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**Legal challenges with the use of Vessel Protection Detachments and Private  
Maritime Security Company guards for on board ship protection against piracy**

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## Introduction

This thesis explores the role of states and non-state actors in the process of protecting ships from piracy and repressing piracy. The geographic location considered in this thesis is the Indian Ocean, prone to attacks by pirates from Somalia aiming to capture and hold ships hostage for ransom payments.

Firstly, it is explored how States in the past through the drafting of the United Nations Convention on the Law of the Sea (LOSC) envisioned the methods to fight piracy and the role of different states in executing this solution. Concretely, it is explained what role the LOSC accords to flag states and other states in the prevention and repression of piracy.

The second and main part of the thesis focuses on the difference in expectation and reality for the ways foreseen to prevent piracy. In the present, states had mainly used warships to protect ships sailing in the seas. Over time, this had changed with a reduction in the reliance on warships and instead, states had begun deploying armed military personnel directly onboard ships called “Vessel Protection Detachments” (VPD) for protecting ships. On the other hand, some states had opted to use “Private Maritime Security Company” (PMSC) guards for protecting ships instead. The goal of this section is to examine why these changes have occurred, compare these new solutions and analyse the corresponding legal challenges behind them.

This change with the use of onboard-protection both in the form of state and private personnel brings up a series of legal challenges most notably in the use of force and rescue of suspected pirates. An analysis would be made regarding what PMSC guards and VPDs are allowed to use in terms of the level of force and the obligations of their ships to conduct rescue operations for suspected pirates. These issues will be compared for both types of armed teams to analyse which solution is more effective at reducing piracy without compromises to ensuring accountability for any controversial incidents at sea.

Thirdly and based on the research results, an assessment for the future. This section will explore whether maritime security in preventing piracy should involve an expanded role for the state, expanded role for the private sector, or an expansion in both their roles.

## 1. Past: The strong role of the state in preventing and repressing piracy

This section will explain the model the LOSC had envisioned to prevent and repress piracy. A strong emphasis was placed on using state agents acting onboard warships for repressing piracy. Each state possesses powers to fight ships engaged in piracy and obligations to protect their ships from piracy. Under article 107 of the LOSC, “a seizure on account of piracy may be carried out only by warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being on government service and authorised to that effect”<sup>1</sup>.

For the analytical process regarding the role of different states for repressing piracy, “every state” and “flag state” will be two distinguishable categories. With the first category, it is relevant to mention the wide-ranging powers under article 105 of the LOSC, which provides to all states that are not just the flag state to exercise enforcement jurisdiction over ships on the high seas and in areas outside the jurisdiction of any state<sup>2</sup>. Before exploring what powers, states possess to fight piracy, below is a definition of piracy to understand what exactly states are fighting.

Piracy according to article 101 of the LOSC is defined as follows.

*Piracy consists of any of the following acts:*

*(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:*

*(i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;*

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<sup>1</sup> United Nations Convention on the Law of the Sea, (10 December 1982, entered into force 16 November 1994). UNTS (LOSC) art107

<sup>2</sup> Ibid., art105

(ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft; (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).<sup>3</sup>

## 1.1 Powers to repress piracy for every state

The LOSC emphasises a collective responsibility for all states to cooperate and repress piracy with article 100<sup>4</sup>. Why this is the case is due to the severity and danger of piracy as it is considered *hostis humani generis* or “enemies of all mankind”<sup>5</sup>. All states are therefore conferred rights to fight against piracy as a common threat to all users of the sea in the international community.

Under article 105, “On the high seas, or in any other place outside the jurisdiction of any State, every state may seize a pirate ship”<sup>6</sup>. This is an enforcement jurisdiction over a pirate ship available to all states on the high seas as a legal authorisation to repress piracy<sup>7</sup>. The rights of every other state on the high seas are further reaffirmed by article 110 1 (a) where a warship is entitled to visit a ship not flying the same flag if it is “engaged in piracy” amongst other possible justifications<sup>8</sup>. This right to visit is generally not permitted under normal circumstances other

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<sup>3</sup> United Nations Convention on the Law of the Sea, (10 December 1982, entered into force 16 November 1994). UNTS (LOSC) art 101

<sup>4</sup> Ibid., art 100

<sup>5</sup> Kraska, James, and Raul Pedrozo. *International maritime security law*. Martinus Nijhoff Publishers, (2013), 812

<sup>6</sup> United Nations Convention on the Law of the Sea, (10 December 1982, entered into force 16 November 1994). UNTS (LOSC), art105

<sup>7</sup> Ibid.

<sup>8</sup> Ibid., art 110

than the flag state<sup>9</sup> to respect exclusive flag state jurisdiction over its ships<sup>10</sup>. Why these powers are different is that this threat to navigation and trade on the seas are too great. It would be impractical if only a warship sharing a flag state with the pirate vessel can stop the suspected pirates and lead to unnecessary delays in stopping this serious threat<sup>11</sup>.

## 1.2 Obligations to protect ships from piracy for flag states

It is argued that flag states have a role to protect its own ships based on article 94 of the LOSC. According to the provision, it is the responsibility of the flag state to “effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag”<sup>12</sup>.

Flag states would need to legislate through its domestic law to prompt ships to create plans for their safety at sea. Shipping companies for instance are required to have a security plan aboard its ships which is subject to the flag state’s approval<sup>13</sup>. This would be especially applicable to flag states with ships sailing in locations with a high risk of pirate attacks. Once a shipping company creates these plans according to the requirements of the flag state, it would mean the flag state would have exercised jurisdiction over the company.

According to the advisory opinions by the International Maritime Organisation (IMO) “Recommendations to Governments for preventing and suppressing piracy and armed robbery against ships”, flag states should also issue guidance for precautionary measures for protection from piracy, discourage its ships from the use of arms by its seafarers, developing actions plans

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<sup>9</sup> United Nations Convention on the Law of the Sea, (10 December 1982, entered into force 16 November 1994). UNTS (LOSC), art 110

<sup>10</sup> Ibid., art 92

<sup>11</sup> Guilfoyle, Douglas *United Nations Convention on the law of the sea: a commentary*. Edited by Alexander Proelss Article 86-112 Hart, (2017), 735

<sup>12</sup> United Nations Convention on the Law of the Sea, (10 December 1982, entered into force 16 November 1994). UNTS (LOSC) art 94

<sup>13</sup> Jesus , HE José Luis. "Protection of foreign ships against piracy and terrorism at sea: legal aspects." *The International Journal of Marine and Coastal Law* 18, no. 3 (2003), 371

that ship owners and crew members should take in the event of an attack etc.<sup>14</sup>. Many of these solutions focuses upon the measures flag states should take prior to any departure. Hence, these are some of the responsibilities that are solely of the flag state to take measures against piracy and reduce the negative impacts these acts can have against its own ships. The next sections will detail how the use of armed teams on ships are the solutions used during the voyage.

In conclusion to this section, the LOSC originally had envisioned the solution to piracy as predominantly an active approach for states to use warships to seize ships suspected of being engaged in piracy. Flag states on the other hand are to maintain effective control over their ships, requiring them to take measures prior to departure for any potential dangers it may encounter on the high seas against suspected pirates.

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<sup>14</sup> IMO. "MSC.1/Circ.1333/Rev. 1 Piracy and Armed Robbery Against Ships Recommendations to Governments for preventing and suppressing piracy and armed robbery against ships." (2015). 2, para. 5

## 2 Present: The reality of state preference for alternative solutions

The solutions envisioned in the past by the LOSC have generally not been the main trend followed by States when tackling piracy. Instead, alternative solutions have been pursued. States prefer armed teams onboard ships for several reasons further elaborated in other sections due to political reasons, financial costs and the effectiveness of preventing ships from being taken hostage<sup>15</sup>. For instance, in data from 2012, there were over 140 companies employing at least 2700 armed contractors onboard ships and plans at the time for 2000 European military personnel to be hired for protection<sup>16</sup>. These armed teams in question can be guards provided by PMSCs or VPDs. Private Maritime Security Companies (PMSC) are defined as “Private contractors employed to provide security personnel, both armed and unarmed, on board for protection against piracy”<sup>17</sup>. Vessel Protection Detachments (VPD) are defined as “military or law enforcement units embarked on a civilian ship in order to ensure its protection against potential attacks”<sup>18</sup>.

