracted security leaving other forms of Contracted Maritime Security largely unregulated.
5. **Practical Challenges to Effective Oversight and Enforcement.** Vessels operating at sea enjoy a great degree of freedom from regulation and oversight. This freedom can include a right to avoid reporting the presence of armed security and the right to determine what and how incidents are reported. Some of this is based on a lack of trust with Coastal State authorities, but there can also be reluctance to report based on financial or reputational damage that could occur with full transparency. The current reporting systems are also very inefficient and involve a significant amount of administrative burden for masters and Company Security Officers.

6.2. Recommendations

Based on the challenges raised within this paper, the following issue areas should be addressed in order to clarify the roles, responsibilities and obligations of various stakeholders in providing oversight for Contracted Maritime Security. As stated previously, this clarification will not solve all the practical problems related to lack of enforcement capability, however, it is a necessary first step to bring needed transparency and clarity to this issue.

Multi-Stakeholder Collaboration

- Based on the complexities of contracted maritime security, there is a need for cross-sector cooperation across all relevant stakeholders including Flag States, Coastal States, the shipping industry, contracted security companies, civil society and regional law enforcement agencies. Currently, most of these forums are divided into separate groups, which has prevented cooperation across sectors. The establishment of a multi-stakeholder working group(s) could assist in building trust between maritime stakeholders, and to develop proposals for IMO consideration.
- While a new structure could be purpose-built to address this need, there are existing, single stakeholder structures that could be brought together to provide cross sector discussions. These could include:
 - The Maritime Working Group of the Montreux Document (Multilateral). Flag States, Coastal States and Port States have the opportunity to exchange in the Maritime Working Group of the Montreux Document Forum. This inter-governmental Working Group is open to all participants to the Montreux Document Forum and meets multiple times a year to discuss current challenges in the regulation of private maritime security.
 - The Maritime Safety Committee (MSC) of the IMO. (Multilateral with Observers). The MSC deals with all matters related to maritime safety and maritime security which fall within the scope of IMO, covering both passenger ships and all kinds of cargo ships.³³ In addition to the MSC, specialized Correspondence Groups or Experts Groups can be formed to meet intersessionally on specific issues.
 - Regional Cooperation Groups. The Contact Group on Piracy off the Coast of Somalia (CGPCS) discussed issues related to private security and the G7++ Friends of the Gulf of Guinea (FoGG) will be addressing piracy as part of the upcoming agenda for Working Group One.
 - Industry Groups. The Shipping Roundtable (made up of BIMCO, ICS, INTERTANKO and INTERCARGO, with OCIMF participation) holds frequent meetings on maritime security. The International Code of Conduct Association (ICoCA) and the Security in Complex Environments Group (SCEG) similarly convene meetings to discuss maritime security issues.

Jurisdiction

- This paper has discussed the various issues surrounding jurisdiction that must be clarified in order to promote better governance of Contracted Maritime Security. While the issues can be refined within a multistakeholder forum, legal interpretation and application of UNCLOS can only be made by an institution with the authority to do so. As discussed, the immediate issues to be clarified include: 1) the right of innocent passage of armed teams in the TTW of Coastal States and 2)

³³ Taken from the IMO Website. Available at: <https://www.imo.org/en/MediaCentre/MeetingSummaries/Pages/MSC-Default.aspx>

Coastal State authority to impose restrictions on the use of contracted security outside of TTW and within the EEZ.

- Among those that could be considered, based on mandate and expertise, to make these determinations:
 - The UN Division for Ocean Affairs and the Law of the Sea (DOALOS) whose remit includes: promoting better understanding and wider appreciation of the United Nations Convention on the Law of the Sea (the Convention), and assisting with uniform and consistent application and implementation through the provision of information, advice and assistance to States and intergovernmental organizations.³⁴
 - The Legal Committee of the IMO, which is empowered to deal with any legal matters within the scope of the IMO or assigned by any other international instrument and accepted by the organization.³⁵
 - The International Tribunal for the Law of the Sea (ITLOS). ITLOS is an independent judicial body established by the United Nations Convention on the Law of the Sea to adjudicate disputes arising out of the interpretation and application of the Convention. ITLOS has already been involved in the case of the ENRICA LEXIE (detailed below).

