



CENJOWS

ISSUE BRIEF

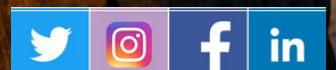
IB/27/26

REGULATING PRIVATE GUNS AT SEA: LEGAL STATUS AND RESPONSIBILITY OF ON-BOARD MARITIME SECURITY GUARD

MS SEHR SANNAH KAPUR



www.cenjows.in



CENTRE FOR JOINT WARFARE STUDIES



CENJOWS

REGULATING PRIVATE GUNS AT SEA: LEGAL STATUS AND RESPONSIBILITY OF ON-BOARD MARITIME SECURITY GUARDS



Sehr Sannah Kapur is a research intern at **CENJOWS**

Introduction

The late 20th and early 21st centuries have witnessed a drastic shift in maritime security with the increase in piracy, especially the USS Cole¹, Limburg Tanker² and Achille Lauro³ incidents having taken place in pre-reported High Risk Areas (HRAs) for piracy. These maritime attacks significantly increased the need for the deployment of naval forces within these pre-identified piracy regions. The Naval powers, being unable to combat the increased levels of modern piracy in the regions of Somalia, the Gulf of Aden, the Red Sea and the Indian Ocean, created a lacuna in the maritime industry.

Although the Naval Forces have dominated the maritime security industry for centuries, the gap in deployment and safeguarding vessels resulted in the creation of Private Maritime Security Companies (PMSCs) and the employment of Privately Contracted Armed Security Personnel (PCASP), thus providing a safe and secure passage for merchant vessels to sail through in the regions identified as High Risk Areas (HRAs)⁴. This present economic model to combat piracy stems from the 16th century notion of privateering⁵ and operates on the premise of combatting piracy

through the regions identified HRAs by employing PCASP as civilian security personnel to protect the vessel, cargo and crew onboard⁶.

Dwelling on the increased use of PCASPs in HRAs, there has been a significant rise in issues stemming from the violation of coastal state sovereignty, also in acts and rules of engagement, thus highlighting the lack of binding international regulations and guidelines governing their status and accountability during the voyages.

This article, by extensively examining through a doctrinal approach, shall provide a comprehensive understanding of the notion of PCASP under international law and an analysis of the jurisdictional interpretative ambiguity and the jurisdictional sovereignty limitations with respect to the open carriage of weapons by PCASP onboard merchant vessels. Furthermore, this paper shall critically analyse case studies to address the lacuna in international law wrt the open carriage of weapons by PCASP onboard merchant vessels.

PCASP as Civilians: the Status Vacuum

The notion of PCASP stems from the lacuna in the maritime security industry to combat piracy. While operating under an economic model, the notion has gained immense traction due to the increased need for these personnel on board commercial vessels. It is imperative to understand that PCASP have not been formally incorporated into the defence forces of states. However, this further ignites issues about the rights and status of PCASP during voyages.

The Geneva Convention under International Humanitarian Law (IHL) in co-relation with the St Petersburg Declaration⁷ identifies a clear distinction between the terms 'combatant' and 'civilian', drawing on their complex inter-relation within the conflict zone only. "Combatants" following the nineteenth century were collectively identified to include, but not limited to, the military force personnel of a State.⁸ However, relying on the Principle of Distinction⁹ and the Geneva Convention Additional Protocol (I) Article 43¹⁰, distinctively defines the notion of 'lawful combatant' and places significant emphasis on the personnel identified as a member of the armed forces of a state party to the conflict, and these armed forces personnel have under IHL the right to directly engage in hostilities.

PCASP are unambiguous civilians as they are not part of the armed forces of any state and do not carry out duties on behalf of the state. While they engage in anti-piracy operations, these operations do not constitute armed conflict under international law. Thus, their status as combatants is non-existent, and they are considered civilians under international law and are not subject to the same privileges as those provided to combatants. Furthermore, there exist no provisions under the United Nations Convention on Law of the Sea¹¹ that award PCASP with a special status and provide them with immunity, in turn safeguarding them from domestic prosecution for having engaged or killed pirates.