### 2.1 Avoiding the need for seizures

This section will explain the powers states possess and why state practice more frequently aims to protect ships from piracy rather than capturing pirate boats and prosecuting suspected pirates. The powers to seize pirate ships on the high seas are available to all states under the LOSC. If a state chooses to exercise these rights set out under article 105, seizures of pirate boats must

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<sup>15</sup> Neri, Kiara. "The use of force by military vessel protection detachments." *Mil. L. & L. War Rev.* 51, (2012),74

<sup>16</sup> Brown, James. "Pirates and privateers: managing the Indian Ocean's private security boom." *Sydney: Lowy Institute for International Policy*, (2012), 3

<sup>17</sup> IMO. "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." (2012), 1, para. 2

<sup>18</sup>Neri, Kiara. "The use of force by military vessel protection detachments." *Mil. L. & L. War Rev.* 51, (2012), 74



be carried out by “warships or military aircrafts, or other ships or aircraft clearly marked and identifiable as being on government service and authorized to that effect” based on article 107<sup>19</sup>.

Although article 100 stipulates that it is a duty for states to “cooperate to the fullest possible extent in the repression of piracy”<sup>20</sup>, cooperation in repression does not encompass a duty to arrest and prosecute suspected pirates either<sup>21</sup>. A seizing state has no obligation to prosecute suspected pirates it captures and exercise adjudicative jurisdiction if it chooses not to<sup>22</sup>. States are often not willing to take responsibility to prosecute suspected pirates that their warships had legally captured under enforcement jurisdiction<sup>23</sup>. States generally, prefer to use means to prevent piracy without involving arrest detention and prosecution of suspects, but rather just stopping an attack<sup>24</sup>.

Why this is the case is because the adjudicative jurisdiction that capturing states could also exercise through prosecution is considered difficult due to lack of sufficient evidence and costly in financial terms<sup>25</sup>. In a report to the United Nations (UN), it has been noted that there have been few prosecutions of suspected pirates by flag states whose ships have been affected by

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<sup>19</sup> United Nations Convention on the Law of the Sea, (10 December 1982, entered into force 16 November 1994). UNTS (LOSC) art107

<sup>20</sup> Ibid., art 100

<sup>21</sup> Guilfoyle, Douglas *United Nations Convention on the law of the sea: a commentary. Edited by Alexander Proelss Article 86-112 Hart*, (2017), 734

<sup>22</sup> Guilfoyle, Douglas. "Counter-piracy law enforcement and human rights." *International & Comparative Law Quarterly* 59, no. 1 (2010),144

<sup>23</sup>Treves, Tullio. "Piracy and the International Law of the Sea." *Modern Piracy, Legal Challenges and Responses* (2013), 133

<sup>24</sup> Guilfoyle, Douglas *United Nations Convention on the law of the sea: a commentary. Edited by Alexander Proelss Article 86-112 Hart*, (2017), 734

<sup>25</sup> Treves, Tullio. "Piracy and the International Law of the Sea." *Modern Piracy, Legal Challenges and Responses* (2013), 133

piracy<sup>26</sup> and that the difficulty of evidence collection is considered the main reason why suspected pirates cannot be punished<sup>27</sup>. For many seizing states, because many are often geographically distant from the Indian Ocean, agreements with countries in the region such as Kenya have been created and transferred the responsibility of prosecuting suspected pirates under international law to other states<sup>28</sup>.

Prosecution is considered unfavourable to a country if a person convicted for piracy attempts to claim asylum in the State that had deployed the naval patrol carrying out the seizure<sup>29</sup>. The chance of granting asylum though, is considered low as suspected pirates would have demonstrated through their hijacking attempts that they could be a danger to the state they claim asylum in<sup>30</sup>. Despite this, it would also be difficult for states to accept this small risk especially if persons convicted of piracy after serving their sentence cannot be sent back to their home country if there were risks of harm and violations of non-refoulement principles<sup>31</sup>.

These are some of the reasons that explains why States take a more passive and defensive approach of focusing on the protection of ships rather than seizures even if active seizures of ships was the primary method envisioned by the LOSC to counter piracy.

## 2.2 Cheaper and more effective prevention of hijackings

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<sup>26</sup> Lang, Jack. "Annex to the letter dated 24 January 2011 from the Secretary-General to the President of the Security Council Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia" (2011), 27, para. 75

<sup>27</sup> Ibid., 23 para. 56

<sup>28</sup> Gathii, James Thuo. "Kenya's piracy prosecutions." *American Journal of International Law* 104, no. 3 (2010), 418

<sup>29</sup> Treves, Tullio. "Piracy and the International Law of the Sea." *Modern Piracy, Legal Challenges and Responses* (2013), 133

<sup>30</sup> Dutton, Yvonne M. "Pirates and impunity: is the threat of asylum claims a reason to allow pirates to escape justice." *Fordham Int'l LJ* 34 (2010), 282

<sup>31</sup> Treves, Tullio. "Piracy and the International Law of the Sea." *Modern Piracy, Legal Challenges and Responses* (2013), 134

There are further reasons why states prefer to use armed teams onboard ships over naval patrols as a method to protect ships from piracy despite the IMO specifically recommending the deployment of naval vessels for patrols in the affected locations to repress piracy<sup>32</sup>. Often, the deployment of warships or other state craft to enforce the law at sea is an expensive endeavor; therefore, states have a preference for smaller more cost effective solutions<sup>33</sup>. Financially more affordable solutions come in the form of VPDs and PMSC guards than warships<sup>34</sup>.

As the deployment of a VPD directly serves a shipping company's security interest of its ships at sea, some of the costs related to their deployment are split with States. For example, although the Italian State did not profit from providing VPDs to shipping companies, the state being only responsible for the salaries of the personnel meant there was not a significant financial burden for implementing this solution<sup>35</sup>. Other forms of activity related to piracy prevention such as large naval patrols are performed for that of the "common good". Financial costs of these activities would be completely for a state to shoulder as there are no means for this service to be charged upon the users of the seas benefiting from this solution in anyway.

One other advantage is that armed teams onboard a ship can offer protection immediately from an attack whereas relying solely on naval vessels for the protection of ships is perceived as ineffective. This is due to the vast size of the location that needs to be patrolled and if a single warship was patrolling one area, it may not be able to protect multiple ships in the event of a simultaneous attack<sup>36</sup>. The European Parliament credits the European Union's (EU) military operation EU NAVFOR ATALANTA and the use of VPDs and PMSC guards as the activities

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<sup>32</sup> IMO. "MSC.1/Circ.1333/Rev. 1 Piracy and Armed Robbery Against Ships Recommendations to Governments for preventing and suppressing piracy and armed robbery against ships." (2015), 4, para. 14

<sup>33</sup>Brown, James. "Pirates and privateers: managing the Indian Ocean's private security boom." *Sydney: Lowy Institute for International Policy*, (2012), 5

<sup>34</sup> *Ibid.*, 10

<sup>35</sup> Cusumano, Eugenio, and Stefano Ruzza . "Security privatisation at sea: Piracy and the commercialisation of vessel protection." *International Relations* 32, no. 1 (2018), 94

<sup>36</sup> *Ibid.*, 4

that have caused the number of successful acts of piracy to decrease significantly<sup>37</sup>. Specific to VPDs, the ability to protect a larger number of ships can also be used in conjunction warships should a state be willing to take upon the high costs<sup>38</sup>. It is also estimated that current levels of naval patrols are insufficient to provide a quick response to any ships at risk<sup>39</sup>. Furthermore, attacks are often considered to be over by the time naval patrols can reach the victim ship in time for rescue efforts<sup>40</sup>. Hence, it makes alternative solutions comparatively more effective at preventing pirate attacks than solely using naval patrols.

Finally, using these solutions can also allow states to possibly reduce the need to exercise adjudicative jurisdiction because not deploying or deploying less naval vessels would also mean suspected pirates are less likely going to be captured. As further elaborated later, VPDs despite being state agents cannot possess a similar authority available to state agents deployed on a warship<sup>41</sup>. These are therefore, some of the reasons explaining why the solutions seen in the present are different to those envision in the past.

### 2.3 Problems with using armed teams for protection

The use of onboard protection does not only offer advantages but also problems. Justifications against the use of private companies for security purposes typically cite their lack of accountability to the public and the absence of clear checks and balances for their actions<sup>42</sup>.

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<sup>37</sup> European Parliament. "Thursday 10 May 2012 Facing effectively the challenge of maritime piracy P7\_TA(2012)0203 European Parliament resolution of 10 May 2012 on maritime piracy (2011/2962(RSP)) 2013/C 261 E/06." *Official Journal of the European Union*, (2013), C261 E/35 para. c

<sup>38</sup> Neri, Kiara. "The use of force by military vessel protection detachments." *Mil. L. & L. War Rev.* 51, (2012), 74

<sup>39</sup> Brown, James. "Pirates and privateers: managing the Indian Ocean's private security boom." *Sydney: Lowy Institute for International Policy*, (2012), 4

<sup>40</sup> Ibid.

