

## ARMED GUARDS ON VESSELS: INSURANCE AND LIABILITY

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*The Paper examines the insurance and liability issues resulting from the use of armed guards on board vessels. The study begins with an overview of the available data on key economic figures representing the projected overall annual costs of modern piracy. The focus is then shifted to the issue of public versus private security, where possible dangers of private-based security options are discussed in general. After explaining why the Somalia region deserves a closer attention when compared to other pirate-infested waters, a brief summary of the international effort to combat piracy threat is presented, followed by a structured overview of the use of private maritime security options in the maritime sector in general. One security option is the use of armed guards on board vessels. This option is explored both from the political (the acceptance by stakeholders) and legal standpoint (legal issues arising from the use of armed guards). An important remedy for the shipping companies/operators threatened by the piracy hazard is the existence of affordable and effective (specialized) marine insurance. A study of available piracy insurance policies is presented, followed by an analysis of case law and other legal issues arising from piracy attacks, which could prove important when considering the legal implications of armed guards employment. Finally, a simplified economic analysis*

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*of available security options is presented, followed by the final assessment of benefits derived from the use of armed guards.*

**Keywords:** *Armed Guards, Piracy, Marine Insurance, Private Security Companies, Somalia.*

## A. INTRODUCTION

The enhanced level of piracy in the Gulf of Aden and off the Somali coastline has resulted in an increase of costs related to maritime commerce and security in the region and maritime trade in general. This is primarily reflected through the rise of insurance premiums due to the piracy risk (primary expenses), secondary expenses for maritime entrepreneurs, and tertiary expenses for coastal states. Secondary expenses are observed through losses due to piracy attacks, and investments made to counter the piracy threat. Tertiary expenses refer to government spending on counter-piracy efforts, and losses in tourism, fishing and related coastal states' industries. Extraordinary expenses can also be observed in instances where certain pirate activities create a global impact on trade and industry, such as is the example of impact on oil prices' index.

The first part of the Paper delivers a summary of the above named factors in order to clarify the significance of threat that the modern piracy creates to the global trade in general, and to the maritime and insurance industry in particular. The latter will include specifics regarding the cost of investment to counter-piracy efforts, and losses when piracy attacks are successful.

The international community has made a significant effort to combat the piracy threat. State navies patrol the pirate-infested waters and offer armed convoy escorts and separate protection to passing vessels, international organizations and bodies have adopted a number of recommendations and guidelines regarding the piracy problem, and maritime industry continues to provide advice and support concerning various means of averting pirate attacks. However, such security lacks efficiency due to the size of the endangered waters area and the quantity of possible individual targets. Due to this reason, the private maritime security has been perceived as a welcomed option in some circles, especially among shipowners/operators who have experienced pirate attacks.

The second part of the Paper discusses the use of private security in the maritime field as opposed to the reliance on public security means. The discussion will

include a short exposé on international and regional projects of cooperation aimed at combating and evading the piracy threat<sup>1</sup>, and a general introduction into the field of private security industry and regulation.

The re-emergence of piracy threat in the last decade<sup>2</sup> at various maritime choke points resulted in numerous activities and side effects coming both from the maritime industry and the coastal states' community. One such manifestation is the increased use of private security companies' (PSC) (un)armed guards on board merchant vessels. Although the PSC service is but one of many methods of averting the piracy threat at the disposal of shipowners and vessel operators passing through pirate-infested waters, the use of this option is steadily increasing.

The third part of the Paper focuses on the issue of armed guards onboard vessels, and impacts of their use in terms of insurance and possible liability resulting from contact between armed guards and pirates. It is also necessary to discuss the general piracy insurance policies, present a short case-law study of certain issues related to insurance covers resulting from detentions of vessels by pirates, and explore the general attitude of maritime industry and community regarding the use of PSCs in the maritime sector.

The final part of the Paper introduces a simplified economic analysis of the available options for the shipping companies and related persons operating in the high-risk areas, where a special focus is placed on the benefits deriving from the use of armed guards. The outcome of the analysis explains the industry's *tacit acceptance* of the use of armed guards on board vessels, and the subsequent stakeholders' confirmation of the value of such a security option.

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<sup>1</sup> For a comprehensive list of international and national legislation, and relevant documents regarding the piracy, see: PILPG, A Global Pro Bono Law Firm: *Documents on Countering Piracy and Related Crimes Off the Coast of Somalia*, available at: <http://publicinternational-lawandpolicygroup.org/documents-on-countering-piracy-and-related-crimes-off-the-coast-of-somalia/>, and, United Nations Division on Ocean Affairs and the Law of the Sea: *National Legislation on Piracy*, available at: [http://www.un.org/Depts/los/piracy/piracy\\_national\\_legislation.htm](http://www.un.org/Depts/los/piracy/piracy_national_legislation.htm), last visited on 20 September 2011. Also, for information on international and national regional cooperation in tackling the piracy problem, see: Oceans Beyond Piracy: *Counter-piracy activities matrix*, available at: <http://oceansbeyondpiracy.org/matrix/counter-piracy-activities-dynamic>, last visited on 20 September 2011. Also, see: Lavriša, *Pirates, Ye Be Warned: A Comparative Analysis of National Piracy Laws*, University of Toledo Law Review, 42, 3 (2010).

<sup>2</sup> For a historical perspective of piracy, with special focus on English maritime and public law perception of this phenomenon, see: Bento, *Toward An International Law of Piracy Sui Generis: How the Dual Nature of Maritime Piracy Law Enables Piracy to Flourish*, Berkley Journal of International Law, 29, 2 (2010), at 103 *et seq.*

The Paper will refrain from tackling the issues of public maritime law (law of the sea issues)<sup>3</sup>, such as are the possible deficiencies of the available legal definitions of the term “piracy”<sup>4</sup>,

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<sup>3</sup> For a comprehensive bibliography over the issue of piracy, see: MKC, *Information Resources on Piracy and Armed Robbery at Sea Against Ships*, 30 September, International Maritime Organization, 2010, and, Editor, *Contemporary Maritime Policy as an Issue of Academic Inquiry. A Bibliography*, May, Piracy-Studies.org, 2011, available at: <http://piracy-studies.org/piracy-bibliography.pdf>, last visited on 20 September 2011. For more on the public law aspects of piracy related issues (including the issues of the definition of the term “piracy” and the trials of suspected/captured pirates), see: Azubuike, *International Law Regime Against Piracy*, Ann. Surv. Int’l & Comp. L., 15, 43 (2009); Tuerk, *The Resurgence of Piracy: A Phenomenon of Modern Times*, U. Miami Int’l & Comp. L., 17, 2 (2009); Sterio, *Fighting Piracy in Somalia (and elsewhere): Why More is Needed*, Fordham Int’l L.J., 33, 373 (2009-2010); Government, *Global Challenge, Regional Responses: Forging a Common Approach to Maritime Policy*, A public-private counter-piracy conference, April, Dubai, Ministry of Foreign Affairs, UAW, 2011; Rosenberg, *Piracy and Maritime Crime: Historical and Modern Case Studies*, Newport Papers 35, Naval War College, 2010 Bont, *Prosecuting Pirates and Upholding Human Rights Law: Taking Perspective*, Working Paper, September, One Earth Future Foundation, 2010; Editor, *Agora: Piracy Prosecutions*, The American Journal of International Law, 104, 1 (2010); Dutton, *Pirates and Impunity: Is the Threat of Asylum Claims a Reason to Allow Pirate to Escape Justice?*, Fordham Int’l L.J., 34, 1 (2011); (ed.), *Australia’s Response to Piracy: A Legal Perspective*, Papers in Australian Maritime Affairs, No. 31, Sea Power Centre - Australia, 2011; Chang, *Piracy Laws and the Effective Prosecution of Pirates*, Boston College International and Comparative Law Review, 33, 2 (2010); Kontorovich, ‘*A Guantánamo on the Sea*’: *The Difficulty of Prosecuting Pirates and Terrorists*, Cal. L. Rev., 98, 243 (2010); Passman, *Protections Afforded to Captured Pirates Under the Law of War and International Law*, Tulane Maritime Law Journal, 33, 1 (2008), and, Etzioni, *Somali Pirates: An Expansive Interpretation of Human Rights*, Texas Review of Law & Politics, 15, 1 (2010). Finally, according to the latest data, more than 1000 persons are either awaiting trials, or are already convicted, see: UNDOC, *Counter-Piracy Programme: Support to the Trial and Related Treatment of Piracy Suspects*, Issue Six: June, United Nations Office on Drugs and Crime, 2011. For more on the differentiation between piracy and terrorism, see: J. Kline, *Maritime Security*, in: Jasper, *Securing Freedom in the Global Commons*, 2010, Stanford: Stanford University Press, 2010, especially at 71.

<sup>4</sup> United Nations Convention on the Law of the Sea (UNCLOS) (UN, *United Nations Convention on the Law of the Sea*, 1833 UNTS 397, United Nations, 1982) defines an act of piracy in Article 101. Also, see other relevant Articles 100-107, UNCLOS. For a comprehensive legal inquiry into the definition and public law apprehension of the term “piracy”, see: Shearer, *Piracy*, October, Max Planck Encyclopedia of Public International Law, 2010. The UNCLOS definition of piracy consists of three elements: (a) illegal acts of violence or detention or depredation, (b) committed for private ends, by a private ship against another, (c) on high seas outside the jurisdiction of any State [also, see the definition present in the SOLAS Convention (IMO, *International Convention for the Safety of Life At Sea (SOLAS)*, 1184 UNTS 3, International Maritime Organization, 1974), in Article 3(1). For more on this issue, see: *Bento*, *supra* note 2, at 127-128]. Major deficiency of such a definition is the fact that it limits the scope of application to the high seas, offering pirates an opportunity to commit acts of piracy in territorial waters (or escape to territorial waters, subject to the “hot pursuit”) and escape the applicability of Article 101. The IMB definition allows for the inclusion of instances of piracy acts outside of the high seas area, see: IMB-PRC, *Piracy Report 1992*, London, ICC International Maritime Bureau, 1993, at 2. See also: IMO, *Draft Code of Practice for the Investigation of the Crimes of Piracy and Armed Robbery Against Ships*, MSC/Circ.984, International Maritime Organization, 2000, especially Article 2.2 on the definition of armed robbery against ships. In cases where piracy can be linked to the organized crime, the application

and the issue of the piracy trials<sup>5</sup>. The prime focus of the Paper is the issue of liability of owners and operators of vessels employing the services of PSCs, and their insurers. One public law issue, the political-legal background behind the privatization of maritime security and possible impacts of such a process, will, however, be discussed in some detail.

## B. PIRACY-RELATED COSTS

The piracy threat yields considerable annual costs to both the international community and the maritime industry. The latest data (2010) on the overall costs

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of the UN, *United Nations Convention Against Transnational Organized Crime*, A/RES/55/25, United Nations, 2000. For more on the issue, see: Keyuan, *Maritime Security in the South China Sea: Regional Implications and International Cooperation*, 2009, Surrey: Ashgate, 2009, at 144. For the so-called “Harvard Draft Convention”, and the meaning of piracy, see: Guilfoyle, *Shipping Interdiction and the Law of the Sea*, 2009, Cambridge: Cambridge University Press, 2009, at 30 *et seq.* For more definitions, see: Chalk, *Maritime Piracy: Reasons, Dangers and Solution*, CT-317, RAND Corporation, 2009, at 3. Finally, see: IMB, *Piracy and Armed Robbery Against Ships - Annual Report*, 1 January - 31 December 2008, ICC International Maritime Bureau, 2008, at 4; Bento enumerates other difficulties with the UNCLOS regime, such as is the issue of “hot pursuit”, limitation of the definition of piracy, an idea of an establishment of an international court [the idea of a specialized international court has been mentioned by a number of authors see: Harrelson, *Blackbeard Meets Blackwater: An Analysis of International Convention that Address Piracy and the Use of Private Security Companies to Protect the Shipping Industry*, Am. U. Int’l L. Rev., 25, 283 (2009-2010), and, especially: Article, *UN debates pirate trial options*, Lloyd’s List, August, 26 (2010), and, Article, *End the lottery of justice on piracy*, Lloyd’s List, August, 23 (2010)], and other (for more on this, see: *Bento, supra note 2*, at 118-126. Also, see: M. Murphy, *Piracy and UNCLOS: Does International Law Help Regional States Combat Piracy?*, in: P. Lehr/H. Lehmann, *Somalia – Pirates’ New Paradise*, in: Lehr, *Violence at Sea: Piracy in the Age of Global Terrorism*, 2007, New York: Routledge, 2007, at 155.). The problems connected to the “high seas” scope of applicability of the UNCLOS, regarding the effort to combat the threat of piracy in Somalia, have been resolved through the UN Security Council Resolution 1816 (UN, *S.C. Res. 1816*, UN Doc. S/RES/1816 (June 2, 2008), United Nations Security Council, 2008), which enabled actions in Somalia territorial waters; For a detailed overview of this and related UN Security Council’s resolutions, see: *Bento, supra note 2*, at 129-131., and, Daley, *Introductory Note to United Nations Security Council: Piracy and Armed Robbery At Sea - Resolutions 1816, 1846 & 1851*, I.L.M., 28, 2 (2009).