The rights awarded to PCASP are subject to the Flag State and the Coastal State under whose maritime jurisdiction the act has occurred, and whether they are awarded the right to self-defence under the legislation. Thus, requiring both Flag States and Coastal States to undertake measures for the protection of PCASPs undertaking anti-piracy operations by subjecting them to a similar status as that of naval personnel under IHL, hence providing them with immunity for their engagement in tackling piracy in the HRAs.

Regulatory Framework

- **International Framework**

The International Maritime Organisation (IMO), having been at the forefront of maritime evolution, has extensively addressed the issue of maritime security through the establishment of the Maritime Safety Committee(MSC). The Committee has, under MSC.1/Circ.1334¹², laid down the acceptable defensive practices for merchant vessels to carry firearms and employ PCASP, thus outlining the need for compliance with national laws of the Flag State, adhering to the legal requirements of the Port and Coastal State before carriage of firearms and employment of PCASPs onboard a merchant vessel. Moreover, drawing on the acceptable practices provided by multiple MSC circulars and IMO Resolutions published in 2009¹³ and 2015¹⁴, a positive approach was undertaken by the IMO, addressing the engagement criteria of PMSC moderately, while placing a significant burden on Flag States, PMCs, Masters, and Shipowners to comply with established national laws, policies, and

regulations.

MSC.1/Circ.1405/Rev.3 (2016)¹⁵ recognised the need for the implementation of Best Management Practices to Deter Piracy and Enhance Maritime Security in the Red Sea, Gulf of Aden, Indian Ocean and Arabian Sea ¹⁶ (BMP5). BMP5¹⁷, provided by the International Charter for Shipping (ICS), operates as an advisory opinion which also provides operational recommendations for the functions undertaken by PCASP during voyages within HRAs specifically. It is imperative to note that BMP5 is not a binding legal international regulation or document; however, it is presently the only document in the maritime security industry which provides operational guidelines to the PMSCs and PCASP regarding their roles onboard commercial vessels.

The Arms Trade Treaty¹⁸ is the latest international treaty which can be considered to implicitly address the operations and trade of small arms and ammunition, specifically the Operational Equipment Packages (OEP) used by PCASPs during HRA voyages. Furthermore, on an implicit reading of Article 2(2)¹⁹, the treaty ambit can expand to cover OEPs under maritime arms trade. While this treaty does not explicitly govern the trade of OEPs in the high seas, it does implicitly place an extensive burden on PMSCs to comply with the national laws of Flag States of the vessels engaging in the trading of OEPs.

The United Nations, *Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All its Aspects* (PoA)²⁰ and the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime (Firearms Protocol)²¹ function as soft law, addressing the need for preventive trade measures to be implemented to curb the trafficking of arms and ammunitions part of the OEPs during voyages. These provisions fail to explicitly hold the Flag States of the PMSCs responsible for the disappearance of part or whole OEPs of the PCASPs employed by them. Dwelling deeper, these provisions do provide for frameworks for the implementation of legal compliance, requiring the Flag States of PMSCs to maintain a registry regarding the OEPs²². However, failure of this regulatory practice, especially in the case of Sri Lanka²³,

wherein whole OEPs disappeared during voyages, and the loss of documentation further violated these soft law provisions.

Sovereignty and Weapon Threat

The notion of maritime navigation and the notion of maritime security have been at odds since the 17th century. While historically the freedom to navigate was enforced by Hugo Grotius in the 15th century,²⁴ upheld under the United Nations Convention on Law of the Sea²⁵ (UNCLOS), the notion of maritime security has been addressed extensively with the criminalisation of piracy²⁶ under the 1856 Paris Declaration²⁷ and UNCLOS. Dwelling further, below is an analysis under international law on the jurisdictional interpretative ambiguity and the jurisdictional sovereignty limitations wrt the open carriage of weapons by PCASP onboard merchant vessels.