<sup>41</sup> Neri, Kiara. "The use of force by military vessel protection detachments." *Mil. L. & L. War Rev.* 51, (2012), 78

<sup>42</sup> Fredland, J Eric. "Outsourcing military force: A transactions cost perspective on the role of military companies." *Defence and Peace Economics* 15, no. 3 (2004), 215

The IMO does not endorse the use of PMSC guards<sup>43</sup> and deems their presence to be potentially dangerous and could “lead to an escalation of violence” with suspected pirates<sup>44</sup>. However, it acknowledges their use by shipping companies and as a result, it has not attempted to actively curb efforts facilitating their expansion.

VPDs serving a similar purpose as their private counterparts offers a more favourable solution to this issue as they are composed of military personnel tied to a specific state with a more certain legal status than their private counterparts<sup>45</sup>. The IMO does not deem the presence of VPDs a risk for “escalation of violence” even though they perform essentially the same function as PMSC guards. Rather, it recommends flag states to provide clarity for their status on board ships<sup>46</sup>. Nevertheless, the use of force by VPDs has also generated controversy due to the *Enrica Lexie* case which will be later referred to in other sections<sup>47</sup>. Furthermore, as the LOSC was drafted prior to the existence of PMSC guards and VPDs, there are few provisions in the treaty itself that can apply directly to these two methods of ship protection. The way these two solutions can be implemented legally under the existing legal framework in the context of use of force and rescue at sea will therefore be analysed below.

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<sup>43</sup> IMO. "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." (2012), 1, para. 1.1

<sup>44</sup> IMO. "MSC.1/Circ.1333/Rev. 1 Piracy and Armed Robbery Against Ships Recommendations to Governments for preventing and suppressing piracy and armed robbery against ships." (2015), 2, para 7

<sup>45</sup>Brown, James. "Pirates and privateers: managing the Indian Ocean's private security boom." *Sydney: Lowy Institute for International Policy*, (2012), 9

<sup>46</sup> IMO. "MSC.1/Circ.1333/Rev. 1 Piracy and Armed Robbery Against Ships Recommendations to Governments for preventing and suppressing piracy and armed robbery against ships." (2015), 2, para 8

<sup>47</sup> Neri, Kiara. "The use of force by military vessel protection detachments." *Mil. L. & L. War Rev.* 51, (2012), 76

### 3 Present: Use of force against suspected pirates by PMSC guards onboard ships

The following section analyses the situations when and to what extent PMSC guards can use force in line with the law in the event of an attack by suspected pirates on the ship they are aboard. It will also explore the responsibilities of different persons onboard a ship namely, the master of the ship and PMSC guards to decide when to use force against suspected pirates. Finally, the section will conclude with an analysis for the potential phase that can be reached following the use of force: the possibility that the PMSC guards temporarily hold suspected pirates captive after an attack. This is a question regarding whether PMSC guards can deprive suspected pirates of their liberty in these situations.

#### 3.1 The limits over the use of force by PMSC guards: Self-defense

When PMSC guards are deployed on board ships, the first instance permitting the use of force is for the self-defense of his or her own life if he or she is attacked directly at sea by a pirate ship<sup>48</sup>. The second instance is for self-defense against attacks made towards the master and crew of the ship they are deployed upon<sup>49</sup>. Whether self-defense had been executed legally by PMSC guards is also determined by factors such as degree of imminence of an attack<sup>50</sup> and principles of proportionality<sup>51</sup>.

In the application of these principles, PMSC guards are expected to avoid all types of responses that may lead to the injury of persons onboard the pirate ship or their own ship, only aiming to deter suspected pirates from commencing or continuing an attack<sup>52</sup>.

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<sup>48</sup>Petrig, Anna "The use of force and firearms by private maritime security companies against suspected pirates." *International & Comparative Law Quarterly* 62, no. 3 (2013), 688

<sup>49</sup> Ibid.

<sup>50</sup> Ibid.

<sup>51</sup> Ibid., 690

<sup>52</sup> Ibid., 691

Before taking action that requires the use of firearms, for non-imminent attacks, PMSC guards are advised to use audio or visual forms of deterrence such as flares or radio hails to indicate to suspected pirate ships approaching the ship to change course<sup>53</sup>. Should these measures be ineffective, another warning must be made again before the use of warning shots fired close to the ship but without hitting it<sup>54</sup>. If the suspected pirates are undeterred, the ship's hull and engine can be fired upon to disable the suspected pirate's craft to stop the attack<sup>55</sup>. If all these attempts to stop an attack fail, PMSC guards are permitted to fire aimed lethal shots towards the pirate<sup>56</sup>. This lethal response must also be proportionate where shots fired must cease as soon as the attack is stopped through these means<sup>57</sup>.

### 3.2 Control over the use of force

In situations where there is time and self-defense is not immediately required to protect the ship, it is the responsibility for the master of the ship to have ultimate authority over the use of force by the PMSC guards<sup>58</sup>. The master of the ship holds command of the ship at all times and retains overriding authority on board including decisions for the use of force by PMSC guards<sup>59</sup>. The leader of the PMSC guards other than being responsible for the management of the team serves an advisory role for the use of force in the process of protecting the ship<sup>60</sup>. A PMSC guard cannot use force for the defense of the ship based upon his or her own decision but does possess the right to self-defense of their own life should they be attacked directly by suspected pirates<sup>61</sup>. This exercise of self-defense does not require the master's approval<sup>62</sup>.

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<sup>53</sup> Petrig, Anna "The use of force and firearms by private maritime security companies against suspected pirates." *International & Comparative Law Quarterly* 62, no. 3 (2013), 690

<sup>54</sup> Ibid.

<sup>55</sup> Ibid. 691

<sup>56</sup> Ibid.

<sup>57</sup> Ibid. 690

<sup>58</sup> Ibid. 696

<sup>59</sup> Ibid.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid.

All the listed responses assumes that sufficient time is available for the master to approve the course of action taken especially those requiring the use of arms. To ensure that the master remains in control over the use of force even if there is insufficient time to seek approval, a master must be informed of responses taken by the PMSC guards against suspected pirates after it has taken place<sup>63</sup>. Therefore, this shows if all of these guidelines are followed accordingly, the ability for PMSC guards to use force is very limited and subject to the approval of a shipmaster.

### 3.3 Deprivation of liberty for suspected pirates after the use of force by PMSC guards

As PMSC guards on board ships are not affiliated with a state, they cannot take part in the process of repressing piracy<sup>64</sup>. This means they cannot use the powers of article 105 of the LOSC available to state agents on warships or state craft to make seizures and arrests<sup>65</sup> that lead to prosecutions against pirate ships unless perhaps they were somehow integrated as part of regular military units<sup>66</sup>. However, this is also fraught with problems related to challenging the role of the State in its monopoly on the use of force<sup>67</sup>. Therefore, PMSC guards can only use force in the form of self-defense to protect ships and cannot seize suspected pirates as state agents can.

In the repellent of an attack, there is the inherent risk that the possible confusion in the ensuing attack and counter attack by self-defense between suspected pirates and PMSC guards can lead to suspected pirates being injured or the pirate ship to be damaged and at risk of sinking. This

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<sup>63</sup> Petrig, Anna "The use of force and firearms by private maritime security companies against suspected pirates." *International & Comparative Law Quarterly* 62, no. 3 (2013), 696

<sup>64</sup> *Ibid.*, 693

<sup>65</sup> United Nations Convention on the Law of the Sea, (10 December 1982, entered into force 16 November 1994). UNTS (LOSC) art105

<sup>66</sup> Petrig, Anna "The use of force and firearms by private maritime security companies against suspected pirates." *International & Comparative Law Quarterly* 62, no. 3 (2013), 694

<sup>67</sup> *Ibid.*



may warrant their rescue by their former victims<sup>68</sup>. Rescue as an issue will be referred to in a later section. This situation post attack however, may be the circumstances that lead to suspected pirates being held on board a ship that they had previously attacked. Holding suspected pirates for a short period of time until their handover to a state is permissible if they are captured using powers available from self-defense in the process of attacking a ship<sup>69</sup>.

Whether shipmasters possess the right to lawfully temporarily deprive liberty from suspected pirates depends if they have been authorised to do so by the domestic law of their corresponding flag state and international law<sup>70</sup>. The ability to exercise this right is also a component of self-defense against an attack according to the international law commission and cannot exist in the absence of it<sup>71</sup>. For instance, if PMSC guards spots a ship in the ocean in possession of weapons or characteristics matching that of a pirate ship, they do not possess the authority to actively seize that suspected ship as it would be considered a right to seizure only available to states<sup>72</sup>. As a result, ships with PMSC guards can only hold suspected pirates and deprive liberty for suspected pirates in very specific circumstances only after being attacked. This makes the right to exercise these powers very restricted.