The Hybridization of Contracted Maritime Security

- The expanded array of contracted maritime security models requires a new lexicon of terminology to increase understanding and transparency. Such a lexicon will allow for greater clarity and oversight for the industry.
- Once agreement is reached across sectors on the categorization of these hybridized forms of security, a multi-stakeholder approach could be used to draft necessary oversight mechanisms for eventual submission to the IMO.

Coastal and Flag State Laws and Policies

- Coastal State laws and policies should be promulgated. Most Coastal States have failed to make their policies regarding contracted security transparent despite IMO encouragement to do so. This has a cascading effect because Flag States cannot perform proper due diligence in these cases where Coastal State laws or policies are not published or transparent.
- Because of the increasing use of uniformed national personnel involved in contracted security, coastal nations should play an active and transparent role in the governing framework. However, the primary Coastal States offering government contracted maritime services have been largely absent from the Montreux Document Working Group and other international forums.
- Coastal State policies could be developed by studying successful regional models that clearly regulate both private and hybridized forms of maritime security. As discussed above, Benin has recently published an Interministerial Decree Concerning Means of Protection of Ships in the Territorial Waters of Benin that could be studied as a possible framework for other regional states to follow. On this note, it was recently announced that the G7++ Friends of the Gulf of Guinea Legal Working Group will begin discussions on the use of contracted security in the Gulf of

³⁴ Summarized from the DOALOS Website. Available at: https://www.un.org/depts/los/doalos_activities/about_doalos.htm

³⁵ Summarized from the IMO Legal Committee Website. Available at: <https://www.imo.org/en/OurWork/Legal/Pages/LegalCommittee.aspx>

Guinea. It is hoped that this forum will allow regional and international stakeholders the opportunity to reach consensus on a roadmap to improve oversight and effectiveness.

Oversight of Contracted Coastal State Security

- Guidance needs to be created to allow Flag States and shipowners to provide better oversight concerning the use of Security Escort Vessels and Embarked Teams from Coastal States. This is particularly relevant for vessels using these services in the EEZ (outside 12nm) and on the High Seas. Currently, the lack of transparency has prevented any Flag State oversight and issuance of Letters of Non-Objection (LONOs) to indicate that they have reviewed the qualification of the team/vessel. This has effectively removed Flag States from the oversight process in areas where Coastal State policies are generally unclear.

Reporting

- In order to better monitor armed security performance and de-escalate tension with coastal communities, mandatory incident reporting for all weapons use by Contracted Maritime Security elements should be firmly enforced. This should include not only reporting to international agencies, but also to Coastal State authorities that might be required to investigate specific incidents.
- Currently, vessel masters can report incidents involving violence at sea to a number of different organizations and authorities including ship owners/ operators, the embarked PMSC, the Flag State, the Coastal State, the International Maritime Bureau, UKMTO and others, but the specific tracking of Contracted Maritime Security performance is not centralized either globally or by region. A system was successfully used in the Western Indian Ocean, where the presence of armed teams was reported the Maritime Security Center for the Horn of Africa, and incident reports were then investigated jointly with the UKMTO. This could serve as a model for other regions.
- Finally, reporting the presence of armed teams and escort vessels to Coastal States will allow for better integration of these numerous assets within larger counter-piracy efforts. Specifically, understanding the location of SEVs and armed teams could reduce the potential for “blue-on-blue” incidents when multiple law enforcement assets respond to incidents at sea. The awareness of the SEVs in will also allow Coastal States to potentially employ these vessels to respond to nearby incidents since they technically remain under the ultimate authority of the Coastal State .

Annex: Case Studies

Case Study: The “Murder at Sea” Case



Crew of Fishing Vessel Ping Shin No. 101 taking celebratory selfies after mass murder at sea.

Picture Credit: news.com.au

In late 2014 news of a horrifying video appeared on YouTube appearing to show unarmed men in the water – some with their hands raised, being shot and killed. Immediately discussions turned to the fact that these were most likely Somali pirates, and they were “getting what they deserved.” Even if they were pirates (which they were not), the violence in the video showed unarmed and defenceless men being murdered by armed guards.