<sup>5</sup> One legal issue concerning the piracy trials is the question of the location of the court. For example, due to the general unwillingness to commit to pirate prosecution cases, the United States (US), United Kingdom (UK) and European Union (EU) have concluded a special agreement with Kenya. For more on this issue, see: RAND, *Countering Piracy in the Modern Era*, Conference Proceedings, National Defense Research Institute, 2009, at 1. Also see: Gettleman, *The West Turns to Kenya as Piracy Criminal Court*, N.Y. Times, April, 24 (2009). One source mentions US\$9.3 million donated in order to assist the prosecutions, see: Article, *Kenya piracy trial suffers second blow*, Lloyd’s List, July, 21 (2010). According to the US legislation (Title 18 U.S.C. § 1651), pirates are to be sentenced for life if caught in committing a crime of piracy on the high seas.

of maritime piracy offers a rough estimation of US\$ 7-12 billion<sup>6</sup>, which is, at first sight, an improvement when compared with the figure of US\$ 13-16 billion<sup>7</sup> in 2004. However, the term “costs of maritime piracy” includes different levels of expenditure, a smaller amount of which is the actual damage caused by pirate attacks.

### a. Ransoms

To begin with, in 2010, the overall amount of money paid in ransoms due to pirate kidnapping of crew members and passengers reached US\$ 238 million<sup>8</sup>, as compared to the US\$ 60 million in 2008<sup>9</sup>. In addition, the average ransom payment in 2010 amounted to US\$ 5.4 million<sup>10</sup>, as compared to an average US\$ 150,000 in 2005<sup>11</sup>. The One Earth Foundation’s report suggests that the combined value of 2009 and 2010 ran-

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<sup>6</sup> Bowden, *The Economic Cost of Maritime Piracy*, One Earth Future Working Paper December, One Earth Future, 2010, at 2. Similarly, according to the International Maritime Organization estimation, the annual overall costs of piracy amount to US\$ 7-12 billion, see: MaritimeSecurity.Asia: *Somali pirates attacking year-round says maritime organization*, available at: <http://maritimesecurity.asia/free-2/piracy-update/somali-pirates-attacking-year-round-says-maritime-organization/>, last visited on 20 September 2011.

<sup>7</sup> Bowden, *ibid.*

<sup>8</sup> Pristrom, *Marseq’s 7th Official Piracy Update Meeting*, Combating Piracy Hamburg, March, Hamburg, Germany, 2011.

<sup>9</sup> *Masefield AG v. Amlin Corporate Member Ltd.*, [2010] EWHC (Comm) 280, at 13.

<sup>10</sup> Bowden, *supra note 6*, at 9. An extreme example is the US\$ 9 million paid for the return of *Samho Dream*, see: Pristrom, *supra note 8*, and US\$ 9.5 million for a South Korean tanker, see: AIV, *Combating Piracy at Sea: A Reassessment of Public and Private Responsibilities*, No. 72, Advisory Council on International Affairs, 2010, at 16. In addition, according to the same source, larger ransom demands stipulate longer length of negotiations, thus creating additional costs arising out of the detention of a vessel. The extreme example of the value of a hijacked vessel is the *Sirius Star*, which had a value of approximately US\$ 150 million, carrying a cargo of crude oil with a value of US\$ 100 million at the time of hijacking [the cargo representing a quarter of Saudi Arabia’s daily output of crude oil, see: Rice, *Pirate anchor hijacked supertanker off Somalia coast*, *The Guardian*, November, 18 (2008)], see: Wikipedia: *MV Sirius Star*, available at: [http://en.wikipedia.org/wiki/MV\\_Sirius\\_Star](http://en.wikipedia.org/wiki/MV_Sirius_Star), last visited on 20 September 2011. It is important to keep in mind that, according to one study, around 12% of crude oil is transported annually through the Gulf of Aden, see: NSC, *Countering Piracy off the Horn of Africa: Partnership & Action Plan*, December, National Security Council, 2008, at 4. In addition, 80% of all European exports/imports pass through the Gulf of Aden, see: Spearin, *Private Security, Somali Piracy, and the Implications for Europe: An Appropriate ‘State’ Response to a Contemporary Challenge?*, European Security and Defence Forum Workshop 2: New Transnational Security Challenges and Responses, Canadian Forces College, 2009, at 2. In addition, a sum of 7.5% of global maritime trade carriage and 30% Europe’s oil imports are annually transported via the Gulf of Aden, see: Boot, *Pirates, Then and Now: How Piracy was Defeated in the Past and Can be Again*, *Foreign Aff.*, 88, 1 (2009).

<sup>11</sup> Pristrom, *supra note 8*.

som costs (including the costs of the negotiation, delivery and related costs) amounts to an approximate figure of US \$830 million<sup>12</sup>. The average length of negotiations for the release of crews and the return of hijacked vessels increased significantly in the last couple of years, following the trend of the increase in ransom figures<sup>13</sup>.

It is worth mentioning that, according to some experts, not all pirate attacks are reported. In fact, several sources claim that around 50% of attacks are not reported<sup>14</sup>, and some sources suggest even a lower ratio of reporting<sup>15</sup>. Most authors classify this phenomenon as a method of keeping the insurance premiums lower than they realistically should be (the logic being: more pirate attacks equal larger individual premiums due to a larger risk of pirate attacks)<sup>16</sup>. Other reasons include the lengthy reporting process that may cause delays in vessel operation, an unwillingness to cooperate with local authorities, or a lack of understanding of the purpose of reporting (gathering information for recommendations and guidelines on how to avert further attacks).

### **b. Shipping Costs**

Shipowners and charterers are becoming increasingly interested in the concept of investment in protection, prevention and preparedness measures<sup>17</sup>. A recent estimation calculated an average sum of US\$ 134,450 investment per vessel per passage, regarding the installation and use of deterrence equipment and (security) personnel<sup>18</sup>. According to one source, the ship security reporting system costs approximately \$US 500 annually per vessel<sup>19</sup>. One method of avoiding the pirate threat, the choice of an alternative route, has also taken a toll in the overall maritime piracy spending. The yearly

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<sup>12</sup> Bowden, *supra* note 6, at 10.

<sup>13</sup> Pristrom, *supra* note 8.

<sup>14</sup> See, e.g.: Vallar, *Pirates and Privateers: The History of Maritime Piracy*, No Quarter Given, September/November, 6 (2005). A moderate estimate amounts to 25%, see: Committee, *Piracy: Government Response to the Committee's Eighth Report of Session 2005-06 - Sixteenth Special Report of Session 2005-06*, HC 1690, The House of Commons, 2005.

<sup>15</sup> See: McDaniel, *Modern High Seas Piracy*, Propeller Club 2005 Update, Propeller Club of the United States, Port of Chicago, 2005.

<sup>16</sup> See: Sakellaridou, *Maritime Insurance & Piracy*, AIDA Europe - Marine Insurance Working Party 2009, Zurich, 2009, at 10.

<sup>17</sup> For an economic analysis of costs related to pirate attacks in terms of a probability of being attacked (depending on different factors, such as is the size, type and speed of the vessel), see: Wolff, *Ship Piracy: Ship Type and Flag*, Chapter 7, 2008, in: Talley, *Maritime Safety, Security and Piracy*, 2008, London: Informa, 2008.

<sup>18</sup> Bowden, *supra* note 6, at 15.

<sup>19</sup> For more general information on different methods and techniques used in averting pirate attacks, see: Editor, *Fending off the pirates*, Maritime Risk International, March, 12 (2010).

costs of re-routing of vessels (in order to avert passing through endangered waters, or the so-called “high risk areas”) have been calculated in the amount of US\$ 2.3-3 billion (costs of additional fuel, wages, possible delays in carriage and similar)<sup>20</sup>.

### **c. International Cooperation Costs**

The costs of sustaining state navies’ presence in the Somali region are considerable. For example, the US Navy spends an average amount of US\$ 82,794 per day per vessel<sup>21</sup>. According to One Earth Report, an estimated US\$ 2 billion is spent annually on combined international naval operations in the Gulf of Aden/Somalia region<sup>22</sup>, whereas related anti-piracy organizations<sup>23</sup> have a combined yearly budget of US\$ 24.5 million<sup>24</sup>.

### **d. Insurance Costs**

According to the AIV analysis<sup>25</sup>, the insurance industry can expect a total premiums earning in the amount of US\$ 100 million<sup>26</sup> per year, whereas individual insurance premium costs have started to decrease due to the increased number of insurance companies offering specialized piracy insurance covers<sup>27</sup>. Currently, an average war risk insurance policy amounts up to US\$ 150,000 per ship, per voyage<sup>28</sup>. In addition, a number of insurance companies offer further financial incentives when PSC services are contracted in combination with the insurance coverage<sup>29</sup>.

The rise in insurance premiums has prompted several big shipping companies to charge the so-called “piracy-tax”, enforced through a surcharge of, according to one example, US\$23 per container, amounting to an approximate US\$300,000 per

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<sup>20</sup> *Pristrom, supra note 8.*

<sup>21</sup> *Id.*

<sup>22</sup> *Bowden, supra note 6, at 16.*

<sup>23</sup> For specific information on the organizations, see: *infra note 61.*

<sup>24</sup> *Bowden, ibid, at 20.*

<sup>25</sup> *AIV, supra note 10, at 35.*

<sup>26</sup> A study published by German Institute for Economic Research (DIW) steered a considerable debate and opposition coming from maritime industry’s circles. The study claims that the insurance industry earns a US\$ 400 million in profit through additional premiums related to piracy insurance coverage. Lloyd’s Market Association (LMA) reacted strongly by stating that the total earnings would not be sufficient to cover the costs of a single total loss, and that the findings on the study are erroneous and inflammatory. For more on this, see: Munro, *Industry reacts angrily to suggestion it has vested interest in piracy*, Insurance Day, July, 26 (2010).

<sup>27</sup> See: *infra F.a.*

<sup>28</sup> *Bowden, supra note 6, at 10-11.*

<sup>29</sup> See: *infra E.c.*



passage<sup>30</sup>. This practice has continued over the years, and the latest figures amount to the value of US\$ 100 per container<sup>31</sup>.

### **e. Coastal Communities/Global Community Costs**

Coastal communities have also felt a considerable strain of piracy-caused damage. According to one source, the Indian tuna industry experienced a 30% decline in tuna-catches in 2008<sup>32</sup>. Kenyan authorities claim that pirate threat creates a significant strain on the cost of imported goods, according to some sources up to 10%<sup>33</sup>, and loss in the tourism sector to the amount of US\$ 139 million annually<sup>34</sup>. Seychelles is claiming considerable losses in economic revenue<sup>35</sup>.

The world economy has been directly affected by pirate attacks through the daily conversion of oil price index. According to Kontorovich<sup>36</sup>, the hijacking of the supertanker *Sirius Star* caused a mini-turmoil of oil prices, which serves as an important indicator to what further similar attacks might provoke<sup>37</sup>. In addition, the PIRA Energy Group calculated that the piracy threat has made an indirect raise in the price of barrel (for about 40 cents) when crude oil is transported through the high-risk areas<sup>38</sup>.