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<sup>68</sup> Petrig, Anna "The use of force and firearms by private maritime security companies against suspected pirates." *International & Comparative Law Quarterly* 62, no. 3 (2013), 694

<sup>69</sup> *Ibid.*, 692

<sup>70</sup> Hammond, David, and Anna Petrig. "Deprivation of liberty at Sea: independent international guidance on deprivation of liberty at Sea by shipmasters, crew and/or privately contracted armed security personnel." (2015), 2

<sup>71</sup> Petrig, Anna "The use of force and firearms by private maritime security companies against suspected pirates." *International & Comparative Law Quarterly* 62, no. 3 (2013), 692

<sup>72</sup> United Nations Convention on the Law of the Sea, (10 December 1982, entered into force 16 November 1994). UNTS (LOSC) art 107

## 4 Present: Use of force against suspected pirates by VPDs onboard ships

The following section will analyse the situations when VPDs can lawfully exercise the use of force against suspected pirates in the event of an attack on the ship they are aboard. It will also again, explore the responsibilities of different persons onboard a ship namely, the master of the ship and VPDs to decide when to use force against suspected pirates. Furthermore, it will also explore the possibility of arrest of suspected pirates by VPDs in relation to their status as state agents after an attack.

### 4.1 The limits over the use of force by VPDs: Self-defense

The use of force by VPDs is to protect the ships they are deployed aboard based on their corresponding state's formal rules of engagement (ROEs)<sup>73</sup>. Self-defense provides the main legal basis for the use of force by VPDs serving onboard ships<sup>74</sup>. The degrees of imminence of an attack and proportionality of a response<sup>75</sup> should also determine the legality of the use of force<sup>76</sup>. For examples regarding the specific types of guidance available to some military personnel, VPDs from the Netherlands are issued a "soldier's card" detailing the instructions on the use of force based on the right of self-defense<sup>77</sup>.

The right to use of force by VPDs generally is to protect ships from attacks based on self-defense<sup>78</sup> rather than using force to execute seizures at sea for pirate ships as warships or crafts

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<sup>73</sup> Symmons, Clive R. "Embarking vessel protection detachments and private armed guards on board commercial vessels: International legal consequences and problems under the law of the sea." *Mil. L. & L. War Rev.*, (2012), 23

<sup>74</sup> *Ibid.*, 45

<sup>75</sup> *Ibid.*, 44

<sup>76</sup> *Ibid.*, 45

<sup>77</sup> Zwanenburg, Marten. "Military vessel protection detachments: the experience of the Netherlands." *Mil. L. & L. War Rev.* 51 (2012), 106

<sup>78</sup> Neri, Kiara. "The use of force by military vessel protection detachments." *Mil. L. & L. War Rev.* 51, (2012), 82

of government service. Those rights available to state agents under the LOSC cannot serve as a legal basis for the use of force by a VPD as they do not fulfill all the requirements needed to board pirate ships<sup>79</sup>. Therefore, the presence of VPDs on a ship as a result, cannot transform it into a ship possessing these rights of seizure under the LOSC with the ability to actively use force to make seizures<sup>80</sup>.

#### 4.2 Control over the use of force

VPDs have the ultimate decision-making power for the use of force for the protection of the ship they are onboard<sup>81</sup>. As VPDs are serving military personnel, a master of the ship would not have the ultimate decision-making power over the use of force<sup>82</sup>. This responsibility falls upon the VPD commander instead where this system aims to ensure that the monopoly of force is held by the government even if the VPD is working alongside private individuals<sup>83</sup>. A master of the ship has no right to compel the VPD team to respond in a manner against the threat of a pirate attack he or she sees fit because this would be controlling the right to potentially lethal force held by state agents.

What a master would be responsible for in the process of defending a ship from an attack would be related to the safety of navigation and maneuvers a ship can make to escape from a pirate ship<sup>84</sup>. The crew on the other hand would remain under the authority and command of the master should they be required to maintain the safety aboard a ship in response to an attack

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<sup>79</sup> Zwanenburg, Marten. "Military vessel protection detachments: the experience of the Netherlands." *Mil. L. & L. War Rev.* 51 (2012), 105

<sup>80</sup> Neri, Kiara. "The use of force by military vessel protection detachments." *Mil. L. & L. War Rev.* 51, (2012), 79

<sup>81</sup> Zwanenburg, Marten. "Military vessel protection detachments: the experience of the Netherlands." *Mil. L. & L. War Rev.* 51 (2012), 112

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

<sup>84</sup> Symmons, Clive R. "Embarking vessel protection detachments and private armed guards on board commercial vessels: International legal consequences and problems under the law of the sea." *Mil. L. & L. War Rev.*, (2012), 39

upon his or her orders<sup>85</sup>. Although the VPD commander operates independently from the master over decisions controlling the use of force on the ship, there is also an emphasis on close cooperation between both parties on board the ship for responses to an attack<sup>86</sup>. This aims to ensure actions taken against pirates are more effective by both parties on the ship.

#### 4.3 Deprivation of liberty for suspected pirates after the use of force by VPDs

As VPDs are military personnel functioning as agents of the state, it would pose questions regarding whether they can arrest suspected pirates after an attack. Should a pirate be held captive by VPDs using self-defense after an attack, whether they can be formally arrested depends on the domestic legislation of the corresponding state of the VPD. The domestic laws of some countries, do provide police powers to VPDs such as Italy which in turn would give their military personnel the right to arrest suspected pirates<sup>87</sup>. However, much of the enforcement jurisdiction available in the LOSC for states to take actively against pirate ships can only be performed from a warship or other duly authorised ships or aircraft clearly marked and identifiable as being on government service<sup>88</sup>.

Despite the existence of these restrictions against active seizures and the active use of force to carry it out, it would be legal for VPDs to deprive liberty from suspected pirates using self-defense. So long as the deprivation of liberty is made in these specific circumstances post attack in a non-active approach without utilising article 105 of the LOSC for legal justifications<sup>89</sup>, it would make these acts legal. VPDs based on its powers from domestic law can also threaten arrest to deter suspected pirates from attacking.

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<sup>85</sup> Zwanenburg, Marten. "Military vessel protection detachments: the experience of the Netherlands." *Mil. L. & L. War Rev.* 51 (2012), 111

<sup>86</sup>Ibid., 112

<sup>87</sup> Neri, Kiara. "The use of force by military vessel protection detachments." *Mil. L. & L. War Rev.* 51, (2012), 78

<sup>88</sup>United Nations Convention on the Law of the Sea, (10 December 1982, entered into force 16 November 1994). UNTS (LOSC) art107

<sup>89</sup> Neri, Kiara. "The use of force by military vessel protection detachments." *Mil. L. & L. War Rev.* 51, (2012), 79

This would be particularly relevant should a VPD encounter a suspected ship on the high sea that appears to be threatening and matching the characteristics of a pirate ship but does not commence an attack. Although a VPD would not be able to actively seize the pirate ship, it could for instance use loud speakers verbally or other methods to signal the threat of arrest if attempts are made to attack and board the ship they are defending. Using this method, a VPD may be able to deter attacks but also avoid the use of force from protecting its ship and the corresponding risk in escalation of violence. As a result, the right to deprive liberty and possibility of arrest by VPDs is only available after an attack in specific circumstances and dependent on domestic law.

## 5 Present: Comparison over the use of force against suspected pirates

Based on all the characteristics observed for PMSC guards and VPDs, firstly, a comparison can be made in the context of a recent dispute concerning the legality over the use of force based on self-defense. Secondly, the next focus is to analyse the situations when there is a loss of control over the use of force. Building upon the case, the issue of the extent accountability can be held is compared for both models in the event of suspected unlawful use of force. Finally, the ability to legally commence the deprivation of liberty by both models is also compared.

### 5.1 Disputes over the use of force by PMSC guards and VPDs

Despite the high thresholds that requires self-defense to be the trigger for the use of force, this power possessed by armed teams has led to strains in bilateral relations for the cooperation between states. At present, there are no known major cases of controversy involving PMSC guards leading to the intentional or accidental loss of life at sea. Actions of PMSC guards have not yet caused major rifts between two countries at the time of writing. VPDs on the other hand, despite possessing more legal certainties regarding their status have become more controversial due to the *Enrica Lexie* incident between Italy and India during 2012. The case involved a ship named the *Enrica Lexie* with two Italian marines in a VPD that had allegedly caused the death of two Indian fishermen after mistaking the ship that the *St Antony* that they were aboard as a pirate ship. This incident had caused considerable strain in the relations between both states<sup>90</sup>.