As part of his investigations into the incident, Ian Urbina of the New York Times contacted researchers from Oceans Beyond Piracy who pointed out that three things were immediately clear – (1) the men in the water were South Asian, not Somali, (2) the destroyed vessel where they were apparently embarked was much more substantial than a pirate skiff and (3) there was a clear picture of a flag in the water which did not indicate a flagless, criminal vessel or pirate skiff.³⁶

Further investigations by Ian Urbina and by Karsten Von Hoesslin of the National Geographic Channel³⁷ revealed that the video was actually related to a fishing dispute near the Seychelles. The boat was rammed and the crew (who hailed from the Makron coast) were murdered once the vessel was sunk. The total number killed that day was well in excess of four, but the numbers are still unclear. The men were shot and killed by unlicensed security guards upon the orders of the Taiwanese fishing boat captain. It is even alleged that the captain himself, and perhaps members of the crew also took part in the slayings.

³⁶ Ian Urbina, *The Outlaw Ocean*, 338, 339 (New York, Alfred A. Knopf, 2010) 338, 339

³⁷ “The Endgame”, *Lawless Oceans*, Directed by Darius Bazargan et al, The National Geographic Channel, 2017.

While this points to a general problem of extreme violence and vigilantism at sea, it also illustrates many of the problems of oversight and regulation of armed guards at sea. Specifically, the events of that day make clear that there are no effective enforcement mechanisms to ensure that incidents are reported. The only way this came to light is the fact that this video was shared amongst fishing boat crews as a type of macabre video exchange. The initial discovery of the video was made by the recovery of a cell phone left in a cab in Fiji and only came to light after the finder found the disturbing content and inquired about its origin.

Normal reporting procedures require that companies shall notify the Flag State administrator of incidents of violence at sea immediately. The Flag should then report to the IMB and the IMO. There are also procedures listed in the Best Management Practices requiring vessels to report to MDAT-GoG, UKMTO or other agencies.

Update: The following information was printed in the Taiwan News:

Kaohsiung District Court on Friday (Jan. 29) sentenced a Chinese national to 26 years imprisonment after he was found guilty of ordering the killing of four pirates at sea in 2012 while serving as the captain of a Taiwanese fishing vessel.

Wang Fengyu (汪峰裕), 43, was convicted of homicide and for violations of the Controlling Guns, Ammunition and Knives Act, the court said. The incident took place on board the Kaohsiung-registered longliner Ping Shin No. 101 when it was operating in the Indian Ocean off the Somali coast on Sept. 29, 2012.

Wang asked two Pakistani mercenaries he hired as the acting captain of the Ping Shin to fire at and kill four suspected Somali pirates that day, the court said. Wang, a Zhejiang-native, was hired by a Kaohsiung company to serve as acting captain of the Taiwan fishing vessel in 2011.³⁸

Discussion: Oversight and Enforcement Weaknesses and Ambiguities

Vetting: Based on the article sighted above, and other sources investigating this case, very little vetting or background checks were conducted on the embarked team. They were identified in the article above as “Pakistani Mercenaries”. The lack of identification and prosecution of the shooters also indicates that the team was not associated with well-regulated PMSCs.

Use of Force: Use of Force policies for armed guards are based on the principle of self-defense and proportionality. This case clearly involved the murder of defenseless men in the water who posed no threat to the vessel or crew. There also appear to be command issues where the vessel master ordered the armed guards to illegally fire on the men in the water – and they complied.

Reporting: Despite the seriousness of the incident, there is no record that this incident was ever reported to regional reporting agencies, the International Maritime Bureau or the IMO by either the shooting vessel or by any of the accompanying vessels that can be seen nearby in the video.

Investigation: No investigation was conducted at the time of the incident. The investigation was only completed after international interest peaked following posting of the video on YouTube and international press interest in the incident. The investigation was also conducted by private means with an official investigation only taking place after pressure was applied.