- **Jurisdictional Interpretative Ambiguity**

- **Territorial Sea**

Territorial Sea constitutes up to 12 nautical miles as part of the maritime jurisdiction of Coastal States under Part II UNCLOS²⁸. Article 19²⁹ recognises the right of innocent passage to all vessels transiting through the territorial sea of the Coastal State. However, under Article 19(2), the right to transit is *'prejudiced to the peace, good order or security of the coastal state'* which is subject to the interpretation of the Coastal State.

While there exists a dissenting opinion regarding the carriage of OEPs (unsealed arms and ammunition) onboard vessels in territorial waters³⁰, States, including India, have considered this act as hostile and in violation of the peace and security of the Coastal State.³¹ This further raises the legal issue, drawing on the notion of armed transit under Article 25³². Furthermore, reading these provisions along with Article 27³³, an explicit interpretation can be drawn regarding the rights of the Coastal State. Having interpreted the presence of OEPs as not innocent³⁴, the State has the authority to arrest the vessel and the crew onboard through the execution of its criminal jurisdiction.

➤ **Contiguous Zones**

The Contiguous Zone is limited to 24 nautical miles from the baseline and is considered to be part of the maritime jurisdiction of the Coastal States pursuant to Article 33³⁵. However, the rights of Coastal States are limited in nature due to the jurisdiction of Flag States on vessels.

Thus, in cases such as *Enrica Lexi*³⁶, wherein the vessels engage in acts criminal in nature, pursuant to the legislation of the Coastal State within the territorial waters, then during the act of hot pursuit³⁷, the Coastal State has jurisdiction to board the vessel of a foreign Flag State.

- **Exclusive Economic Zones**

The Exclusive Economic Zone (EEZ) extends to 200 nautical miles under Part V UNCLOS³⁸. On an implicit reading of Article 56³⁹ and the ITLOS judgment in the *M/V Virginian G* case⁴⁰, the Coastal States have regulatory jurisdiction over vessels and the activities undertaken by them in the EEZ, if the vessel is known to have committed illegal actions⁴¹. Thus, on performing a layered unpacking, it can be argued that trade or transfer of OEPs between vessels in the EEZ of the Coastal State is an economic activity within the jurisdictional ambit of the Coastal State and subject to the definitive interpretation of the terms 'innocent' and 'prejudice' within Article 19⁴².

- **High Seas**

PCASP enjoys the majority of freedoms on the high seas⁴³, drawing on the notion of the freedoms of the high seas⁴⁴ and being subject to the legislative jurisdiction of the Flag State of the vessel.

Jurisdictional Sovereignty Limitation

- **Flag States**

The majority of the PCASPs operate within and on the border regions of the HRAs, which in most cases are within the territorial jurisdiction or EEZ of numerous Coastal States. It is axiomatic that their activities fall within the legislative jurisdiction of Coastal States; however, beyond territorial waters, they are still subject to the Flag States of the PMSCs. The majority of the Flag States have undertaken licensing frameworks for the deployment of PCASP; these frameworks vary from being comprehensive to non-existent.

The UK is one of the few Flag States which has, under the Maritime Coastguard Agency (MCA), provided vessels deploying the UK flag guidelines⁴⁵ regarding the selection of the PMSC and deployment of PCASP onboard vessels transiting through HRAs. While the document substantively engages with the ISO 28007 certifications⁴⁶, it limits the use of PCASP to the high seas itself, thus limiting the Flag State liability.

The lack of flag state accountability and due diligence in terms of PMSC selection highlights the limited international regulatory frameworks in place for the uniform conduct of PCASPs and OEPs onboard vessels. Moreover, dwelling deeper, it can be argued that there exists minimal oversight in terms of carriage of unsealed weapons by Flag States. Thus, limiting the status of PCASP onboard to that of commercial contract holders.