What the *Enrica Lexie* case reveals is that the reliance on state-based solutions may lead to unintentional consequences of hampering the cooperation between states in the process of repressing piracy. Italy in its submission of merits to the International Tribunal for the Law of the Sea (ITLOS) against India accused India of violating article 100 of the LOSC for hampering

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<sup>90</sup> Ireland-Piper, Danielle. "The Enrica Lexie and St Antony: A Voyage into Jurisdictional Conflict." *QUT L. Rev.* 14 (2014), 77

international cooperation for repressing piracy “by the arrest and detention of the *Enrica Lexie*, and the arrest, detention and prosecution of the Italian Marines”<sup>91</sup>.

Had the case involved the use of force by PMSC guards, from the perspective of upholding article 100, cooperation would likely be unaffected by any major incidents at sea as there are fewer avenues for disputes between states as hypothetical future incidents would involve no state agents. If Indian fishermen were accidentally killed by PMSC guards, India would likely be able to press charges against the defendants without a foreign state protesting the exercise of adjudicative jurisdiction.

Although the flag state with the PMSC guards onboard may also intervene claiming flag state jurisdiction under article 97 of the LOSC<sup>92</sup>, this may be unlikely if the ship is flying a flag of convenience which implies a lax approach over the management of affairs involving the ship<sup>93</sup>. It is likely that the responsibility of dealing with such hypothetical incidents would be deferred to the ship owner or master of the ship by the flag state<sup>94</sup>. On the other hand whether the state of an individual PMSC member would exercise diplomatic protection in the event of a dispute depends entirely on the state itself. In 2009, two Norwegian citizens Tjostolv Moland and Joshua French, employees of a private security company had allegedly committed murder in Congo and were subsequently sentenced to death<sup>95</sup>. In this affair, the Norwegian state had

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<sup>91</sup> *Italy v India*. "In the dispute concerning the enrica lexie incident The italian Republic v. The republic of India Notification under article 287 and annex VII, article 1 of UNCLOS and statement of claim and grounds on which it is based 26 June 2015." *ITLOS*, (2015), para 29 f

<sup>92</sup> United Nations Convention on the Law of the Sea, (10 December 1982, entered into force 16 November 1994). UNTS (LOSC) art 97

<sup>93</sup>Liss, Caroline. "Regulating Private Military and Security Companies at Sea: New Developments and Challenges." *Institute for Near East and Gulf Military Analysis (INEGMA), Regional Response to Maritime Piracy: Enhancing Public-Private Partnerships and Strengthening Global Engagement.*, (2012), 3

<sup>94</sup> *Ibid.*

<sup>95</sup> Bangstad, Sindre, and Bjørn Enge Bertelsen . ""Heart of darkness reinvented? A tale of ex-soldiers in the Democratic Republic of Congo (Respond to this article at <http://www.therai.org.uk/at/debate>).". *Anthropology Today*, (2010), 8

demonstrated its willingness to be involved in controversial diplomatic incidents where their citizens were members of private security companies<sup>96</sup>. Whether Norway or another state caught in a similar affair at sea would act in a similar manner remains to be seen.

Therefore, shifting responsibilities of protection for ships to private companies and avoiding direct state to state fallouts would be preferential for ensuring good state to state cooperation in the event of any controversies over the use of force at sea<sup>97</sup>. This may also ensure that piracy can be repressed more effectively in the absence of disputes between states.

## 5.2 Accountability for the unlawful use of force by PMSC guards and VPDs

Although the responsibility for who can control the use of force is clear for both types of armed teams, questions remain for the responsibilities of the persons involved after the use of force especially if it is suspected to be unlawful. The controversies surrounding VPDs as a result of the *Enrica Lexie* case, does not make PMSC guards less controversial and a more favourable solution for ensuring accountability over the use of force at sea. This is further elaborated in the following.

Data regarding the number of encounters between PMSC guards and suspected pirates remains scarce. Currently, there appears to be no publicly known cases of violations by PMSC guards over the use of force. There is also no data regarding the number of PMSC guards prosecuted for violations committed against suspected pirates. Publicly available sources of “evidence” for possible violations that may have occurred can only be found from unverifiable or unreliable sources such as sensationalised YouTube videos of apparent violent encounters between suspected pirates and PMSC guards<sup>98</sup>. It can only be assumed that there is a possibility

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<sup>96</sup>Bangstad, Sindre, and Bjørn Enge Bertelsen . ""Heart of darkness reinvented? A tale of ex-soldiers in the Democratic Republic of Congo (Respond to this article at <http://www.therai.org.uk/at/debate>).". *Anthropology Today*, (2010), 10

<sup>97</sup> Cusumano, Eugenio, and Stefano Ruzza. "The Political Cost-Effectiveness of Private Vessel Protection: The Italian Case." *The International Spectator*, (2018), 142

<sup>98</sup> Youtube. "Somali Pirates Mess with the Wrong Ship." (2016). Retrieved from <https://www.youtube.com/watch?v=BIMjQOCLkS4>



that there have been situations where suspected pirates repelled from an attack by PMSC guards have been killed unlawfully. Investigations into the event are likely to not have occurred either.

A country with a weaker state authority would likely be unable to ensure accountability for unlawful actions caused by PMSC guards. Should Somali citizens suspected of piracy be unlawfully killed or injured in such events, the likelihood of the Somali state being able to arrest, prosecute and ensure accountability for these actions against its citizens is most likely to be lower than that of India due to its absence of a viable government and law enforcement capabilities.

In these situations, the VPD model may be better at ensuring unlawful acts involving the use of force are better held to account and taken into control as the country behind the VPD in theory would be obliged start criminal investigations. Italy in the *Enrica Lexie* case had conducted a criminal investigation in the case against its own marines<sup>99</sup>. Had the Indian fishermen been Somali citizens instead, it would also be likely that Italy would have acted in the same manner and investigate such incident as well while the Somali state may not be able to do so. If the VPD team were PMSC guards, only the state of victims involved in incidents would likely be motivated to investigate. It would be unclear whether the company that the guards belong to would take disciplinary action against these unlawful acts and deliver them to a state authority to face justice. This would be dependent on the company's professional conduct and their willingness for comprehensive self-regulation.

Tools though are already in existence or emerging for companies and states to create a better framework for the regulation over the use of PMSC guards. This can be most notably seen in the Montreux document, in its clarification of, and reaffirmation of international law and encouraging the adoption of national regulations for private military companies on land<sup>100</sup>.

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<sup>99</sup> *Italy v India* . "In the dispute concerning the enrica lexie incident The italian Republic v. The republic of India Notification under article 287 and annex VII, article 1 of UNCLOS and statement of claim and grounds on which it is based 26 June 2015." *ITLOS*, (2015), 5, para. 14

<sup>100</sup> Montreux Document. "The Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict of 17 September 2008." (2008).

Although it is specific to land and during armed conflict, it remains open to its applicability to other comparable situations<sup>101</sup>. Objectively, this matches the situation seen upon ships containing PMSC guards, making it relevant to interpret the Montreux document in this context<sup>102</sup>. Often, the role of PMSC guards onboard ships matches that of the activities referenced in the document. This is especially true in the context of their service being primarily focused on providing security guarding and protecting ships at sea in the similar manner as their on land counterparts categorised as private security companies separated and differentiated from services of a military nature<sup>103</sup>.

In supplementing the Montreux document, there is also an “International Code of Conduct for Private Security Service Providers (ICoC)” setting out the principles more clearly to private security companies for upholding international law<sup>104</sup>. The participation of 94 companies some of which that are maritime based and a certification system that recognizes this code of conduct could improve the transparency and practices at sea<sup>105</sup>. Shipping companies can have a clearer understanding regarding whether the PMSCs that they hire can protect their ships while abiding by international law. This would likely make it more difficult for unscrupulous PMSCs to be

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<sup>101</sup> Parsons, Dana M. "Protecting the booty: creating a regulatory framework to govern increased use of private security companies in the fight against pirates." *Tul. Mar. LJ* 35 (2010), 172

<sup>102</sup> Petrig, Anna "Looking at the Montreux Document from a Maritime Perspective." *Maritime Safety and Security Law Journal*, no. 2 (2016), 19

<sup>103</sup> Montreux Document. "The Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict of 17 September 2008."(2008), 38

<sup>104</sup> ICoC. "International Code of Conduct for Private Security Service Providers." 2010.

<sup>105</sup> —. *International Code of Conduct for Private Security Service Providers Membership* . n.d. Retrieved from.