Keeping in mind the increasing level of violence observed during the recent pirate attacks (the use of heavier weaponry, like RPGs<sup>39</sup>), pirate attacks pose a serious threat to the marine environment in cases where serious damage to the vessel might lead to a pollution of marine environment. However, up to the present date, no serious marine pollution incidents caused by a pirate attack have been reported<sup>40</sup>.

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<sup>30</sup> See: CMA-CGM, *Aden Gulf Surcharge*, Press Release, December, CMA-CGM, 2008.

<sup>31</sup> Bowden, *supra note 6*, at 10-11.

<sup>32</sup> FIS, *Piracy leads to Drop in Indian Ocean Tuna Catch*, FIS World News, January, 26 (2009).

<sup>33</sup> Bowden, *supra note 6*, at 21. According to the same source, Seychelles's economy is affected to the extent of US\$ 10.5 billion yearly, Bowden, *id.* Also see the impacts on Taiwan and Nigeria, Bowden, *ibid.*, at 22. In addition, having in mind the possible re-routing of vessels around the Cape of Good Hope, Egypt could see a decline in its Suez Canal revenue up to US\$ 642 million yearly, Bowden, *ibid.*, at 24.

<sup>34</sup> See: Bento, *supra note 2*, at 109.

<sup>35</sup> See: Bowden, *supra note 6*, at 21.

<sup>36</sup> Kontorovich, *supra note 3*, at 245.

<sup>37</sup> The same incident was confirmed by Bento, see: Bento, *supra note 2*, at 110.

<sup>38</sup> See: Holmes, *The Somali Pirate Attacks Are Taking a Toll on Oil Prices*, Business Insider, March, 21 (2011).

<sup>39</sup> See: *infra D.a.*

<sup>40</sup> For a dramatic incident involving the Greek flagged supertanker *Maran Centaurus*, and a "close-call" with environmental disaster and death to the persons on board, see: Eichstaedt, *Pirate State: Inside Somalia's Terrorism at Sea*, 2010, Chicago: Lawrence Hill Books, 2010, at 174.

It is difficult to predict the future volume of pirate-related costs. Despite the overall lower figure in 2010 as opposed to the previous years, the increasing number of marine insurance companies offering competitive premium prices and a considerable level of non-reporting of pirate-related incidents prevents an objective analysis of the actual losses. Since the international community still lacks a proper strategy regarding the threat from maritime piracy in general, and in particular cases (such as the region of Somalia/Gulf of Aden), it may safely be concluded that the issue will persist to cause a serious threat to the maritime security<sup>41</sup>. The worrying side-effect of such a predicament is the observed increase in ransom figures, and the reported increase of violence as exhibited by the pirates in the recent attacks, the combination of which may lead to unexpected and troublesome financial burdens in the near future, not to mention the danger such behavior creates for the seafarers.

Whereas some authors suggest that piracy represents no more than a regional problem<sup>42</sup>, the belief of the present author is that the safety of passage through maritime commerce lanes, like the Somalia coastline and the Gulf of Aden passage which are considered to be important so-called “sea-lanes of communication” areas (SLOC), is much more than merely a pure issue for the shipping companies and a few local coastal states to worry about<sup>43</sup>. A backset in the continuous (and safe) flow of vessels and goods at any important maritime choke point, including Somalia<sup>44</sup>, will produce a number of negative effects on the global economy, as shown previously<sup>45</sup>.

Therefore, an investment in maritime security is the key element of a partial answer to the piracy threat<sup>46</sup>. What remains to be seen is whether such an investment will focus on internationally governed security, privately enforced security, or a combination of both.

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<sup>41</sup> Cf.: Liss, *Privatising the Fight against Somali Pirates*, Working Paper No.152, Asia Research Centre, Murdoch University, 2008, at 5-6.

<sup>42</sup> “What can be said with somewhat more authority is that piracy does not pose a threat to international maritime trade (which presently generates annual revenues in excess of \$7 trillion), much less to the global economy. Piracy is a regional problem, the effects of which fall disproportionately on those states that are most severely affected by the phenomenon...”, Chalk, *supra* note 4, at 2.

<sup>43</sup> Cf.: “Many also believe that protecting national maritime security, including securing sea lines of communication and ensuring freedom of navigation, is the proper domain of naval forces rather than private actors. In this view, it is for governments, and not profit-motivated private companies, to provide military services that protect against piracy”, Liss, *Privatising the Fight against Somali Pirates*, Working Paper No.152, Asia Research Centre, Murdoch University, 2008, at 18.

<sup>44</sup> See: *infra* D.

<sup>45</sup> Cf.: Odeke, *Somali Piracy - Effect on Oceanborne Commerce and Regional Security and Challenges to International Law and World Order*, A&NZ Mar LJ, 25, 3 (2011).

<sup>46</sup> See: *infra* C.b., where it is argued that piracy cannot be defeated on the sea.

## C. PUBLIC AND PRIVATE SECURITY IN THE MARITIME SECTOR

The emergence of a wider scope of use of private security<sup>47</sup> is closely connected to the modern-time warfare<sup>48</sup>, where, more frequently in the last decade, governments rely on PSCs<sup>49</sup> to perform functions traditionally reserved<sup>50</sup> for government institutions, such as the armed forces<sup>51</sup>. Hernandez offers a summary list of conditions<sup>52</sup> that have influenced the increasing employment of PSCs, including the modern trend

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- 47 For a historical perspective of the use of PSCs, see: Ortiz, *Private Armed Forces and Global Security: A Guide to the Issues*, 2010, Oxford: Praeger, 2010, Chapter 2. For types of activities usually performed by PSCs, see: Ortiz, *ibid.*, at 93 *et seq.* For a thorough research into the regulation of the PSCs' activities, see: Nemeth, *Private Security and the Law*, 2005, Boston: Elsevier Butterworth Heinemann, 2005.
- 48 For a number of examples of the employment of PSCs in the second part of 20<sup>th</sup> century, see: Isenberg, *Shadow Force: Private Security Companies in Iraq*, 2009, London: Praeger Security International, 2009, at 2.
- 49 PSCs are similar to organizations usually referred to as "private military companies" (PMC), the difference being that PSCs are usually defined as defensive oriented services aimed at the protection of persons and property, whereas PMCs offer armed offensive services and are usually contracted by governments [for more information, see: Hernandez, *'Pirates' in the Sea: Private Military and Security Company Activities in Southeast Asia and the Philippines case*, Working Papers Series, no. 9, Global Consortium on Security Transformation (GCST), 2010]. These two types of organizations are commonly referred to as "PMSCs" ("private military security companies"). The Montreux Document provides for the following definition: "*PMSCs' are private business entities that provide military and/or security services, irrespective of how they describe themselves. Military and security services include, in particular, armed guarding and protection of persons and objects, such as convoys, buildings and other places; maintenance and operation of weapons systems; prisoner detention; and advice to or training of local forces and security personnel*", ICRC, *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*, 0996/002 08.2009 1,000, International Committee of the Red Cross, 2009, at 9. Note that the term PMSC often also refers to "private maritime security companies". Singer also uses the term "PMC", referring to "private military firms", see: Singer, *Corporate Warriors: The Rise of the Privatized Military Industry and Its International Security*, *International Security*, 26, 3 (2001-2002). Also, Isenberg uses the term private security contractors (PSCs), see: Isenberg, *supra note 48*, Preface. For more specific categorization, see: Isenberg, *ibid.*, at 25. Ortiz analyses in detail the scope of service provided by PMCs, see: Ortiz, *supra note 47*, at 48-49. For a bibliography of the relevant sources (up to 2005), see: ICRC, *Selected Bibliography on Private Military and Security Companies*, 15 December, International Committee of the Red Cross, 2005. Also, see (up to March 2008): Muir S. Fairchild Research Information Center: *Private Military Companies Bibliography*, available at: <http://www.au.af.mil/au/aul/bibs/pmc08.htm>, last visited on 20 September 2011.
- 50 An often quoted reference: "... a human community that (successfully) claims the monopoly of the legitimate use of physical force within a given territory", by Max Weber in "Politics as a Vocation", available in: Mills, *From Max Weber*, 1997, London: Routledge, 1997, at 78.
- 51 For a comprehensive study of private land security in the United States and abroad, see: Storm, *The Private Security Industry: A Review of the Definitions, Available Data Sources, and Paths Moving Forward*, RTI Project Number 0212315.001.001, Research Triangle Park, 2010.
- 52 Hernandez, *supra note 49*, at 1.

of downsizing the armies (leaving an abundance of military and related experts to be employed by PSCs), an increasing number of low-scale conflicts around the Globe, and a desire of governments to reduce the engagement of their own military forces in order to influence the opinion of domestic population<sup>53</sup>. Singer places the momentum at the end of the Cold War era, reflected through a “vacuum” in the security market, the transformation of the nature of modern warfare, and the privatization phenomena<sup>54</sup> entering the security arena<sup>55</sup>. Ortiz states that the modern PSCs industry is highly competitive, continuously participating in public tenders<sup>56</sup> and earning a considerable profit<sup>57</sup>, which, according to some sources, amounts to US\$ 200 billion annually<sup>58</sup> (out of which, according to another [older] source, at least half of the income belongs to the PMC companies<sup>59</sup>).

In addition, the need for additional security provided to vulnerable (maritime) commercial spots (energy sources and installations, trade lanes, communication centers) often requires specialized and dedicated private security options. Liss observes

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<sup>53</sup> For example, the size of private military security companies’ personnel in Iraq is the second largest, next to the size of the US deployed troops, see: *Hernandez, supra note 49*, at 7. In 2006, the ratio was 1 contractor to 1.4 soldiers, see: *Bauman, Betraying Our Troops: The Destructive Results of Privatizing War*, 2007, New York: Palgrave Macmillan, 2007, at 7. Later reports indicate a number of PSC personnel in the amount of 120.000 in Iraq alone, see: *Isenberg, supra note 48*, at 8. Same author compares the presence of PSCs in the First Gulf War, Bosnia and Iraq, see: *Isenberg, ibid.*, at 15. Similarly, Ortiz offers data on PSCs’ involvement in Iraq and Afghanistan, *Ortiz, supra note 47*, at 146.

<sup>54</sup> For a comprehensive study of the interrelationship between the governmental, inter-governmental, non-governmental and private security interests, see: *Shearing, The New Structure of Policing: Description, Conceptualization, and Research Agenda*, NCJ 187083, U.S. Department of Justice, 2001.

<sup>55</sup> *Singer, supra note 49*, at 193.

<sup>56</sup> For examples of cooperation between governments and PMCs, see: *Kinsey, Corporat Soldiers and International Security*, 2006, London: Routledge Taylor & Francis Group, 2006, at 98 *et seq.*

<sup>57</sup> *Ortiz, supra note 47*, at 5. The same author explores the public debate related to the use of P(M) SCs, where “... supporters see them as flexible and cost-effective alternatives to state soldiers and police, facilitating commercial activity into otherwise unviable markets, and even as prospective peacekeepers”, and “... critics ... approach them as agents undermining state authority, intending to capture the natural riches of the developing world for the benefit of multinational corporations (MNCs), and ultimately fostering underdevelopment and conflict”, *Ortiz, ibid.*, at 7. Ortiz also underlines the neoliberalism and privatization as two important aspects of modern times that led to a wide-spread use of PSCs in general, see: *Ortiz, ibid.*, at 115-128. See especially the categorization of private security as a “quasi-public good”: *Ortiz, ibid.*, at 119-120, as the “public-private partnership” in security: *Ortiz, ibid.*, at 123-126.

<sup>58</sup> See: *Isenberg, supra note 48*, at 3. The same author indicates that the security is often tied to a number of different enterprises, such as is the example of the reconstruction work in Iraq where around 12% of each reconstruction contract’s value is spent on security, see: *Isenberg, ibid.*, at 26.

<sup>59</sup> *Kinsey, supra note 56*, at 2.

that “... *the lines between national and international security have become blurred and security challenges are today met by a range of diverse state and non-state actors*”<sup>60</sup>.

Before proceeding to the PSCs’ services in the maritime sector in general and the issue of armed guards in particular, a general overview of security efforts regarding the threat of piracy is to be presented.