- **Coastal State**

Coastal States and Port States enjoy the same rights under UNCLOS. These States are required to have in place national maritime guidelines or legislation parallel to MSC-FAL.1/Circ2⁴⁷, addressing the notification guidelines of the Coastal State and the carriage of OEPs onboard foreign-flag state vessels while entering their maritime jurisdiction, thus allowing for clarity in terms of OEPs. Sub-sections 5.12.2 and 5.12.5 of MSC-FAL.1/Circ2⁴⁸ clearly assert the need for compliance with port national laws for the carriage of weapons off the vessel, as non-compliance would result in criminal charges, as was observed in the

case of M/V Seaman Guard Ohio⁴⁹.

USA, alternatively, requires each foreign-flagged state vessel having PCASP aboard to have a pre-established Vessel Security Plan⁵⁰ which outlines the role of PCASP and declares the carriage of weapons onboard before entering the maritime jurisdiction of the state, thus placing the accountability on the Flag State. Norway similarly requires prior notification to the Norwegian Maritime Authorities⁵¹ regarding the carriage of OEPs and PCASP onboard foreign-flag state vessels entering the maritime jurisdiction of the State.

While Coastal States have the right to enforce weapon control measures to safeguard their sovereignty, they must provide guidelines regarding the carriage of OEPs within their maritime jurisdiction to avoid the vessel engaging in a multiport voyage to ensure compliance and criminal prosecution, thus respecting the sovereignty of the State.

Case Studies: Immunity V. Accountability

- **Enrica Lexi**

This case raised the questions regarding the intersection between accountability, immunity and sovereignty. Two Italian Mariners deployed for vessel protection onboard an Italian-flagged vessel named 'Enrica Lexi' opened fire at an Indian fishing boat in the Indian EEZ, killing two fishermen onboard, under the pretext of the fishing vessel being a pirate vessel and the fishermen being armed. The legal proceedings resulted in a complex legal dispute between India and Italy.

India asserted its legislative jurisdiction under Article 56 UNCLOS⁵², while Italy maintained that the Italian Mariners were entitled to immunity as they were state agents and were performing state operations by protecting the Flag State vessel. The International Tribunal for Law of the Sea, through its arbitral tribunal⁵³, held and concluded that the Italian Mariners were considered "state officials," thus enjoying immunity "*ratione materiae*" under Article 7 of the ILC Draft Articles on State Responsibility⁵⁴.

Furthermore, the question of territorial tort being observed can be found under Article 12 of the United Nations Convention on Judicial Immunity of the States and their Property⁵⁵.

While the Italian Mariners were entitled to immunity under international customary law, as they were state officials and formal members of the defence forces of the State, they were acting on behalf of their state. Furthermore, legally, India did not have the jurisdiction to try the marines under its criminal jurisdiction, even though the act took place in the EEZ of the country and against the citizens of the country due to India being a signatory of the UNCLOS and having ratified the same, thus showcasing the lack of jurisdiction of a coastal state with respect to acts of violence taking place in the exclusive economic zone of the said coastal state. This further raises concerns regarding the sovereignty of the state.

- **M/V Seaman Guard Ohio**

MV Seaman Guard Ohio (the vessel), owned by a US-based PMSC, sailing under the Flag State of Sierra-Leone, provided maritime security support to vessels entering the Indian Ocean and Red Sea HRAs. The location of the vessel with respect to the Indian Territorial Waters (TTWs) has conflicted, as that of 12.8nm and 10.8nm⁵⁶, resulting in the question of violation of the Indian Arms Act⁵⁷, as India does not permit commercial vessels to carry unsealed weapons and OEPs within its territorial waters. Another issue arose during the litigation with respect to the lack of documentation, as the master of the vessel was unable to provide documentation about the license to the weapons seized onboard, which had been termed as illicit by India.

While the court identified the right of innocent passage, the vessel was entitled to enter the TTWs, as enshrined under Article 19(1) UNCLOS⁵⁸, the vessel was found to violate Article 19(2) 'prejudice, good order or security of the coastal state'⁵⁹ due to the presence of unauthorised weapons onboard during the transit. Moreover, the Arms Act, Section 3,⁶⁰ prohibits the possession of unlicensed firearms and ammunition.