[https://www.icoca.ch/en/membership?private\\_security\\_companies%5Bcompanies%5D=companies&area\\_of\\_operation=all&headquarter\\_country=all&keywords=&op=Search&view\\_type=list&form\\_built\\_id=form-Z\\_CqKgD8b0Fjs8GYFt8dcAqjhEOSJERS-pTjHZOL0IQ&form\\_id=\\_search\\_for\\_memb](https://www.icoca.ch/en/membership?private_security_companies%5Bcompanies%5D=companies&area_of_operation=all&headquarter_country=all&keywords=&op=Search&view_type=list&form_built_id=form-Z_CqKgD8b0Fjs8GYFt8dcAqjhEOSJERS-pTjHZOL0IQ&form_id=_search_for_memb).

able to continue operation unless there is an improvement and transparency provided in the services offered<sup>106</sup>.

### 5.3 Deprivation of liberty for suspected pirates by PMSC guards and VPDs

PMSC guards cannot legally arrest suspected pirates as they lack these powers reserved for state agents. Although the master of the ship possesses the right to temporarily hold suspected pirates captive after the exercise of self-defense, the need to locate a state to take custody of suspected pirates mean a longer time would be needed to formalise an arrest. VPDs with arresting powers can skip the process of locating a state to take custody of the suspected pirates and take the responsibility of holding the suspected pirates directly whereas PMSC guards cannot. This act would remain legal as long as the process is conducted without utilising article 105 of the LOSC as justification and only based on self-defense after an attack by the suspected pirates. Although it is expected that suspected pirates will be handed over to a state authority by the VPD conducting the capture, there is comparatively less ambiguity regarding which state would take custody than if PMSC guards conducted a capture<sup>107</sup>. The most likely country would be the one deploying the VPD that takes formal custody of suspected pirates captured after an attack from a ship containing a VPD. Therefore, for VPDs if given powers to arrest at sea, it can make their function more flexible beyond just protecting ships at sea than PMSC guards.

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<sup>106</sup> ICoC. "International Code of Conduct for Private Security Service Providers." 2010, 4, para 8

<sup>107</sup> Guilfoyle, Douglas *United Nations Convention on the law of the sea: a commentary*. Edited by Alexander Proelss Article 86-112 Hart, (2017), 759

## 6 Present: Rescue of persons in distress by ships

Beyond the potential for the use of force, ships containing armed guards are likely to encounter situations that may warrant the rescue of their former attackers under the LOSC. There is a legal requirement to commence a rescue regardless of who the victims at sea are and the cause of their distress. Unlike the use of force where there are differences between PMSC guards and VPDs regarding who can decide when to use force, all rescue decisions are taken by the master of the ship. Hence, the analysis will begin with an explanation for the obligations of ship masters which exist regardless the type of armed team deployed onboard. It will then explore the problems and issues that could be encountered by each respective model of protection be it PMSC guards or VPDs. Article 98 of the LOSC below provides the legal basis determining when rescues need to be conducted.

### *Article 98*

#### *Duty to render assistance*

*1. Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers:*

*(a) to render assistance to any person found at sea in danger of being lost;*

*(b) to proceed with all possible speed to the rescue of persons in distress, if informed of their need of assistance, in so far as such action may reasonably be expected of him;*

*(c) after a collision, to render assistance to the other ship, its crew and its passengers and, where possible, to inform the other ship of the name of his own ship, its port of registry and the nearest port at which it will call.*

*2. Every coastal State shall promote the establishment, operation and maintenance of an adequate and effective search and rescue service regarding safety on and over the sea and,*

where circumstances so require, by way of mutual regional arrangements cooperate with neighbouring States for this purpose<sup>108</sup>.

## 6.1 Rescue for suspected pirates

The legal basis obliging masters of ships to rescue suspected pirates from the sea can be found under article 98 (1) of the LOSC<sup>109</sup>. This responsibility of rescue falls upon the master of the ship and the presence or absence of an armed team should not influence the decision to rescue suspected pirates in distress or not<sup>110</sup>. Decisions should solely be made in consideration for the safety of the ship if rescue is conducted and if it is reasonable to do so<sup>111</sup>.

The issue of rescue may arise if armed teams in the exercise of self-defense injured attacking suspected pirates or caused damage to the pirate boats that may risk its sinking. Under article 98 of the LOSC, it would ultimately be the master of the ship's responsibility to ensure without "serious danger to the ship, the crew or the passengers" to rescue suspected pirates if they were in distress or at risk of being lost at sea<sup>112</sup>.

Situations where suspected pirates are in danger of being lost at sea but do not qualify for rescue exists when they continue to attack their former "victim" ship after attempts to approach and rescue them. A master of a ship would therefore realistically then not be expected to conduct a rescue as it could lead to "serious danger" towards the safety of his or her own ship. As masters are required to rescue "any person"<sup>113</sup>, not only is his or her ship required to commence the rescue of suspected pirates possibly in danger due to self-defense action by PMSC guards or

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<sup>108</sup> United Nations Convention on the Law of the Sea, (10 December 1982, entered into force 16 November 1994). UNTS (LOSC) art 98

<sup>109</sup> Ibid., art 98 (1)

<sup>110</sup> Petrig, Anna "The use of force and firearms by private maritime security companies against suspected pirates." *International & Comparative Law Quarterly* 62, no. 3 (2013), 695

<sup>111</sup> United Nations Convention on the Law of the Sea, (10 December 1982, entered into force 16 November 1994). UNTS (LOSC) art 98 (1)

<sup>112</sup> Ibid.

<sup>113</sup> Ibid.

VPDs, but also suspected pirates that have not attacked the ship should they encounter any at sea<sup>114</sup>. If a ship were to receive a distress signal from a pirate ship that had not commenced an attack against the receiving ship, so long as they will not threaten the safety of the rescue ship, the master is still required to proceed to rescue if it is reasonable of him or her to do so<sup>115</sup>. This is due to the obligation to rescue applies to anywhere on the seas without geographical limitations<sup>116</sup>.

No forms of differentiation in terms of rescue can therefore be made for any suspected pirates in danger of being lost at sea even if their “distress” is not a result of actions from the PMSC guards or VPDs.

## 6.2 Questions arising post rescue of suspected pirates by ships with PMSC guards onboard

The LOSC regulates the responsibilities for initial rescue involving exclusively the process of taking persons in distress out of the water. What happens after, however, is not covered by mentioned rules. For the disembarkation of rescued suspected pirates off ships with PMSC guards, which state should exercise enforcement jurisdiction and take custody of rescued suspected pirates is unclear. Secondly, which state should exercise adjudicative jurisdiction and prosecute rescued suspected pirates is also unclear. It has been suggested that a realistic solution is for ships that had rescued suspected pirates to hand them over to patrolling naval ships<sup>117</sup>.

States however, have already demonstrated a willingness to refuse to disembark rescued persons at a place of safety most notably by Australia during the events of the *Tampa* incident. In 2001, a Norwegian cargo ship that had rescued 433 asylum seekers was denied entry into

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<sup>114</sup> Petrig, Anna "The use of force and firearms by private maritime security companies against suspected pirates." *International & Comparative Law Quarterly* 62, no. 3 (2013), 694

<sup>115</sup> Ibid.

<sup>116</sup> Ibid.

<sup>117</sup> Ibid., 693

Australia<sup>118</sup>. Hardline stances for the refusal to disembark survivors were justified by the notion that asylum seekers were a threat, often linked to crime and terrorism<sup>119</sup>. However, for state naval vessels to receive suspected pirates from a rescue ship, it is difficult to argue the previous controversial stance as false that the survivors are not a threat. Nevertheless, any state committed to patrolling the Indian Ocean should also be responsible for search and rescue operations under the basis that naval vessels are suitable places of safety for suspected pirates rescued by normal ships<sup>120</sup>.

A naval vessel may also have little incentive to offer a place of safety for suspected pirates rescued by ships, as states may desire to avoid voluntarily taking upon these responsibilities likely out of fear of being forced to commit to making prosecutions. The question remains for merchant ships to determine what to do with suspected pirates it has rescued and where to disembark them if naval vessels refuse. This is especially relevant to ships with PMSC guards.

In the backdrop of a reluctance of states to avoid prosecutions and enforcement action, this effectively could make ships that had conducted a rescue “stuck” with their former attackers making them unable to continue their voyage for their original purpose. It is also acknowledged that holding suspected pirates on warships impairs its ability to carry out patrols and therefore requiring an international solution for their transfers off ship<sup>121</sup>. By the same logic however, there should also be solutions regarding the transfer of rescued suspected pirates off ships and on to naval vessels.