### **a. International Effort**

A combined international<sup>61</sup> and private effort to combat global maritime piracy has yielded positive results. According to the International Maritime Organization’s (IMO) statistics<sup>62</sup>, the average rate of successful pirate attacks has been reduced from 50% in 2008 to 20% at the present moment. The same source indicates that as of 20 July 2011, pirates have been holding a total number of 22 vessels and 656 seafarers, observing a steady decline in those numbers through 2011<sup>63</sup>. It is however impor-

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<sup>60</sup> Liss, *Privatising Anti-Piracy Services in Strategically Important Waterways: Risks, Challenges and Benefits*, GraSPP-DP-E-09-003 and OPU-DP-E-09-001, GraSPP’s Ocean Policy Education and Research Unit, 2009, at 1.

<sup>61</sup> International activity consists of a military and civil cooperation, and is divided into a number of combined or separate initiatives. These initiatives include: Internationally Recommended Transit Corridor (IRTC) and the connected European Union’s Naval Force (EU NAVFOR) - ATALANTA Operation, Maritime Security Centre – Horn of Africa (MSCHOA) [an armed escort through the Gulf of Aden, for more information, visit: EU NAFOR Somalia, Maritime Security Centre: Horn of Africa, available at: [www.mschoa.org](http://www.mschoa.org), last visited on 20 September 2011; also, see: IMO, *Piracy and Armed Robbery Against Ships in Waters off the Coast of Somalia: Information on Internationally Recommended Transit Corridor (IRTC) for Ships transiting the Gulf of Aden*, Ref. T2-OSS/2.7.1, International Maritime Organization, 2009], Combined Maritime Forces (CMF) (regional cooperation established to provide naval security in the Somalia and Gulf of Aden waters; according to one source, over 14 states’ navies have been active in the region, see: *RAND*, *supra note 5*, at 2, or, according to other sources, 17 states’ navies, see: Clift, *Piracy: a brief overview*, Special Presentation, Hill Dickinson, 2010), Contact Group on Piracy off the Coast of Somalia (CGPCS), Shared Awareness and Deconfliction (SHADE), IMO Djibouti Code of Conduct Concerning the Repression of Piracy and Armed Robbery Against Ships in the Western Indian Ocean and The Gulf of Aden (see: IMO, *Protection of Vital Shipping Lanes: Sub-regional meeting to conclude agreements on maritime security, piracy and armed robbery against ships for States from the Western Indian Ocean, Gulf of Aden and Red Sea areas*, C 102/14, International Maritime Organization, 2009), Maritime Security Patrol Area (MSPA), Regional Cooperation Agreement on Combating Piracy and Armed Robbery (ReCAAP) (for more information, see: ReCAAP Information Sharing Centre, available at: <http://www.recaap.org/>, last visited on 20 September 2011). For more individual information, especially concerning the states’ navies protection convoys, see: England, *Piracy - Gulf of Aden*, Loss Prevention Briefing, 16 July 2010, North of England, 2010. For more information on various types of cooperation to combat the piracy threat, see: Wilson, *The Pirates of the Gulf of Aden: The Coalition is the Strategy*, *Stan. J. Int’l L.*, 43, 243 (2009).

<sup>62</sup> IMO, *Piracy: Orchestrating the Response*, Launch of the Action Plan to promote the 2011 World Maritime Day Theme: Piracy, IMO Headquarters, London, 2011.

<sup>63</sup> According to Bowden, around 1,600 acts of piracy occurred in the period of 2006-2010, with 54 casualties reported, see: *Bowden*, *supra note 6*, at 6.

tant to stress that, according to the latest available data<sup>64</sup>, around 22% of successful aversions of pirate attacks came from the assistance of states' navies, whereas the remaining successful defense operations are to be ascribed to the crews and armed guards on board vessels. This latest figure indicates the level of use of armed guards in practice, although no definite data is obtainable.

The public spending on sustaining military and civilian presence in Somalia and the Gulf of Aden region is considerable<sup>65</sup>. For example, the EU NAVFOR operation uses US\$ 8.3 million just for Operational and Force Headquarters, whereas the participating nations cover the costs of the navies involved<sup>66</sup>. Whether the issue of maritime safety regime will be reserved to the state competence or shared with private resources can become, according to some authors, a question of a cost-benefit analysis. Thus, according to the so-called "interest-driven" theories, states cooperate as long as the advantages of such cooperation are higher than the calculated costs<sup>67</sup>. This could potentially lead to a situation where high costs of supporting naval engagement, when compared to relatively acceptable rates of hiring PSCs, deter governments from pursuing an option of state involvement and the so-called "state-controlled violence".

### **b. Privatization of SLOCs**

The issue of armed guards employed on board vessels and the PSCs' armed maritime patrols engaged in pirate-infested waters alongside passing vessels brings upon considerations relevant to both the private (to be discussed in the later text) and public (maritime and security) law. The public law issues concern a long-term perspective or providing security not only to the individual vessels, but also to the maritime choke points ("maritime choke points" being defined as places of high annual concentration of shipping), such as is the Gulf of Aden, which is one of the most congested maritime routes of commerce. Should the security of vessels become dependent on PSCs that act in high seas and/or territorial waters (or other relevant maritime zones as defined by the United Nations Convention on the Law of Sea [UNCLOS]<sup>68</sup>) of unstable political regimes, it is questionable to what extent the

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<sup>64</sup> See: INCE, *Piracy: Issues arising from the use of armed guards*, March, INCE & CO - International Law Firm, 2010, at 2.

<sup>65</sup> See: *supra* A.c, for the estimated costs.

<sup>66</sup> See: EU, *EU naval operation against piracy (EU NAVFOR Somalia - Operation Atalanta)*, EU NAVFOR/06, EU Council Secretariat, 2009.

<sup>67</sup> Stiles, *Who is keeping the sea safe? Testing theories of international law compliance*, *Cooperation and Conflict*, 45, 2 (2010), at 141.

<sup>68</sup> See: *supra* note 4.

PSC' behavior could be effectively controlled by relevant jurisdictions<sup>69</sup>. Furthermore, if the presence of international task forces is reduced, given the expected performance of the PSCs, the PSCs would in practice gain control over the (safe) flow of goods through specific maritime choke points and thus become a possible stakeholder within the context of security at sea regarding the safe carriage of persons and goods<sup>70</sup>. Should they ever achieve such a status, it is dubious to what extent would that be beneficiary to the freedom of navigation as established by the UNCLOS and respected by modern coastal states. Lehr and Lehmann refer to the recent contract between the Somalia's Transitional Federal Government (TFG) and one PSC that was given a two-year mandate with the purpose of creating the Somali Coast Guard. As authors observe, "... *in a way of speaking, this would be a fight between Somali pirates on the one side and privateers with a government-in-exile letter of marquee on the other*"<sup>71</sup> (having in mind the dubious nature of the TFG in Somalia<sup>72</sup>).

Thus, the employment of the PSCs (and national armed forces at large) should only serve as an interim solution, until a proper model of reshaping the unstable political regimes into effective governments can be found<sup>73</sup>. Only a fully operational and stable coastal state can provide for a satisfactory solution to the issue of piracy at large, and no amount of national or private armed forces in such areas can achieve the desired effects.

#### **D. SOMALIA AND GULF OF ADEN PIRACY**

Discussing the re-emergence of piracy as a global phenomenon, Bento presents<sup>74</sup> a number of factors that have led to this occurrence. The inter-relationship of increased global maritime trade, combined with political instability in certain re-

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<sup>69</sup> Salzman enumerates the most prominent concerns regarding the use of private military companies. According to the author, the use of PMCs can potentially lead to the undermining of the states' use of monopoly on violence, increase the war engagement without the due process of democratic accountability, and prioritizing the private before the public good, see: Salzman, *Private Military Contractors and the Taint of a Mercenary Reputation*, *International Law and Politics*, 40, 4 (2008), at 860 *et seq.*

<sup>70</sup> One such consideration goes into an extreme: the privatization of the part of the Somalia coastline, where the "owner/operator" of the territory/maritime zone would be responsible for the secure carriage of goods and persons, and be given a right to charge passing ships, see: Kirell, *Could Profit Motive Put and End to Piracy?*, *ABS News*, May, 8 (2009) and Leeson, *Want to Prevent Piracy? Privatize the Ocean*, *National Review*, April, 13 (2009).

<sup>71</sup> *Lehr, supra note 4*, at 20.

<sup>72</sup> For more on the issue, see: *infra note 107*.

<sup>73</sup> For concrete consideration over the issue, see: *Eichstaedt, supra note 40*, at 181 *et seq.*

<sup>74</sup> *Bento, supra note 2*, at 107.

gions (Somalia being a prime example) and technological improvements<sup>75</sup>, has led to an increased pirate activity<sup>76</sup>. Alongside the Somalia and the Gulf of Aden region, the Red Sea, the Indian Ocean, the Caribbean, the Straits of Malacca<sup>77</sup>, the South China Sea<sup>78</sup> and the Niger Delta<sup>79</sup> are known areas of pirate activity<sup>80</sup>. Due to the size and the overall organizational structure of the modern-day pirates, modern piracy is often categorized as an instance of international organized crime.<sup>81</sup>

Out of the different mentioned maritime zones where piracy attacks are frequent, the Somalia coastline and the Gulf of Aden (see the figure below) capture the attention of the world public as the “hot-spot” of piracy. There are numerous factors that have influenced the build-up of piracy in the Somalia region and the Gulf of Aden. Aside from the political instability in Somalia, and the inability of the “government” (intentionally left under apostrophes, to indicate the ineffectuality of a “single” political regime in the country<sup>82</sup>) to enforce law and order, a number of studies and reports indicate that the initial armament of locals developed as a

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<sup>75</sup> For more on this issue, see: Sullivan, *Piracy in the Horn of Africa and Its Effects on the Global Supply Chain*, J. Transp. Sec. 3, 2 (2010).

<sup>76</sup> For an extended list of factors, see: Chalk, *The Maritime Dimension of International Security*, FA7014-06-C-0001, RAND - Project Air Force, 2008, at 11-14.

<sup>77</sup> For a general overview, see: Dali, *Piracy attack in the Malacca Strait*, August, ATLAS Service Partners, 2001.

<sup>78</sup> For more information on the piracy in Southeast Asia, and the employment of PSCs, see: Liss, *The Privatisation of Maritime Security - Maritime Security in Southeast Asia: Between a rock and a hard place?*, Working Paper No. 141, Asia Research Centre, 2007. See also: McKinnon, *Maritime Piracy: A Hong Kong Perspective*, Working Paper Series, City University of Hong Kong, Hong Kong Centre for Maritime and Transportation Law, 2011, and, an older analysis: Keyuan, *Piracy at sea and China's response*, Lloyd's Maritime and Commercial Law Quarterly, 3, August (2000).

<sup>79</sup> See: Ilogu, *Chidi Ilogu on...* Maritime Risk International, March, 1 (2008).

<sup>80</sup> For a comprehensive study and comparison of anti-piracy activities in major global pirate-endangered regions, see: Riggs, *Piracy in the Horn of Africa: A Comparative Study with Southeast Asia*, Master's Thesis, December, Naval Postgraduate School, Monterey, California, 2009, and, Maoche, *Piracy along the Horn of Africa: An Analysis of the Phenomenon within Somalia*, Master's Thesis, July, IFSH, 2010.

<sup>81</sup> For example, see: *Ortiz*, *supra* note 47, at 67.

<sup>82</sup> See the speech of Mr. Justice David Steel in: *Masefield AG v. Amlin Corporate Member Ltd.*, *supra* note 9, at 12. For more background information on Somalia, see: Silva, *Somalia: State Failure, Piracy, and the Challenge to International Law*, Va. J. Int'l L., 50, 554 (2010). For a detailed account of the political situation in Somalia (and Eritrea), see: UNSC, *Letter dated 18 July 2011 from the Chairman of the Security Council Committee pursuant to resolutions 751 (1992) and 1907 (2009) concerning Somalia and Eritrea addressed to the President of the Security Council*, S/2011/433, United Nations Security Council, 2011.



response to the considerable size of illegal fishing<sup>83</sup> by foreign trawlers, and the continuous dumping of toxic waste along the Somali coast<sup>84</sup>. Today, Somalia is a “failed state” with no effective government since 1991, ruled by local warlords involved in arms/drugs trade and constant warfare, and offering little possibility for any sort of industrial/business development. In addition, hunger and natural hardships create additional problems for the local population, which faces poverty<sup>85</sup> and deprivation of human rights<sup>86</sup>.