Domestic Courts granted the acquittal on the opinion that the vessel was anchored, awaiting refuelling⁶¹. However, the mere presence of the unauthorised weapons onboard, the lack of prior notification and permission from the Authorities was regarded as a threat to the sovereignty of the State. Moreover, this case raised major concerns regarding the carriage of OEPs within the territorial sea of a Coastal State and highlighted the lack of regulations, thus threatening the 'peace and security' of the Coastal State.

Reforms and Conclusion

The mere presence of OEPs on board vessels is a major concern regarding the sovereignty of states. There is an eminent need for the construction of uniform international guidelines combining provisions of BMP5⁶² and International Safety Management Code⁶³ to regulate the embarkment, onboard-storage and disembarkment of OEPs.

The need for legislation addressing PCASPs and OEPs has increased at both the international and national levels. While international treaties⁶⁴ hold the Flag States accountable for crimes committed by their vessels or personnel within the territorial jurisdiction of Coastal States, their existence is limited by the willingness of enforcement of accountability by Flag States. Thus, requiring codification of customary practices to ensure accountability at all levels.

To conclude, the law has always been slow to develop and govern global issues due to its nature. International law has developed on issues primarily resulting from its absence. With the increasing number of PCASPs being deployed onboard vessels transiting through HRAs, there is an imminent need to safeguard their rights and provide regulations for the handling of the OEPs.

DISCLAIMER

The paper is the author's individual scholastic articulation and does not necessarily reflect the views of CENJOWS, the Defence forces, or the Government of India. The author certifies that the article is original in content, unpublished, and it has not been submitted for publication/web upload elsewhere and that the facts and figures quoted are duly referenced, as needed and are believed to be correct.

ENDNOTES

- ¹ Federal Bureau of Investigation, “USS Cole Bombing,” October 12, 2000.
- ² United States Department of State, *Country Report on Terrorism* (2004).
- ³ US Association for Diplomatic Studies and Training, “The Achille Lauro Hijacking—‘These Sons of Bitches Must Be Prosecuted,’” September 29, 2014.
- ⁴ Carolin Liss, “PMSCs in Maritime Security and Anti-Piracy Control,” in *Routledge Handbook of Private Security Studies*, ed. Rita Abrahamsen and Anna Leander (2015).
- ⁵ Molly A. Warsh, “Atlantic Piracy 2.1: Reading 2 – 16th Century Piracy,” in *Atlantic Piracy in Global Perspective, c. 1500–1750* (2024).
- ⁶ Liss, “PMSCs in Maritime Security.”
- ⁷ *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight (St Petersburg Declaration)*, adopted November 29–December 11, 1868, entered into force December 11, 1868.
- ⁸ Isabelle Davion, “Combatants (Nineteenth–Twenty-First Century),” June 22, 2020
- ⁹ International Committee of the Red Cross, “Distinction.”
- ¹⁰ *Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol I)*, art. 43.
- ¹¹ *United Nations Convention on the Law of the Sea*, December 10, 1982, 1833 U.N.T.S. 397.
- ¹² IMO, *MSC.1/Circ.1334: Guidance to Shipowners, Ship Operators, Shipmasters and Crews on Preventing and Suppressing Acts of Piracy and Armed Robbery Against Ships* (June 23, 2009).
- ¹³ International Maritime Organization, *Resolution A.1025(26): Code of Practice for the Investigation of Crimes of Piracy and Armed Robbery Against Ships* (December 2, 2009).
- ¹⁴ IMO, *MSC.1/Circ.1333/Rev.1: Recommendations to Governments for Preventing and Suppressing Piracy and Armed Robbery Against Ships* (12 June 2015)
- ¹⁵ International Maritime Organization, *MSC.1/Circ.1405/Rev.3: Revised Interim Guidance to Shipowners, Ship Operators and Shipmasters on the Use of Privately Contracted Armed Security Personnel on Board Ships* (2016).
- ¹⁶ *Best Management Practices for Protection against Somalia-Based Piracy (BMP5)*, 5th ed. (2018).
- ¹⁷ Ibid.
- ¹⁸ *Arms Trade Treaty*, adopted April 2, 2013, entered into force December 24, 2014, 3013 U.N.T.S. 269.
- ¹⁹ Ibid., art. 2(2).
- ²⁰ United Nations, *Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All Its Aspects*, UN Doc A/CONF.192/15 (2001).
- ²¹ *Firearms Protocol*, adopted May 31, 2001, entered into force July 3, 2005.
- ²² Ibid., art. 7.
- ²³ Dryad Global, “Vessel Protection – Why Were Floating Armouries Created?,” July 22, 2024.