Without the reassurance that specific patrolling naval states will take over rescued suspected pirates from ships that had performed the rescue, it remains to be seen whether ships would

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<sup>118</sup> Fox, Peter D. "International Asylum and Boat People: The Tampa Affair and Australia's Pacific Solution." *Md. J. Int'l L.* 25 (2010), 357

<sup>119</sup> Devetak, Richard. "In fear of refugees: The politics of border protection in Australia." *The international journal of human rights* 8, no. 1 (2004), 105

<sup>120</sup> IMO. "MSC 78/26/Add.2 Annex 34 Resolution MSC.167(78) (adopted on 20 May 2004) Guidelines on the treatment of persons rescued at sea." (2004), 8 para. 6.14

<sup>121</sup> Kraska, James. "Coalition Strategy and the Pirates of the Gulf of Aden and the Red Sea." *Comparative Strategy* 28, no. 3 (2009), 209

avoid rescuing suspected pirates and violate the LOSC if there are no guarantees that some naval ship in the patrol area would take responsibility for rescued suspected pirates. Should there be refusals from naval vessels, this could therefore mean there could be more risks of suspected pirates not being rescued by ships with PMSC guards.

### 6.3 Questions arising post rescue of suspected pirates by ships with VPDs onboard

Due to the presence of state agents, ships with VPDs onboard taking on rescued suspected pirates implies that a state could have some form of custody over suspected pirates. In that situation, which state in question may have de facto custody of rescued suspected pirates is clear: the state that had deployed the VPD. However, despite the presence of VPDs, many responsibilities related to rescued is directly addressed to the master. This makes it difficult for VPDs to take custody immediately of rescued suspected pirates without the authorisation of the master.

Shipmasters for instance, have a duty to “do everything possible, within the capabilities and limitations of the ship” to treat rescued suspected pirates “humanely and to meet their immediate needs”<sup>122</sup>. Even if the state deploying the VPDs have powers of arrests, there appear to be no ways for these powers to override and relieve the master from his or her immediate responsibilities. Although the VPD or crew members may assist in the process of rescue, it should be the master that decides on what circumstances rescued suspected pirates are released from his care to safety<sup>123</sup>. Only upon an authorisation from the master can VPDs officially take rescued suspected pirates from his or her care and relieve the master of his or her duties.

Although the master retains authority, it would be inconceivable for whatever reason for a master to refuse to officially transfer responsibility of rescued suspected pirates to VPDs especially if they already possess official state authorisation for their presence on the ship. If the master refuses, the question regarding which state should take eventual custody of rescued suspected pirates resurfaces again.

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<sup>122</sup> IMO. "MSC 78/26/Add.2 Annex 34 Resolution MSC.167(78) (adopted on 20 May 2004) Guidelines on the treatment of persons rescued at sea." (2004), 5, para. 5.1.2

<sup>123</sup> Ibid., 6, para. 5.1.6



Practically, it would be difficult for a master to find an alternative should he or she refuse to hand over suspected pirates to the VPD. Furthermore, the IMO expects that the eventual responsibilities after the immediate rescue should fall upon states as there is an obligation for states to “co-ordinate and co-operate in relieving the master of the responsibility to provide follow up care” for persons rescued at sea<sup>124</sup>. In relieving the master of his or her responsibilities, the IMO aims to reassure “masters of ships providing assistance are relieved of their responsibility within a reasonable time”<sup>125</sup>. The IMO also obliges the master to contact the state responsible for search and rescue where suspected pirates are rescued or “any other government authority that may be able to assist”<sup>126</sup> if the former is not possible. Using the presence of the VPD as a representative of government authority to provide assistance to rescued suspected pirates appears to be a suitable course of action that the master of the ship should take and upholds the obligations set out by the IMO.

Therefore, it would be legal, practical or even encouraged for the interests of the rescued suspected pirates for a master to transfer his or her responsibilities over to the VPD.

#### 6.4 Comparison of rescues for suspected pirates by ships with PMSC guards and VPDs

In contrast to PMSC guards, a VPD is unlikely to encounter similar problems regarding the disembarking of rescued suspected pirates. It would be illogical for a state to have authorised a VPD to withdraw support from the team only on the basis that they had gone beyond their normal task of protecting the ship and temporarily held suspected pirates custody after their rescue. Even if a state itself is unable to commit resources to assist, it would be logical that it would through diplomatic channels to request for assistance from other states.

This could therefore mean, suspected pirates have higher chances of rescue if they are repelled from a ship with VPDs than one with PMSC guards as the VPD can rely on the support from their corresponding state.

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<sup>124</sup> IMO. "MSC 78/26/Add.2 Annex 34 Resolution MSC.167(78) (adopted on 20 May 2004) Guidelines on the treatment of persons rescued at sea." (2004), 3, para. 1.2

<sup>125</sup> Ibid., 4, para. 2.6

<sup>126</sup> Ibid., 4, para. 5.1.4

## 7 Future: Reforms to the PMSC guards and VPDs model of on board ship protection

Based on the findings in the previous section, the following recommends how these two solutions of using PMSC guards and VPDs can be implemented with better accountability over the use of force. In addition, more clarity could be provided at better ensuring events post rescue are properly managed in relation to the deprivation of liberty. Finally, it concludes with how the methods of ship protection could be overhauled completely as a potential radical new solution for on board ship protection shifting away from both the PMSC guards and VPD models.

### 7.1 Changes to improve accountability over the use of force

#### 7.1.1 PMSC guards

A solution would be required for ships at present continuing to use PMSC guards to ensure that all potential unlawful use of force is investigated properly by the relevant authorities. Currently, the IMO deems the reporting of attacks, “both successful and unsuccessful attacks” as a vital need for the ship owners, companies, master and crew<sup>127</sup>. To preempt the avoidance of reporting for violent incidents at sea, a review could be done regarding reporting and record keeping for flag states that it requires from the master of a ship.

For reforms to the existing IMO recommendations, there could be new requirements for ships travelling through areas affected by piracy to certify that the ship had not encountered any incidents involving suspected pirates. For ship masters, they should be required to confirm that navigation had been safe throughout the entire journey without any encounters with suspected pirates. This would be favourable over only reporting incidents for successful and unsuccessful suspected pirate attacks. With this policy, ship masters would be actively lying if an incident

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<sup>127</sup> IMO. “MSC.1/Circ.1334 Piracy and Armed Robbery against ships Guidance to shipowners and ship operators, shipmasters and crews on preventing and suppressing acts of piracy and armed robbery against ships.” (2009), 1 para. 1

of a pirate attack remained unreported. This would likely reduce incentives to withhold information regarding an attack. The onus upon the master would be to report of the absence of an encounter rather than actively report of an encounter. Having this requirement would likely be easy to implement as the only likely cost would be extra time required for administrative paperwork to be completed by the master of the ship at the conclusion of a journey. This pressure may therefore create a better level of transparency for navigation at sea and may bring more potential future controversies involving PMSC guards to light.

#### 7.1.2 VPDs

The impacts of the *Enrica Lexie* case is said to have sparked a shift in policy for Italy and other countries originally to take a more welcoming approach to PMSC guards and phase out the use of VPDs<sup>128</sup>. Much of the private security industry though, still appears frowned upon due to its role in challenging the ingrained norm that states should be the actor holding a monopoly on legitimate violence<sup>129</sup>. However, deficiencies in the state's abilities and the lack of political will to exercise powers they possess to repress piracy has also somewhat "forced" governments to accept the reality that PMSC guards are here to stay<sup>130</sup>.

However, this is not a trend that should be followed due to the efforts to develop a better system of guidelines for PMSC guards in the form of the Montreux document are only just emerging and not legally binding. Rather, efforts to promote the use of PMSC guards should be halted temporarily. From the perspective of ensuring accountability over alleged unlawful use of force, continuing to use VPDs would be a safer option that is less problematic. The direct authorisation from states is what provides guarantees that controversial incidents will be properly investigated and if necessary, have the VPDs involved prosecuted for the unlawful

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<sup>128</sup> Cusumano, Eugenio, and Stefano Ruzza . "Security privatisation at sea: Piracy and the commercialisation of vessel protection." *International Relations* 32, no. 1 (2018), 97

<sup>129</sup> van Ginkel, Bibi, van der Putten Frans-Paul , and Willem Molenaar . "State or Private Protection against Maritime Piracy?." *A Dutch Perspective/Netherlands Institute of International Relations 'Clingendael*, (2013), 34

<sup>130</sup> Ibid.

use of force. This can be observed and mentioned before in the *Enrica Lexie* case<sup>131</sup>. So long as the proper checks and balances over VPDs are used properly, accountability over their use of force may be better ensured. Hence, what needs to change to improve accountability is for states to make better use of VPDs until the proper and better system is in place to manage PMSC guards in the future for the long term. By that time, only likely then would PMSC guards be a comparable and legally acceptable solution to protect ships from piracy with the safeguards available for ensuring accountability for unlawful use of force.