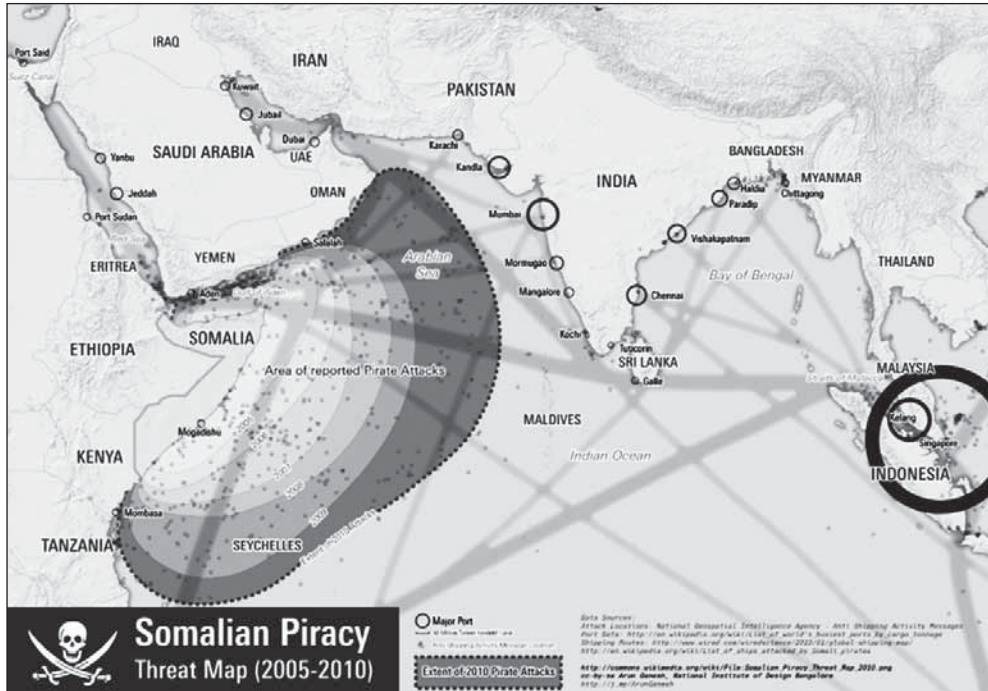
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<sup>83</sup> The phenomenon known as the “illegal, unreported and unregulated” (IUU) fishing is a known issue, affecting a large number of coastal states’ communities, and producing an annual cost to the predominantly developing countries to the excess of US\$ 2-15 billion, see: Foundation, *Pirates and Profiteers: How Pirate Fishing Fleets are Robbing People and Oceans*, EJF: 2005, Environmental Justice Foundation, 2005, at 2, and especially at 7.

<sup>84</sup> *AIV, supra note 10*, at 14. Also, see: UNEP, *National Rapid Environmental Desk Assessment – Somalia*, United Nations Environment Programme, Special Report, 2005, at 133, and, Hussein, *The Evidence of Toxic and Radioactive Wastes Dumping in Somalia and its Impact on the Enjoyment of Human Rights: A Case Study*, United Nations Human Rights Council 14<sup>th</sup> Session, Panel discussion on Toxic Wastes, Geneva, 2010.

<sup>85</sup> Thus, the prospect of piracy seems to be appealing to a part of younger population, given practically no other choice of “career”.

<sup>86</sup> For more on the issue of Somalia, see: Liss, *Privatising the Fight against Somali Pirates*, Working Paper No.152, Asia Research Centre, Murdoch University, 2008, at 2-3. For more detailed analysis of the situation in Somalia, see: Bernal, *Somali Piracy: Jurisdictional Issues, Enforcement Problems and Potential Solutions*, Georgetown Journal of International Law, 41, January (2010). For a US perspective, see: Bronwyn, *Somalia: A New Approach*, Council Special Report No. 52, Council on Foreign Relations, 2010. For general perspectives, see: Lehr, *supra note 4*, at 8 *et seq.* For more on the issue, also see: Hansen, *Modern Piracy as a Subject of Academic Enquiry*, 19 December, International Relations, 2008.



*Somalia Piracy Threat Map 2005-2010*<sup>87</sup>

### a. Pirate Business Model

Pirate “*entrepreneurs*” have established the so-called “*pirate business model*”<sup>88</sup>. A “mother ship” carries pirates and their equipment far from the coastline in search of possible targets. Once a good target is spotted, and providing there is no visible navy (or PSC) escort nearby, the mother ship releases two to three attack skiffs, with pirate-soldiers armed with different types of weapons (including rocket propelled grenades - RPGs), satellite phones and other equipment, ready to take the target-vessel by use of force. Pirate attacks<sup>89</sup> result in stealing and robbery of goods, re-sale of captured

<sup>87</sup> Source: Wikimedia Commons: *Somalia Piracy Threat Map 2010*, available at: [http://en.wikipedia.org/wiki/File:Somalian\\_Piracy\\_Threat\\_Map\\_2010.png](http://en.wikipedia.org/wiki/File:Somalian_Piracy_Threat_Map_2010.png), last visited on 20 September 2011.

<sup>88</sup> Perhaps the most detailed account of the inside stories and life of the Somali pirates, see: Bahadur, *The Pirates of Somalia: Inside Their Hidden World*, 2011, New York: Pantheon Books, 2011. Also, see: Russell, *Who Rules the Waves? Piracy, Overfishing and Mining the Oceans*, 2010, New York: Pluto Press, 2010, Chapter 4.

<sup>89</sup> For a detailed analysis of different phases of the pirate attack, see: Herbert-Burns, *Compound Piracy at Sea in the Early Twenty-First Century: A Tactical to Operational-Level Perspective on Contemporary, Multiphase Piratical Methodology*, in: Lehr, *supra* note 4, at 97 *et seq.*

vessels<sup>90</sup>, kidnapping and payments, and other similar misconduct. Pirates usually use intimidation by a demonstration of force coming for the use of “small” guns, whereas lately, more reports indicate the use of heavier weaponry<sup>91</sup>. Recent reports even suggest that the pirate teams are being “... *sent out without the fuel to return*”<sup>92</sup>.

According to one report<sup>93</sup>, pirate groups or “clans” use loans to finance their enterprise. Thus, a successful attack, resulting in hijacking and ransom payment, is a *conditio sine qua non* for the survival of such a group, due to the fact that so-called financiers/sponsors often threaten the pirates, should they fail to produce successful results, with the safety of their families back on the shore. Thus, as one author concludes, the “... *pirates become increasingly desperate the longer they are at sea*”.<sup>94</sup> According to Cochrane, the modern pirate enterprise can be classified as organized crime<sup>95</sup>. Using information gathered through personal contacts and UN reports, Cochrane prepared a rough estimation of the division of interest arising out of a successful ransom payment. The pirate-soldiers involved in the actual boarding/seizure/hijacking operation receive around 30% of the income (according to Wilson, a pirate-soldier is paid an average amount of US\$ 10,000 per a successful attack<sup>96</sup>), the ground militia responsible for the pirate bases’ security receive around 10%, the local community around 10% (this being an important method of winning the “hearts and minds” of the local populace, facing all the hardships previously described), the financier around 20% (according to some reports, piracy creates corruption, as is seen as a good way to earn “easy” money, and it could be seen as a sort of illegal “*pirate joint-stock corporation*” enterprise<sup>97</sup>), and the sponsor (usually a local warlord or influential militia leader or arms dealer) around 30%.

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<sup>90</sup> For more on the phenomenon known as the so-called “phantom ships”, see: *Chalk, supra note 76*, at 6. Also, see: *Herbert-Burns, ibid.*, at 96 and 113-115.

<sup>91</sup> See: see: *Herbert-Burns, ibid.*, at 111.

<sup>92</sup> See: Article, *Armed guards prove a sticking point as insurers try to clarify cover*, Lloyd’s List, July, 7 (2010).

<sup>93</sup> Lodge, *Maritime Liaison Office Bahrain*, Combating Piracy Hamburg, March, Hamburg, Germany, 2011.

<sup>94</sup> *Lodge, ibid.*

<sup>95</sup> Cochrane, *Treasure ships*, Money Laundering Bulletin, March, 15 (2010). For more on the named and other relevant Security Council resolutions, see: *Guilfoyle, supra note 4*, at 64 *et seq.*

<sup>96</sup> *Wilson, supra note 61*, at 248. Such an amount represents an average 5-10 years’ wage by local standards. According to a more recent data, an individual earning per a successful attack amount to a figure of US\$ 50,000, see: Kraska, *Contemporary Maritime Piracy: International Law, Strategy and Diplomacy at Sea*, 2011, Santa Barbara, California: Praeger, 2011, at 50.

<sup>97</sup> According to some sources, the organized crime connections can be traced to areas outside of the region, such as is one example referring to direct communication between the pirates and London, see: *Bahadur, supra note 88*, Chapter 3. Also, see: Tremlett, *Somali pirates guided by London intelligence team*, *The Guardian*, May, 11 (2009).

Chalk has taken all the previously mentioned factors into consideration, and concluded that the main dangers of piracy are the following: “(a) *threat to the lives, (b) fraud, stolen cargos and delayed trips and could undermine a maritime state’s trading ability, (c) encouraging corruption among elected officials and bureaucrats, and, (d) potential to trigger a major environmental catastrophe*”<sup>98</sup>.

### **b. Incidents in the Somalia/Gulf of Aden Region**

Today, the Somalia and the Gulf of Aden “host” a highest annual reported pirate-related incidents. According to a number of studies<sup>99</sup>, around 33,000 vessels pass the Gulf of Aden/Somalia coastline annually, and out of that amount, less than 1% of vessel witness attempted/successful pirate attack<sup>100</sup>. According to the data presented at the European Security and Defence Forum, 0.5% of vessels passing through the Gulf of Aden get attacked<sup>101</sup>. Current statistics of pirate-related incidents<sup>102</sup>, as of 18 August 2011, according to the IMB Piracy Reporting Centre (PRC)<sup>103</sup>, amount to the following figures:

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<sup>98</sup> Chalk, *Maritime Piracy: Reasons, Dangers and Solution*, CT-317, RAND Corporation, 2009, at 4.

<sup>99</sup> For example: Gortney, *Statement of Vice Admiral William E. Gortney, U.S. Navy Commander, U.S. Naval Forces Central Command Before the House Armed Services Committee on Counter-Piracy Operations in the U.S. Central Command Area of Operations*, March, House Armed Services Committee on Counter-Piracy Operations in the U.S. Central Command Area of Operations, 2009.

<sup>100</sup> For detailed information on the pirate attacks, see: EA, *Somalia Piracy: Successful & Attempted Hijacks*, 1 Jan 2008 - 22 Sept 2010, Exclusive Analysis, 2010.

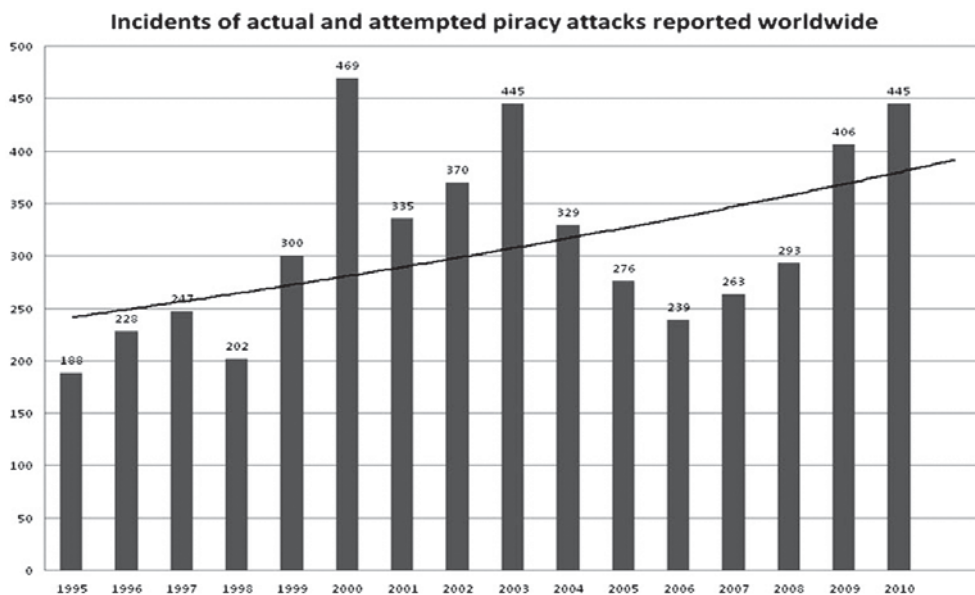
<sup>101</sup> See: *Spearin, supra note 10*, at 2.