³⁸ Chinese captain gets 26-year jail term over killings at sea, Kaohsiung court finds Chinese national guilty of ordering the killing of four pirates at sea in 2012, By Central News Agency 2021/01/29 Accessed at: <https://www.taiwannews.com.tw/en/news/4115308>

Case Study: The ENRICA LEXIE Case



Photo Credit: Indian Coast Guard

On 15 February 2012, two Indian Fishermen were killed off the southern coast of India by Italian Marines who were serving as part of a Vessel Protection Detachment (VPD) on the MT ENRICA LEXIE. The incident occurred approximately 20.5 miles off the coast of India. The marines opened fire on the fishing vessel after they felt that the approaching fishing vessel was intending to commit an act of piracy. The resulting round of gunfire killed the two fishermen.

The ship reported the incident through the SSAS system and with a subsequent email message to UKMTO as well as the operations centre of the shipping company. After the incident, the ship continued on course (apparently not realizing the seriousness of the injuries) for another 2.5 hours. At this time, the Indian Coast Guard requested that the vessel enter into port at Kochi to further investigate. As the Italian merchant ship made its way to the port, it was monitored by 2 Indian Coast Guard vessels and a patrol aircraft until it dropped anchored at Kochi. Subsequently, the ship was boarded the next morning by over 30 Coast Guard personnel who began an investigation and eventually took custody of the two Italian Marines who were suspected of firing on the fishing boat. It is important to note the amount of resources required to stop and apprehend suspects. Most Coastal States do not have the resources to coordinate and conduct this type of operation.

This case later caused a diplomatic incident between India and Italy in that the Indian Government wanted to charge two members of the VPD with murder. Italy strongly claimed that India did not have jurisdiction in international waters and that the crew was illegally deceived into diverting into Indian waters (and jurisdiction). Further, they claimed that the guards had diplomatic immunity since they were carrying out a military mission. In their initial statement to Indian authorities, the Marines stated *"Please be informed that on board of this Vessel there is a duly appointed Protection Detachment acting as Law Enforcement Detachment. The Detachment belongs to Italian Navy and is exclusively answerable to Italian Judicial Authorities"*³⁹. Italy also repeated the claim that the vessel was diverted to Kochi under false pretenses (ostensibly to make an identification and report on the piracy incident).

³⁹ Permanent Court of Arbitration Website. Available online at: <https://pcacases.com/web/sendAttach/16500>

Discussion: Oversight and Enforcement Weaknesses and Ambiguities

Jurisdiction. Since the ship was located at 20.5 nautical miles at the time of the incident, there was a dispute between Italy and India over whether the vessel could be legally stopped, and the crew detained. Since the vessel eventually did enter Indian waters, the Indian Coast Guard asserted that is within their rights to detain the vessel and suspected seafarers. Italy challenged that India used deception to lure the vessel into the India port of Cochin.

Use of Force. The use of deadly force in this incident tragically resulted in the death of 2 Indian fishermen who were not pirates. This incident makes clear the inherent difficulty in determining the intent of vessels that approach transiting vessels at sea and why the use of graduated force and understanding of threats are important factors to consider when employing armed security.

Reporting. While the suspected piracy attack and the subsequent use of deadly force were reported to international reporting agencies, they were not reported to India. In the Indian Ocean as well as other geographic areas such as the Gulf of Guinea, Coastal States have complained that they are often not informed of incidents at sea.

Presence of Armed Guards. The presence of armed teams is normally reported to international reporting agencies, but they are not normally reported to Coastal States. In the case of India, the Maritime Rescue Coordination Centre (MRCC) in Mumbai has requested this data be shared, but the shipping industry has objected to sharing this information.

Case Study: The Challenges of contracting Coastal State Security

As explained previously, there is a burgeoning industry of Coastal State related contracted security in several parts of the world. The contracted services offered can consist of contracted Security Escort Vessels or Host Nations armed security guards who are embarked on the vessel. While the services offered by these companies are important to establish security for individual vessels, a number of concerns have been expressed by those who are attempting to provide oversight.