## 7.2 Changes to improve clarity over the deprivation of liberty for rescued suspected pirates

### 7.2.1 PMSC guards

What is clear in relation to the rescue of suspected pirates is the need to ensure their disembarkation to a place of safety after the initial process of being taken out of the water and provided for their immediate needs. Beyond this, to improve clarity for their status after rescue by ships with PMSC guards, the international community could define more clearly that one specific state such as the flag state, should be responsible for arrest and exercise of adjudicative jurisdiction after the master has upheld his or her duties to take care of their immediate needs. With this solution, naval patrols acting on behalf of their own corresponding state would likely be more willing to take aboard transfers of rescued suspected pirates from ships, knowing ultimately that it would not be their state that has the ultimate responsibility for arresting suspected pirates and putting them on trial. This may prevent rescued suspected pirates from being “stuck” on their rescue ship in the future and reduce the possible incentive to abandon suspected pirates repelled from an attack.

Taking into account the likely inability of Somalia assumed to be the “flag state” of pirate ships or the possible unknown nationality of ships, the responsibility of adjudicative jurisdiction could be transferred to countries of the region willing to exercise these powers over rescued

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<sup>131</sup> *Italy v India* . "In the dispute concerning the enrica lexie incident The italian Republic v. The republic of India Notification under article 287 and annex VII, article 1 of UNCLOS and statement of claim and grounds on which it is based 26 June 2015." *ITLOS*, (2015), 5, para. 14

suspected pirates as seen with the example of Kenya<sup>132</sup>. The concerns raised for the conduct of ships with PMSC guards for the potential refusal to rescue could therefore be avoided by a more clear-cut assignment or exemption of responsibilities to states.

### 7.2.2 VPDs

Although VPDs may possess more powers than PMSC guards to better deal with the question of state responsibility over rescued suspected pirates, the question regarding what VPDs can do after receiving their custody from the master remains. In particular, whether they can make a formal arrest after taking the responsibility of providing care to rescued suspected pirates is an issue that needs to be resolved.

It is possible that the precedents established by shiprider agreements permitting the embarking of “law enforcement officials from the region on law enforcement vessels of patrolling naval states” could provide a solution<sup>133</sup>. The system aims to permit an embarked law enforcement official to bring suspected pirates at sea “directly within the jurisdiction of the shiprider’s home state” even though the embarked official does not enforce from their own warship or government craft<sup>134</sup>.

The question in connection to rescue would then be whether VPDs can also exercise their jurisdiction over suspected pirates on the ship they are protecting if the shiprider agreements already permits the “absence” of a warship commissioned by the enforcing state. Criticism against such agreements notes that article 107 of the LOSC could be undermined by the poorer transparency and abuse of enforcement powers<sup>135</sup>. For example, if a Kenyan shipriding official was onboard a US naval vessel, a suspected pirate awaiting arrest would be misled into thinking they were under US jurisdiction rather than Kenyan jurisdiction based on the markings displayed on the arresting ship. The same argument could be applied in rescue by ships with

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<sup>132</sup> Gathii, James Thuo. "Kenya's piracy prosecutions." *American Journal of International Law* 104, no. 3 (2010), 418

<sup>133</sup> Geiss, Robin, and Anna Petrig. *Piracy and armed robbery at sea: the legal framework for counter-piracy operations in Somalia and the Gulf of Aden*. Vol. 1. Oxford University Press, (2011), 86

<sup>134</sup> *Ibid.*, 88

<sup>135</sup> *Ibid.*, 93

VPDs onboard where a suspected pirate being rescued would not be able to know which state is arresting them until they are taken aboard the ship.

Despite the problems raised, what this example shows is that the international community accepts that a state could potentially exercise jurisdiction without their own warship or government crafts under agreements and specific circumstances. These changes show that perhaps in the future, the international community may be able to accept the enforcement jurisdiction of a VPD has over suspected pirates rescued after an attack with clear limits. To solve these legal concerns over the abuse of enforcement powers, it could be specified that their powers of arrest can only be exercised after rescue as a result of self-defense and not by active seizure. With this solution, its legality may be less likely challenged. This would be a means of creating more clarity over whether VPDs can exercise powers of arrest; and if they can, what limited circumstances they can exercise their powers.

### 7.3 Radical new solutions?

Alternative solutions to onboard ship protection should also be considered in the future. Often times more international cooperation may be the best solution for the next step forward. One such radical solution could involve the deployment of VPDs under the authority of the UN, authorised by resolutions from the United Nations Security Council (UNSC). A resolution could authorise the deployment of troops on ships travelling through areas affected by piracy under the authority of the UN.

For one state that would likely benefit from such solution and have an incentive to influence the future of onboard ship protection, it would be India especially after the *Enrica Lexie* case. As India has also been active in deploying troops on land for peacekeeping<sup>136</sup>, there could also be potential for India to have the same level of involvement at sea under the banner of the UN. Should India be permitted by UNSC authorisation to deploy Indian VPDs on ships, it could give India better control over the issue of ship protection and address its concerns over the possible threats normal VPDs could pose to its citizens. An event similar to the *Enrica Lexie*

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<sup>136</sup> Thakur, Ramesh Chandra, Chiyuki Aoi, and Cedric De Coning. "Unintended consequences of peacekeeping operations." *United Nations University Press*, 157

case may also be prevented if Indian VPDs authorised by the UN were allowed to protect ships on the seas.

This system may also better protect ships flying flags of convenience as the overwhelming assumption is that countries offering these flags from open registries may not necessarily have adequate protection for these ships. Precedents for the use of foreign security forces on ships are already developing with the ever changing threats and security concerns of governments. VPDs are already permitted on ships that do not correspond with the flag state for ships operating for the world food program<sup>137</sup>. The possible use of French forces onboard non-french flagged ships between the UK and France may also create more future precedence for the means to use military or police forces to protect ships not under the flag of that state<sup>138</sup>. Although terrorism is different to piracy, both problems are similar enough to be analysed in the same respect for how they should be tackled.

For such solutions to be implemented effectively, this may only be possible and heavily dependent on the relations between the flag state and the state offering protection under the UN. A voluntary approach to receiving VPD protection should allay concerns of eroded flag state sovereignty over its ships. When coupled with the UNSC solution, as long as any type of protection from the UN is not considered mandatory and built on an opt in approach, flag state sovereignty would not be eroded by foreign VPDs so long as they legally consent to their use aboard ships. Whether this solution can be viable though, requires further in-depth assessments and research to prove if the future development of ship protection by military forces would have a greater role for states other than the flag state.

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<sup>137</sup> Neri, Kiara. "The use of force by military vessel protection detachments." *Mil. L. & L. War Rev.* 51, (2012), 76

<sup>138</sup> BBC. "Armed French police start cross-Channel ferry patrols." *BBC*, (2016).

## 8 Conclusion

In conclusion, what is certain is that the old solutions envisioned by the LOSC is out of date and unable to fully tackle the issue of piracy in the present day. Although there would not be the complete absence of states willing to implement the said LOSC solutions, alternative solutions are bound to remain for the long term. As the number of states willing to follow the original solutions envisioned by the LOSC continues to decline due to its ineffectiveness and financial costs, the international community needs to be prepared to address the legal questions created by their preference for alternative solutions.

These solutions in the form of PMSC guards and VPDs both have their benefits and flaws as a solution to protect ships from piracy. VPDs however despite the *Enrica Lexie* case, appears preferable over PMSC guards from the context of ensuring accountability over the use of force and the ability to better manage post rescue issues. Whether states in the future would promote the VPD model for these said benefits to the problems seen in the status quo is unknown.

Although VPDs may be a better solution, this does not mean there is no place for PMSC guards in the future efforts to tackle piracy. With continued efforts to reform and change the system, one day in the future, the presence of PMSC guards in ship protection may be accepted as a normal part of the efforts to tackle piracy alongside military personnel. So long as there is a focus on ensuring that all unlawful acts are held to account and that PMSC guards exercise their tasks with the utmost level of care and respect for international law, this should make them a viable and acceptable solution.

However, as the efforts to tackle piracy are ever developing and changing, there is no way to predict with certainty what policies states will pursue in the years to come. A hypothetical controversial event involving PMSC guards may still change the attitudes states have towards PMSC guards in the same manner that the *Enrica Lexie* case did for VPDs. Efforts to improve governance in Somalia may also rein in piracy from its root cause and reduce the need to implement both solutions in the future anyway. Hence, how will onboard ship protection from piracy develop remains to be seen.



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