<sup>102</sup> For a detailed account, including overall global pirate-related statistics and reports, see: IMB, *Piracy and Armed Robbery against Ships*, Report for the Period of 1 January - 30 June 2011, ICC International Maritime Bureau, 2011. Also, IMO publishes a monthly review of latest incidents, see, e.g.: IMO, *Reports on Acts of Piracy and Armed Robbery Against Ships*, July 2011, International Maritime Organization, 2011.

<sup>103</sup> IMB Piracy Reporting Centre (PRC): *Pirate-related Incidents in 2011*, available at: <http://www.icc-ccs.org/piracy-reporting-centre/piracynewsfigures>, last visited on 20 September 2011. Also, see: International Chamber of Commerce, International Maritime Bureau, ICC Commercial Crime Services: *IMB Live Piracy Map 2011*, available at: <http://www.icc-ccs.org/piracy-reporting-centre/imb-live-piracy-map>, last visited on 20 September 2011. The same agency offers live piracy reports centre, see: International Chamber of Commerce, International Maritime Bureau, ICC Commercial Crime Services: *Live Piracy Report*, available at: <http://www.icc-ccs.org/piracy-reporting-centre/live-piracy-report>, last visited on 20 September 2011.

<b>Worldwide Incidents</b>	<b>Incidents Reported for Somalia</b>	<b>Current vessels held by Somali pirates</b>
Total Attacks Worldwide: 314 Total Hijackings Worldwide: 31	Total Incidents: 178 Total Hijackings: 22 Total Hostages: 362 Total Killed: 7	Vessels: 18 Hostages: 355

In comparison, the following figure<sup>104</sup> offers the scale and scope of worldwide reported pirate attacks from 1995 to 2010, where, again, it is re-confirmed that the average number of pirate attacks steadily increases on the annual basis:



<sup>104</sup> Source: Blue Mountain: *Piracy Statistics*, available at: <http://www.bluemountaingroup.co.uk/maritime-security/piracy-statistics.asp>, last visited on 20 September 2011.

## E. ISSUE OF ARMED GUARDS

The armed guards<sup>105</sup> are usually defined as the “privately contracted armed security personnel” (PCASP)<sup>106</sup>. Another commonly used term is the so-called “shipriders”<sup>107</sup>. The employment of armed guards is by no means the only measure available to the shipping companies and related persons in charge of vessels. In fact, the use of PCASPs is often characterized as the last resort available to avert the threat of pirate attacks (in theory at least; in practice, the use of PCASPs has become frequent and preferred by the shipowners/operators; more on this issue in the further text). The maritime industry recommends the use of the Best Management Practices for Protection against Somalia Based Piracy (BMP – current edition number 4)<sup>108</sup>, which provides a detailed set of instructions for ship operators and masters of vessels regarding the preparation for pirate attacks, and offers a “model behavior” in cases of pirate attacks. This includes the use of special security equipment on board vessels, and crew training<sup>109</sup>. Another possibility is the use of armed convoys<sup>110</sup> (or escort

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<sup>105</sup> The 1977 Protocol I to the Geneva Conventions adopts a number of criteria which a “mercenary” or an armed guard needs to adhere to [for more on the issue, see: ICRC, *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, Protocols additional to the Geneva Conventions, International Committee of the Red Cross, Diplomatic Conference of Geneva of 1974-1977, 1977, Article 47]. For a critique of this Convention, and its alleged inapplicability on the modern-day PSCs, see: Millard, *Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies*, *Military Law Review*, 175, June (2003). Another important international source is the “Mercenaries Convention”, see: UN, *International Convention Against the Recruitment, Use, Financing and Training of Mercenaries*, UNTS, vol. 2163, United Nations, 1989. For more on the issue, see: *Salzman, supra note 69*, at 874 *et seq.* For a comprehensive study of the issue, see: Milliard, *Overcoming Post-Colonial Myopia: A Call to Recognize and Regulate Private Military Companies*, 51th Graduate Course, Master’s Thesis, The Judge Advocate General’s Corps United States Army, 2003. Also, see: Österdahl, *The Public-Private in Armed Conflict: The Accountability of Private Security Companies*, Working Paper 2010:3, Uppsala Faculty of Law, 2010.

<sup>106</sup> IMO, *Interim Recommendations for Flag States regarding the Use of Privately Contracted Armed Security Personnel On Board Ships in the High Risk Area*, MSC.1/Circ. 1406, International Maritime Organization, 2011, at 1.

<sup>107</sup> UNSC, *supra note 82*, at 54.

<sup>108</sup> Industry, *BMP4 - Best Management Practices for Protection against Somalia Based Piracy: Suggested Planning and Operational Practices for Ship Operators, and Masters of Ships Transiting the High Risk Area*, Version 4 - August 2011, Witherby Publishing Group Ltd, 2011.

<sup>109</sup> An IMO analysis has shown that around 45% vessels passing through the Somalia region do not adhere to the BMP recommendations, see: IMO, *Piracy: Orchestrating the Response*, *supra note 62*.

<sup>110</sup> Such as is the example of the IRTC, see: *supra note 61*.

ships<sup>111</sup>), or military personnel on board vessels flying certain flags (the so-called Vessel Protection Detachments [VPDs])<sup>112</sup>. One method of deterrence is a choice of an alternative route over the Cape of Good Hope. However, such a method exhibits the issue of extra costs<sup>113</sup> for shipowners and other interested parties<sup>114</sup>, comprising of extra fuel factor, time factor, an increase in freight rates factor, and the possible subsequent increase in the imported goods prices.

Finally, in case of the employment of PSCs, it is possible to choose between an armed and an unarmed option. Regarding anti-piracy services, according to Liss<sup>115</sup>, most PSCs offer the following specialized services: (a) consulting, (b) specialized training of the involved personnel, (c) (armed) guards on board vessels or in accompanying escort vessels, (d) support in kidnapping scenarios, and, (e) protection of fisheries.

#### **a. PSCs in the Maritime Sector**

According to Hernandez, “... *the bulk of PMSC operations in Southeast Asia are maritime security activities*”<sup>116</sup>, given the importance of the security of SLOCs and maritime energy installations (platforms, pipelines, etc.), partially due to the complexity of the task, and partially due to the lack of incentive provided by the Association of Southeast Asian Nations (ASEAN). This trend seems to be gathering its momentum in the Somalia region as well.

The UN Security Council latest report on Somalia indicates that up to the present date, no single vessel under the PCASP protection has been hijacked<sup>117</sup>, this being a strong incentive towards the continuing use of this option. The same report

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111 PSCs have begun offering escort ships services, see: HSMS, *Private ship escort guard against pirates*, 7 August, Hight Seas Maritime Security Ltd, 2011.

112 According to various press releases, Danish, Israeli, German and Russian marines and commandos are reported to have been present on board domestic registered vessels as a military escort/guard.

113 According to Townsend, this can lead to additional costs up US\$ 2 million, see: Townsend, *No romance in modern piracy*, Maritime Risk International, March, 23 (2009).

114 As presented in: IMO, *Piracy: Orchestrating the Response*, *supra note 62*.

115 Liss, *Privatising the Fight against Somali Pirates*, Working Paper No.152, Asia Research Centre, Murdoch University, 2008, at 7.

116 Hernandez, *supra note 49*, at 10.

117 UNSC, *supra note 82*, at 54. For examples of successful PCASP operations, see: Phillips, *Pirate attacks trigger armed guard coverage*, FeralJundi.com, December, 13 (2009), available at: <http://feraljundi.com/1226/maritime-security-pirate-attacks-trigger-armed-guard-coverage/>, last visited on 20 September 2011. For an incident involving a pirate getting shot by PCASPs, see: Eichstaedt, *supra note 40*, at 174.

indicates that the use of PSC services<sup>118</sup> in the Somalia/Gulf of Aden has risen drastically in the last two years<sup>119</sup>, heightening the competition between private maritime security providers, thus potentially leading to the fall of prices of the employment of PSCs. Parallel to this growth, local coastal states have recognized the trend, and offered a number of subsidiary services (the right of establishment for the PSC companies, private escort vessels, armaments lease, etc.), in order to support the private security industry's efforts, and earn an extra profit available through such activities<sup>120</sup>. One possible negative outcome of such a trend is an increase in ransom payments, and the length of negotiations/vessel-crew detention periods<sup>121</sup>.

### **b. Stakeholders' Positions**

The Governments' (both the coastal states' and the flag states') approach towards the employment of armed guards witnessed a sharp change in the last two years. The US administration publicly endorsed the use of PSCs on board vessels as early as the 2008<sup>122</sup>. Other Governments and national maritime associations did not initially share such a view, but under the pressure from the industry, they resolved to a discrete change of attitude<sup>123</sup>. A good example of such a shift is the position of the German Maritime Association, which, following the flagging-out of German registered vessels to flag states supporting the use of armed guards<sup>124</sup>, withdrew its opposing stance towards the employment of PCASPs<sup>125</sup>, and openly

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<sup>118</sup> For a list of currently active PSCs in the maritime sector that offer services in Somalia, see: *UNSC, ibid.*, at 314.

<sup>119</sup> *UNSC, ibid.*, at 54.

<sup>120</sup> *UNSC, id.*

<sup>121</sup> *UNSC, id.*

<sup>122</sup> *Spearin, supra note 10*, at 2-3. Such a position was further strengthened by the adoption of the Maritime Security Directive, forcing US flag vessels to carry security teams on board when passing through high risk waters as defined by the Directive, see: Guard, *Maritime Security Directive 104-6 (Rev 5) - Guidelines for U.S. Vessels Operating in High Risk Waters*, Docket No. USCG-2009-0384, Federal Register / Vol. 76, No 9/2011, Department of Homeland Security - Coast Guard, 2009.

<sup>123</sup> See e.g.: Reuters, *Spain allows armed guards on ships in danger zones*, Reuters, October, 30 (2009). Also, see: *infra note 129* on how the International Chamber of Shipping made a change in attitude towards the use of PCASPs.

<sup>124</sup> According to one study based on a survey completed with 110 German shipping companies, one in ten uses the services of PSC, see: Knight, *Anti-piracy measures for sale in Hamburg*, FeralJundi.com, October, 25 (2010), available at: <http://feraljundi.com/somalia/maritime-security-anti-piracy-measures-for-sale-in-hamburg-germany/>, last visited on 20 September 2011.