Examples of incidents of errors in use of force or lack of preparedness of Coastal State personnel
(Drawn from the CSO Alliance Website)

- PYXIS DELTA (4 February 2013, Lagos) – one seafarer was killed in the crossfire between embarked security forces and attackers.
- SP BRUSSELS (29 April 2014, Niger Delta) – one seafarer was killed, one severely injured when two Nigerian Police Force embarked on the ship failed to prevent a boarding by pirates.
- SEA STERLING (26 August 2014, Niger Delta) – no casualties, but attackers managed to briefly board the vessel against the resistance of two Nigerian Navy ratings before a Nigerian Navy patrol vessel appeared on the scene.
- SEA VOYAGER (5 November 2014, Niger Delta) – possibly two naval ratings killed or injured when armed attackers boarded the ship. The soldiers fled into the citadel.
- JASCON 24 (23 January 2015, Niger Delta) – one naval rating was killed on the vessel which was actually functioning as a “security vessel” for an offshore oil & gas operation. The attackers managed to board the vessel and engaged the soldiers in a firefight. Two of the four soldiers embarked on the vessel fled into the citadel.
- KALAMOS (3 February 2015, Niger Delta) – one seafarer was killed by a Nigerian Navy rating who disobeyed the master’s order to hold fire during a hostage stand-off on the ship’s bridge. The attackers had boarded the ship undetected by the crew or the security detachment.
- MT B OCEAN (24 January 2022, Ivory Coast (50 NM off Abidjan) – Vessel was boarded and fuel taken. Ivory Coast embarked guards were taken by surprise and disarmed by pirates upon boarding the vessel.

Discussion: Oversight and Enforcement Weaknesses and Ambiguities

Lack of Transparency. Particularly in the case of contracted Security Escort Vessels (SEVs), there are a number of layers of stakeholders who participate in the hiring process. This is normally defined in a confidential Memorandum of Understanding (MoU) between PMSC and the Nigerian Navy. This memo has been revised over the years and currently lists about 30 local companies involved in supplying the vessels to protect individual clients.

Lack of Vetting and Oversight. Shipowners looking for protection in Nigerian waters have limited options. Embarked teams (including Nigerian Navy teams) have been declared illegal by Chief of Naval Staff since 2016, although there are reports that some are still being offered. Obviously, these teams operating on the margins of legality are difficult to properly vet. The same challenges are

associated with the employment of SEVs, which are sometimes not fit for purpose and have been criticized for "extremely high costs and issues of poor performance and reliability."⁴⁰

Lack of Capability or Will to Arrest and Detain. Security Escort Vessels and embarked detachments can make up a large number of Navy and Law Enforcement personnel at sea on any given day. Because they are employed to protect specific clients, they are not normally available to patrol dangerous areas and to detain and arrest suspected pirates and other perpetrators of violence at sea.

⁴⁰ "Nigerian Navy Arrests Seven for Providing Maritime Security Services." Published October 18, 2019, by The Maritime Executive. Available online: <https://www.maritime-executive.com/article/nigerian-navy-arrests-seven-for-providing-maritime-security-services>

Case Study: The Junction Rain Arrests



Suspects detained on board the Sea Angel III. Photo credit: The Nation

In April 2019, the Nigerian Navy was conducting a combined operation with embarked US Navy and Coast Guard Officers codenamed “Operation Junction Rain” where US advisors are embarked for active patrols with regional navies. During one of these patrols a Nigerian Navy vessel approached and boarded the Sea Angel III, a security vessel that was operating outside Territorial Waters, but within the Nigerian EEZ. According to the Nigerian Navy, the vessel was attempting to hide its identity and upon questioning, the vessel gave deceptive answers and denied the presence of weapons on board. The crew of the Sea Angel III was then arrested on suspicion of piracy as well as charges that it had illegally entered Nigerian waters with illegal arms. In addition to five Nigerian citizens, the detainees included four foreign nationals.

However, the arrested suspects claimed that they were part of a maritime security team providing anti-piracy security services in the Gulf of Guinea. A spokesperson for the maritime security firm, the U.S.-based Trident Group, said the team was located well into international waters when their vessel was boarded, and the weapons found were all licensed and permitted.⁴¹

According to numerous Nigerian government officials, and particularly the Chief of Naval Staff, the use of embarked armed security contractors in its territorial seas and EEZ is forbidden. Instead, shipping interests may hire privately-operated escort vessels carrying armed Nigerian Navy security personnel⁴².