-
- ²⁴ Hugo Grotius, *The Freedom of the Seas* (1609).
- ²⁵ *Id at 11*.
- ²⁶ Cicero, *De Officiis*, I.34; Alfred P. Rubin, *The Law of Piracy* (1988), 10–11; Masha Fedorova and Piet Hein van Kempen, *A History of Maritime Piracy*.
- ²⁷ *Paris Declaration Respecting Maritime Law*, April 16, 1856.
- ²⁸ Convention on the Territorial Sea and the Contiguous Zone (adopted 29 April 1958, entered into force 10 September 1964) 516 UNTS 205, art 1.; UNCLOS, Part II.
- ²⁹ UNCLOS, art. 19.
- ³⁰ UNODC, *Summary of Laws Regulating Floating Armouries* (2020).
- ³¹ *Dudnik v Inspector of Police* [2018] 1 MLJ (CrI) 173 (India)
- ³² UNCLOS, art. 25.
- ³³ UNCLOS, art. 27.
- ³⁴ Dryad Global, “Vessel Protection Floating Armouries Legislation,” September 1, 2020.
- ³⁵ UNCLOS, art. 33.
- ³⁶ Enrica Lexi Case (India v Italy)
- ³⁷ UNCLOS, art. 111.
- ³⁸ UNCLOS, Part V.
- ³⁹ UNCLOS, art. 56.
- ⁴⁰ *M/V “Virginia G”* (Panama v Guinea-Bissau), ITLOS Reports 2014.
- ⁴¹ Dolliver Nelson, “Exclusive Economic Zone,” in *Max Planck Encyclopedia of Public International Law* (2008).
- ⁴² UNCLOS, art 19.
- ⁴³ UNCLOS, Part VII.
- ⁴⁴ *Convention on the High Seas*, April 29, 1958, art. 2.
- ⁴⁵ Department for Transport, “Interim Guidance to UK Flagged Shipping...” (December 6, 2011).
- ⁴⁶ International Organization for Standardization, *ISO 28007-1:2015* (2015).
- ⁴⁷ 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* (25 May 2012), 1.
- ⁴⁸ *Ibid*.
- ⁴⁹ *Dudnik v Inspector of Police*.
- ⁵⁰ 33 CFR Part 104
- ⁵¹ [Norwegian Maritime Authority](#), “Use of Armed Guards,”
- ⁵² UNCLOS, art 56.
- ⁵³ UNCLOS, Annex VII.
- ⁵⁴ International Law Commission, *Draft Articles on State Responsibility* (2001), art. 7.
- ⁵⁵ *United Nations Convention on Jurisdictional Immunities of States and Their Property*, 2004, art. 12.

⁵⁶ Human Rights at Sea, *MV Seaman Guard Ohio* (2015).

⁵⁷ Arms Act 1959 (India).

⁵⁸ UNCLOS art 19(1)

⁵⁹ UNCLOS, art 19(2).

⁶⁰ Arms Act 1959, sec 3.

⁶¹ Centre for Maritime Law, “Dudnik v Inspector Police.”

⁶² BMP5

⁶³ International Maritime Organization, *ISM Code* (2018).

⁶⁴ *United Nations Convention against Transnational Organized Crime* (adopted 15 November 2000, entered into force 29 September 2003) 2225 UNTS 209, arts 3, 15.