<sup>125</sup> For a legal consideration of German regulation regarding the use of PSCs, see: Salomon, *Private Sicherheitsdienste auf Handelsschiffen - Rechtliche Implikationen*, PiraT-Arbeitspapiere zur Maritimen Sicherheit Nr. 2, IFSH, 2011, at 25 *et seq.*



started to pursue an option of employing the federal police on German flagged vessels passing the endangered waters<sup>126</sup>. Provided this was a question of public moral and safety in terms of the use of firearms as opposed to the benefit derived from the tonnage tax based on the German registry of vessels, it would suggest that the economic rationale prevailed (however, it seems that the predominant motive was the safety of German flagged vessels' crewmembers). Recently, the German Federal Government has been considering the implications of the use of armed guards regarding criminal liability<sup>127</sup>, thus effectively accepting the use of PSCs as a legitimate means of combating the piracy threat. Other Governments<sup>128</sup>, such as the United Kingdom (UK), have until very recently remained firm regarding their opposition to the employment of armed personnel on board vessels, this view beginning to shift under the influence of/pressure from the shipping industry (and statistical data)<sup>129</sup>. Regarding the position of the maritime industry, the same change of view may be observed<sup>130</sup>. It is noteworthy to quote the International Group of P&I Clubs latest comment regarding this issue:

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<sup>126</sup> See: Article, *German owners swap flags to protect against pirates*, Lloyd's List, June, 14 (2010). See also: Editor, *Ausflagung für Piratenschutz*, Hafen Report, Juni, 14 (2010). The same can be observed in Japan [see: Watanabe, *Japan may allow armed guards on ships to combat pirates*, The Asahi Shimbun, August, 20 (2011)], Denmark [see: Editor, *Danish Ministry of Justice sanctioned armed guards on board*, Sea News, January, 7 (2011)], Norway [see: Berglund, *Shipowners arm to fight piracy*, Norway International Network, January, 18 (2011)] and India [see: Editor, *India: Government to deploy armed guards on board cargo vessels*, Maritime Sun, May, 26 (2011)], to name a few relevant jurisdictions.

<sup>127</sup> See: Article, *Piracy: criminal liability risks when using armed private security teams*, Internationalallawoffice.com, September, 14 (2011).

<sup>128</sup> See also: Commission, *Commission Recommendation of 11 March 2010 on measures for self-protection and the prevention of piracy and armed robbery against ships*, Official Journal of the European Union, L 67/13, 17.3.2010. (2010).

<sup>129</sup> See: Blog, *UK government seeks to deter use of armed guards onboard*, Lloyd's List, January, 25 (2010); Also, see: Committee, *Piracy: Government Response to the Committee's Eighth Report of Session 2005-06 - Sixteenth Special Report of Session 2005-06*, HC 1690, The House of Commons, 2005, and, MCA, *Measures to Counter Piracy, Armed Robbery and other Acts of Violence against Merchant Shipping*, MGN 298 (M), Maritime and Coastguard Agency, 2005. Insider information suggest that the UK Government is rethinking its stance over the issue, parallel to similar "change of heart" as observed in non-governmental organizations and industry associations, like the International Chamber of Shipping, see: INCE, *Piracy - Issues Arising from the Use of Armed Guards, Shipping, March*, INCE & CO, 2011. As a confirmation to the change in the official UK position regarding the use of PCASPs, see: Article, *UK U-turn on armed guards lifts threat of shipowner prosecution*, Lloyd's List, October, 12 (2011).

<sup>130</sup> In a recently completed German study, a survey among the German marine insurance companies has shown that insurance companies favor the presence of military or armed personnel on board vessels, see: *Hernandez, supra note 49*.

*“However, the previous strong opposition of industry associations to the use of armed guards has softened in the light of increasing levels of piracy activity in areas distant from naval protection and against a background of increasing aggression against crews. There has been a shift from general opposition to more neutrality, and in high risk cases, positive support for the deployment of armed personnel”*<sup>131</sup>.

The IMO’s standpoint towards the employment of armed guards has gradually shifted from a strong opposition<sup>132</sup> to moderate disagreement, but at the same time, recognition of the *de facto* practice of employment of the PCASPs. Two recent documents address this issue: (a) Interim Recommendations regarding the Use of Privately Contracted Armed Security Personnel On Board Ships<sup>133</sup>, which is addressed to the flag states and provides for basic guidelines regarding the adoption of a standpoint regarding the PCASPs (which should lead to the adoption of national legislation/acts regarding the issue of PCASPs), and, (b) Interim Guidance to Shipowners, Ship Operators, and Shipmasters on the Use of Privately Contracted Armed Security Personnel On Board Ships<sup>134</sup>. According to the latter document, the issue of PCASPs is not anymore focused on whether such services should or should not be adopted, but what the criteria<sup>135</sup> should be used in order to secure quality services. Thus, the IMO has recognized that the PSCs are often employed in practice.

### **c. Pro and Contra Arguments**

The benefit of the employment of PSCs can be observed through a comparison between the costs of employment of state navies as compared to an increase in marine insurance premiums. Spearin thus compares the 2008-2009 figures, showing that the later expense is ten-times smaller than the public spending incurred<sup>136</sup>. Another benefit seems to go *hand-in-hand* to the shipowners/operators who have em-

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<sup>131</sup> IGP&I, *Piracy - FAQs*, Revised: September 2011, International Group of P&I Clubs, 2011, at 4.

<sup>132</sup> IMO, *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*, MSC.1/Circ. 1334, International Maritime Organization, 2009, at 60-61.

<sup>133</sup> IMO, *supra note 106*.

<sup>134</sup> IMO, *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*, MSC.1/Circ. 1405, International Maritime Organization, 2011.

<sup>135</sup> Such as: general due diligence, training, background information and previous employment, certificates, size of armed guard teams, etc., see: IMO, *Interim Guidance, supra note 134*.

<sup>136</sup> Spearin, *supra note 10*, at 6.

ployed the services of armed guards. Spearin mentions a number of sources claiming that pirates generally tend to avoid shipping companies known for employing the PSCs<sup>137</sup>. Furthermore, the PSCs can adhere to the special needs of the shipowner/operator and provide flexible “working hours” (no need to depend on states navies’ convoys). In addition, some PSCs have entered into special arrangements with insurance companies offering discounts on premiums if the PSC services are accepted<sup>138</sup>, which under certain conditions can amount to as much as 50% reduction<sup>139</sup>. Certain marine insurance companies offer special shipowner liability policy, covering any liability resulting from the use of armed guards on board vessels<sup>140</sup>.

Legal issues arising from the use of PSCs are still largely unanswered (due to the nature of such services, usually confidential). One such issue is the question whether the armed guards could potentially be treated as “pirates”. The PSCs may offer “escort” vessels boarded with a team of highly specialized armed guards capable of engaging in both defensive and offensive actions. In cases of engagement, it is conceivable that such escort vessels can attempt to board alleged pirate vessels. This could possibly be interpreted as an act of piracy, according to UNCLOS Article 101, UNCLOS<sup>141</sup>, and could also stand in contrast to Article 19, where the concept of free passage is “disturbed” by the introduction of weapons. For this reason, one solution presented to the PSCs is to formulate contracts in such a manner that the PSC guards become “*supernumeries*” to the crew of the protected vessel<sup>142</sup> (according to

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<sup>137</sup> Spearin, *ibid.*, at 10.

<sup>138</sup> For more on such occurrences, see: Harrelson, *supra* note 4, at 297.

<sup>139</sup> Phillips, *supra* note 117. The usual prices of PSC service amount to US\$ 100,000 per passage or US\$ 25,000 per a three-detachment team (Spearin, *supra* note 10, at 11.), and around US\$ 12,000 per day per an escort vessel [see: Joubert, *Private security firms benefit from piracy*, France 24, November, 30 (2008). Also, see: Editor, *Private Security Firms Join Battle Against Somali Pirates*, October 26, Fox News, 2008]. However, as noted earlier, when a PSC service is contracted in combination with an insurance coverage, considerable discounts can be expected. As an example, see the Hart Security “Protected Gulf of Aden Voyages” service, which includes: “Cover placed 100% at Lloyd’s, Vessels protected by Hart Security Team during voyage, Piracy included within War coverage, Attractive insurance terms aligned with preferential market rates from Hart, Hull values up to USD 75,000,000, War P&I up to USD 75,000,000, Detention cover to protect Loss of Earnings if required, No deductible for Physical Damage Cover”, Hart: Land, Sea and Air Security: *Protected Gulf of Aden Voyages*, available at: [www.hartsecurity.com](http://www.hartsecurity.com), last visited on 20 September 2011.

<sup>140</sup> Phillips, *supra* note 117.

<sup>141</sup> See: *supra* note 4.

<sup>142</sup> For more on this issue, see: Spearin, *supra* note 10, at 8. The “supernumeries” model is suggested as a proper way of retaining the P&I cover for the security personnel, see: Carden, *Piracy and Armed Robbery at Sea - How Best to Protect Seafarers: Piracy and P&I Insurance*, IGP&I Maritime Security Subcommittee, International Group of P&I Clubs, 2010.

which, arguably, such an “offensive” measure could be interpreted as a “defensive” operation of the crew).

Even after a shipowner/operator concludes a contract with a PSC employing thereby the services of armed guards, a number of public law issues persist. Whether arms are permitted on board vessels is a question of the coastal/flag/registration state legislation. Thus, in order to secure the services of PCASPs, it is not merely sufficient to sign a contract, but it is also necessary to ensure that the flag/registration state either allows or is not specifically against the use of arms on board vessels. Additionally, provided that the flag/registration state allows the use of firearms on board vessels, it is necessary to ensure the legal (dis)embarkation of PCASPs. Not all coastal states are willing to allow the passage of armed personnel through their maritime zone of control<sup>143</sup>. In practice, the armed guards are transported to vessels when they enter specific jurisdictions where their presence is tolerated. The Yemeni navy, for example, is reported to be offering transportation services<sup>144</sup>, the Djibouti is offering a bureaucracy-friendly environment for the registration of PSCs firms/establishments<sup>145</sup>, and recently, the Saudi Government has openly stated that they will tolerate the use of arms for self-defense, and thus, *de facto* open up its ports for the use of PSCs services<sup>146</sup>.

One of the often-repeated arguments *contra* the employment of PSCs is a feared escalation of violence and related costs. This has led some authors, such as Harrelson, to openly ask for the prohibition<sup>147</sup> of employment of the armed guards on board vessels. Others claim that no such escalation is probable and that the likely result of armed personnel on board vessels will serve as a major deterrence factor<sup>148</sup>, whereas the reported increase in the use of heavy firepower by pirates may be interpreted as a product of direct investment by pirates themselves, in order to make their business more prone to success and thus more profitable.

Another uncertain legal aspect of the PSC services is the issue of insurance coverage. The current uncertainty regarding the use of PSCs is how the armed guards’ risk

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<sup>143</sup> For comprehensive information on coastal states’ regulation regarding the use of arms on board vessels, see: UK P&I Club: *ICS & ECSA guide to flag state rules in respect of private armed guards*, available at: <http://www.ukpandi.com/knowledge-developments/industry-developments/maritime-security-piracy/>, last visited on 20 September 2011.

<sup>144</sup> According to one study, the Yemeni navy charges up to US\$55,000 per ship, see: Bateman, *Riding Shotgun: Armed Security Guards onboard Merchant Ships*, RSIS Commentaries 28/2010, S. Rajaratnam School of International Studies, 2010

<sup>145</sup> See: Article, *Ships openly allowed to carry arms in Saudi waters*, Lloyd’s List, May, 25 (2010).

<sup>146</sup> See: *Lloyd’s List*, *ibid*.

<sup>147</sup> Harrelson, *supra* note 4, at 311-312.

<sup>148</sup> Blog, *Armed marines will not escalate pirates’ violence*, Lloyd’s List, November, 25 (2010).

will be insured, and under which policy it should be insured. The so-called “*knock-for-knock*”<sup>149</sup> clauses introduced into the security contracts, and currently favored by the marine insurance industry, clearly separate the liability of PSCs from that of the shipowner/operator, by stipulating that the risk is borne where it occurs, meaning that the PSCs will cover damage suffered by their personnel, whereas the shipowners/operators/cargo interest will cover their own liability. The IMO adopted special recommendations regarding the insurance cover related to possible legal issues potentially arising from the use of PCASPs. First recommendation suggests that the PSCs should secure their own insurance coverage (company, personnel and third-party liability) and that such insurance should not fall within the scope of the shipowner’s insurance policy<sup>150</sup>. This issue is however not fully covered, as the IMO recommendations recognize the need to hold individual council with the insurance policy providers in order to explore in detail the possibility of shipowners/operators and others being held liable for losses due to armed engagements of the employed PCASPs.