⁴¹ Nigerian Navy sparks diplomatic row over arrest of American, 8 others on high sea, Oluwatoyin Amao, April 20, 2019, Located at: <https://shipsandports.com.ng/nigerian-navy-sparks-diplomatic-row-over-arrest-of-american-8-others-on-high-sea/>

⁴² “Nigeria Detains Security Contractors During Anti-Piracy Sweep” published Apr 24, 2019 7:29 PM BY THE MARITIME EXECUTIVE. Accessed at: <https://maritime-executive.com/article/nigeria-detains-security-contractors-during-anti-piracy-sweep>

Discussion: Oversight and Enforcement Weaknesses and Ambiguities

Jurisdictional Issues: While Nigeria has claimed that they forbid security contractors in their Territorial Waters, it is also known that Nigeria also disallows security services in their entire EEZ, a point that is seen as illegal by most interpretations of the UN Convention on the Law of the Sea. This incident occurred in the “Contested Zone” described in earlier chapters between the end of Territorial Waters (TTW) at 12nm and the outer limit of the Exclusive Economic Zone (EEZ) at 200nm.

Presence of Armed Guards: It is unknown whether the Sea Angel had declared the presence of armed guards. In this particular case, the Nigerian government claimed that the crew of the Sea Angel gave deceptive answers when questioned, thereby avoiding the question of whether they could legally arrest non-Host Nation security vessels working outside the TTW in the EEZ. What is clear is that there is a lack of trust between Coastal States and international security providers which leads to a lack of communication and reporting.

Glossary and Explanation of Terms

BMP – Best Management Practices. These documents are published by the shipping industry to enhance maritime security with input from militaries and international organizations. They do not recommend or endorse the use of contracted security but argue that this is a decision for ship operators after conducting a risk analysis and coordination with the Flag State, the insurance provider and littoral states. Guidance includes:

- BMP5, Best Management Practices to Deter Piracy and Enhance Maritime Security in the Red Sea, Gulf of Aden, Indian Ocean and Arabian Sea.
- BMP West Africa, Best Management Practices to Deter Piracy and Enhance Maritime Security off the Coast of West Africa including the Gulf of Guinea.
- Global Counter Piracy Guidance for Companies, Masters and Seafarers

Citadel - A citadel is a designated area where, in the event of imminent boarding, the crew may seek protection. A citadel is designed and constructed to resist forced entry. The use of a citadel cannot guarantee a military or law enforcement response.

CMS – Contracted Maritime Security. As security models have proliferated, maritime security services can be defined within two broad categories: Contracted Private Services and Contracted Governmental Services. Within these two broad categories, there are five basic models of contracted maritime security services that are defined within this report. However, these models continue to evolve over time and must be continually assessed in order to ensure proper oversight.

Coastal State – States with a sea coastline whose jurisdiction relates to its own maritime zone and encompasses the resources and activities undertaken there.

Flag State – The State under whose laws the vessel is registered or licensed and is deemed the nationality of the vessel.

Flags of Convenience - Flags of convenience is a type of Open Registry, but different in that FOCs may also offer some additional features such as an attractive fiscal regime, substantially lower administrative fees, more accessibility to the administration, and lower costs for the ship owners.

GUARDCON - Standardized contract template for the employment of contracted security

Handbook on the Use of Force by Private Security Companies (UNODC). This Handbook has been developed to provide advice to Member States on procedures and rules that could be used in the creation of use-of-force guidelines covering a wide spectrum of activities and operations that private security companies may encounter.

Host Nation Armed Security Guards – Embarked armed personnel originating from Coastal states that are arranged between the shipping industry, but not always specifically endorsed by the Flag State.

Hybridization – The expansion of the maritime contracted security from private security teams into contracted government security services and public-private partnerships.

ICOCA – International Code of Conduct Association

ISO 28007 This voluntary standard was developed as an initiative by the maritime industry based on a request by the International Maritime Organization to provide guidelines for PMSCs deploying Privately Contracted Armed Security Personnel (PCASP) on board ships operating in the Piracy High Risk Area in the Indian Ocean. The full title is “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)”

ISPS – International Code for Ships and Port Security.

IMO – International Maritime Organization

IMO Circulars (Provide Guidance to Flag States, Coastal States, Ship Owners/Operators, and maritime security providers. The most pertinent documents for this discussion include:

- MSC.1/Circ.1443: Interim Guidance to private maritime security companies providing contracted armed security personnel on board ships in the High Risk Area;
- MSC.1/Circ.1408: Interim recommendations for port and Coastal States regarding the use of privately contracted armed security personnel on board ships in the High Risk Area
- MSC.1/Circ.1406/Rev.2: Revised interim recommendations for Flag States regarding the use of privately contracted armed security personnel on board ships in the High Risk Area;
- MSC.1/Circ.1405/Rev.2: 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;

Listed Area – Normally refers to an area identified by the JWC as an area of perceived enhanced risk where owners are required to notify underwriters of voyages and may be subject to additional premiums.

Open Registries – ship registries that allow ship owners of other nationalities to flag and operate ships under their flag.

PCASP – Privately Contracted Armed Security Personnel. Embarked private security personnel hired by the shipping industry.

PMSC – Private Maritime Security Company (In other contexts, PMSC stands for Private Military and Security Companies).

Regulating the Use of Force by Private Security Providers, A Guidance Tool for States (DCAF). This guide, developed by the Geneva Centre for Security Sector Governance (DCAF) is intended for national actors who seek to update or develop national regulatory frameworks concerning the use of force by PSPs, including parliamentarians, law and policy-makers, ministries, regulatory authorities, and oversight bodies.

Rules for the Use of Force – According to BIMCO’s GUARDCON, use of force should be:

- In accordance with Flag State law;
- In accordance with regulations of any port and any Port and Coastal State laws which govern the storage and use by PCASP of their weapons and Security Equipment;
- Consistent with the aim of protecting and defending the crew and vessel;
- Consistent with the use of force only being used when essential and then using the minimum level necessary;
- Part of a detailed and graduated response plan which is reasonable and proportionate;

- Clear in setting out the roles of the Master and the Team Leader of the PCASP;
- Documented, agreed and signed by the Owners and the Contractors as an Annex to any contract/agreement for the provision of security services on board a ship; and
- Recommended to be submitted by the Owners to the Flag State prior to embarkation of the PCASP.

SEV-GUARDCON – Standardized contract template for the employment of security escort vessels (SEVs).

Traditional/National Registry - Ship registries that are administered by an individual country as a national registry for the registration of their own ships flying their own flag, owned, operated and manned by nationals of that country. In a traditional registry the owner of the ship should necessarily be from the country of registration and the place of business should be in the country of registration. This registration and linking to a national registry also mean that these ships may be requisitioned at time of war for the transportation of goods and people in the service of the nation.

SEV – Security Escort Vessel. Contracted vessel manned by uniformed Coastal State personnel and operating under a public-private partnership arrangement.

VPD – Vessel Protection Detachment. Uniformed military personnel embarked on a vessel with explicit approval from the Flag State and most commonly match the nationality of the Flag.

VRA - Voluntary Reporting Area. A geographic area where vessels are encouraged to register with established reporting areas. Registration establishes direct contact between the vessel and trusted reporting agencies and also contains information on whether armed security is embarked. VRAs are currently active in the Indian Ocean, the Gulf of Guinea and South-East Asia.

100 Series Rules. Use of force guidance developed by the shipping industry to provide graduated response measures and lawful use of force in accordance with the right of self-defense. Secondly, it reduces the risk to the security and shipping interests to civil liability claims and potential criminal or other charges.

About this series

The Business and Security Series provides a focus on contemporary security governance challenges and examines the ways in which greater cooperation between states, international organisations, civil society and the commercial sector can help to address them. The series promotes policy relevant research as part of the mandate of DCAF's Business and Security Division to support innovative partnerships that bring stakeholders together to realize shared security and development goals.

**DCAF - Geneva Centre for
Security Sector Governance**

Maison de la Paix
Chemin Eugène-Rigot 2E
CH-1202 Geneva
Switzerland

☎ **+41 22 730 94 00**

✉ **info@dcaf.ch**

🐦 **@DCAF_Geneva**

www.dcaf.ch