An often-debated issue is the question of the superior authority on board the vessel when a PCASP team is employed: who is primarily responsible for the (a) well-being of the crew, vessel and cargo, and (b) determination whether a danger from a pirate attack exists<sup>151</sup>. An IMO recommendation suggests the incorporation into a service contract of “... [a] *clear statement that at all times the Master remains in command and retains the overriding authority on board*”<sup>152</sup>, marking a clear answer to any potential confusion arising from the relationship between the master of the vessel and the PCASP team leader. It is, however, possible to imagine certain objections coming from the PSCs regarding the necessity for the PCASP team leader to have a full-command capability when faced with situations requiring immediate response. One study<sup>153</sup> suggests that security service contracts may include clauses under which the master of the vessel is under an obligation to follow the instructions coming from the PCASP team leader. The same study also mentions possible issues arising from such scenarios, where these instructions lead to the re-routing of vessels (a decision that may stand in conflict with obligations as previously established through charter and carriage contracts). In addition, when lives of crewmembers and

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<sup>149</sup> For contractual difficulties that might arise out of the security contract in cases of pirate attacks, see: Martin, *Fighting Piracy with Private Security Measures: When Contract Law should tell Parties to Walk the Plank*, *American University Law Review*, 59, 5 (2010), at 1376 *et seq.*

<sup>150</sup> *IMO, Interim Guidance, supra note 134*, point 3.1.

<sup>151</sup> See: Carden, *Maritime Piracy and Insurance*, *Combating Piracy Hamburg*, March, Hamburg, Germany, 2011.

<sup>152</sup> *IMO, Interim Guidance, supra note 134*, point 3.3, Annex, at 6.

<sup>153</sup> *INCE & CO., supra note 64*, at 2.

marine environment are endangered, international regulations impose strict duties on masters to act in order to preserve life at sea and protect the marine environment. One such obligation, as pointed out by the afore-mentioned study, is contained within the SOLAS Regulation<sup>154</sup>, in Article 34(1), where it is clearly stated that no person shall interfere with master's actions regarding the previously mentioned situations<sup>155</sup>.

Finally, a recent Lloyd's List article, signed by BIMCO<sup>156</sup>, enumerated a number of legal concerns regarding the use of PSCs. The first issue prompted a possibility of pirates claiming to be acting in self-defense. This may be difficult to prove, especially having in mind the difficulty that shipping companies face when trying to prove that they have experienced a pirate attack. The second point raised the question regarding the use of deadly force (by the PCASPs). Should the PCASPs need to resort to the use of force, the IMO recommends that "... *in no case should the use of force exceed what is strictly necessary, and in all cases should be proportionate to the threat and appropriate to the situation*"<sup>157</sup>, whereas professional practice and court apprehension should provide, if the need requires, further clarification. A further interesting issue is the question of possible legal risks regarding a negligent behavior of PSCs. Again, the IMO suggests that employers should consult their insurers regarding the specifics of their insurance policies and possible inter-relationship with the PSCs' owned insurance policies.

One point raised by BIMCO deserves closer attention. BIMCO recognizes a need for more clarification regarding the "policing" of PSCs and PMCs, as they view private security to be a considerably different service when performed on land as opposed to sea. What remains to be answered is who will control the actions of PSCs and their personnel, or – to widen the scope of the question – is it wise to transfer the protection of a public interest (freedom of navigation) from public bodies (the international community and navy task forces) to private bodies (the PSCs). The Montreux Document<sup>158</sup>, a document prepared by the International Red Cross and eighteen governments, attempts to provide a general overview and guidance (it is not

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<sup>154</sup> See: IMO, *International Convention for the Safety of Life At Sea (SOLAS)*, 1184 UNTS 3, International Maritime Organization, 1974, Amendments to SOLAS chapter V, Regulation 34 – Safe navigation and avoidance of dangerous situations.

<sup>155</sup> Similar is to be observed in ISPS Code, Part B, point 4.10, see: IMO, *Part B – Guidance regarding the provisions of Chapter XI-2 of the Annex to the International Convention for the Safety of Life at Sea, 1974 as amended and Part A of this Code*, SOLAS/CONF.5/34 ANNEX 1, International Maritime Organization, 2002.

<sup>156</sup> Article, *Governments must set up piracy protection measures*, Lloyd's List, September, 23 (2010).

<sup>157</sup> IMO, *Interim Guidance*, *supra note 134*, point 3.5, Annex, at 7.

<sup>158</sup> *The Montreux Document*, *supra note 49*.

legally binding) regarding international legal obligations of both the PSCs and bodies that contract PSCs' services<sup>159</sup>. In addition, the International Peace Operations Association (the association of PSCs) adopted the Code of Conduct<sup>160</sup>, with similar goals in mind. Whereas both previously named documents refer to the land based PSC activities, the Code of Conduct of the International Association of Maritime Security Professionals (IAMPS)<sup>161</sup> is the first document of its kind, referring to the code of conduct of private marine security companies, aiming to offer quality assessments of the relevant PSCs. The Security Association for the Maritime Industry (SAMI)<sup>162</sup> is another organization aiming to foster such a development. Despite the fact that none of the above mentioned documents can be truly valid unless supported by clear (inter)national legislation, they can serve as a good pointer to the shipping industry when choosing the PSC partner.

## F. PIRACY INSURANCE POLICIES AND LIABILITY ISSUES

As one insurance company's study suggests, the piracy is a "peak" risk, meaning that the low probability of occurrence is countered with a high potential loss<sup>163</sup>. This makes the marine insurance coverage an indispensable tool in keeping the business "afloat"<sup>164</sup>. At the same time, since modern piracy is still a novel occurrence

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<sup>159</sup> Ortiz is critical towards the named Document, as he feels that PMCs should not be approached "... as if they were the mercenaries of past eras", *Ortiz, supra note 47*, at 57. Also, see: *supra note 105*, for the international regulation of "mercenaries".

<sup>160</sup> For more information and the text of the Code, see: International Stability Operations Association (ISOA): *ISOA Code of Conduct*, available at: <http://www.stability-operations.org/index.php>, last visited on 20 September 2011.

<sup>161</sup> For more information, see: International Association of Maritime Security Professionals' (IAMPS), available at: <http://iamsponline.org/>, last visited on 20 September 2011.

<sup>162</sup> For more information, see: Security Association for the Maritime Industry (SAMI), available at: <http://seasecurity.org/index.php/legal>, last visited on 20 September 2011.

<sup>163</sup> Allianz, *Piracy: An ancient risk with modern faces*, AGCS/Pir/0609, Allianz Global Corporate & Specialty, 2009, at 9. The piracy insurance has been present in the standard marine insurance coverage since the end of the 18<sup>th</sup> century [for more on this issue, see: Kahn, *Pirates, Rovers, and Thieves: New Problems with and Old Enemy*, Tul. Mar. L.J., 20, 4 (1995-1996), at 307 *et seq.*].

<sup>164</sup> For an academic study on the role of marine insurance in assuring the securitization of maritime carriage of goods and persons over sea, see: Lobo-Guerrero, *'Pirates', stewards, and the securitisation of global circulation*, *International Political Sociology*, 2, 3 (2008). For an interesting article researching the issue of salvage awards applicable to the peril of piracy, see: Rapp, *Salvage Awards on the Somali Coast: Who Pays for Public and Private Rescue Efforts in Piracy Crises?*, *American University Law Review*, 59, 5 (2010).

regarding the inter-relationship with certain maritime contracts and clauses, a number of legal issues arise between the contractual parties faced with legal effects of a piracy act. Both aspects are to be discussed in the further text.

### a. Insurance Policies

The insurance coverage for piracy<sup>165</sup> is present in most typical Institute clauses of the Hull & Machinery (H&M) insurance policies<sup>166</sup>. The main problem with the standard insurance policy<sup>167</sup> is that it will generally refrain from offering complete piracy-related coverage in specific regions where the threat is high<sup>168</sup>. Thus, parallel to the standard insurance clauses, a number of specialized marine insurance policies have been (re)established (“re-established” due to the fact that pirate-related incidents have been re-shifted<sup>169</sup> from the War Risk policies to the H&M policies, and lately, back again to the War Risk coverage) in order to provide cover for piracy related damage. The hull War Risks policy covers vessels entering a “war zone”<sup>170</sup>, as pre-

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<sup>165</sup> For the relevance of the definition of piracy in terms of piracy insurance coverage, see: Passman, *Interpreting Sea Piracy Clauses in Marine Insurance Contracts*, *Journal of Maritime Law & Commerce*, 40, 1 (2009).

<sup>166</sup> See: Institute Time Clauses Hulls 1/11/95, cl. 6.1.5; Institute Voyage Clauses Hulls cl.4.1.5.; Institute Time Clauses Freight 1/11/95, cl. 7.1.5.; Institute Voyage Clauses Freight 1/11/95, cl. 5.1.5.; Institute Fishing Vessels Clauses 7/20/87, cl. 6.1.5.; Institute Yacht Clauses 1/11/85, cl. 9.1.4.; Institute Time Clauses Hull Port Risks, 7/20/87, cl. 4.1.5.; Institute Bulk Oil Clauses 1/2/83; and, Institute Coal Clauses, 1/10/82. Institute Cargo Clauses (A) also cover piracy, cl. 6.2., but Institute Cargo Clauses (B) and (C) do not support this sort of coverage (cargo insurance also does not include ransom payments, more on this in the further text). For more on the issue of piracy insurance coverage, see: Nousseia, *Maritime Piracy Revisited: Implications for Insurance, Shipping and Trade*, *Transportrecht*, 32, 7/8 (2009), at 300.

<sup>167</sup> According to UK P&I Club study, the hull insurers generally exclude piracy as a covered risk, whereas the war risk covers are starting to include piracy as a named risk, see: P&I, *Piracy - update October 2009*, Special Report: Piracy 2009, UK P&I Club, 2009. This is re-confirmed in a recent study regarding the division of the coverage, where it is concluded that piracy risk is mainly insured through the War Risk insurance, see: MARSH, *Piracy - the insurance implications*, Special Report, MARSH/Ince & Co., 2011, at 4.

<sup>168</sup> According to the Hill Dickinson study, the hull insurance will come into effect unless the damage has occurred out of a “... *conduct causing loss is riot (12 or more persons), civil commotion, an act of terrorism or has a political motive*”, whereas war insurance will come into effect when “... [the] *conduct amounts to a riot or civil commotion or terrorism*”, *Clift*, *supra* note 61.

<sup>169</sup> Such a “shift” occurred through the use of the so-called “free of capture and seizure” (FC&S) clauses; for more on this issue, see: Douse, *Combating Risk on the High Sea: An Analysis of the Effects of Modern Piratical Acts on the Marine Insurance Industry*, *Tulane Maritime Law Journal*, 35, 3 (2010), at 279 *et seq.*

<sup>170</sup> Such zones are also commonly referred to as the “listed areas”. As an example of a listed area, see: MARSH, *supra* note 167, at 7.



viously established by the War Risks policy, where a normal H&M policy does not apply<sup>171</sup>. Such coverage requires an additional premium, and it is usually signed for a specific passage and paid per transit<sup>172</sup>. The cargo War Risk policy applies for cargo entering such endangered areas. War Risks policies can contain excluded areas within the endangered zone, and may in addition be canceled on short notice (48 hours)<sup>173</sup>.

In principle, the ransom payments<sup>174</sup> are to be covered by general average<sup>175</sup>, where Protection & Indemnity (P&I) Clubs will (may) participate, referring to such

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<sup>171</sup> It is possible to conceive a situation where a War Risk policy would also fail to apply. When pirates use heavier weaponry, such as rockets and RPGs, it may be possible to establish “war risk” exclusion. Pirate attacks committed with ordinary guns and weaponry do not collide with the above mentioned exclusion.

<sup>172</sup> Allianz, *supra note 163*, at 10.

<sup>173</sup> Typically, a standard cargo policy cancellation date amounts to 30 days, see: Sakellaridou, *supra note 16*, at 6. Also, as an example of the piracy cancellation notice, see: JCC, *Cargo Piracy Notice of Cancellation*, JC2008/024, Lloyd’s Joint Cargo Committee 2008.

<sup>174</sup> The payment of ransoms did steer some political debates over the acceptability of such a policy, but the overwhelming position is that ransoms ought to be paid. Two competing principles are as follows: (a) payment of ransoms provides incentive towards further kidnapping, as opposed to, (b) payment of ransoms is the only means of protection of the kidnapped seafarers (and retrieval of stolen property). Whereas the latter absolutely deserves the primacy, it is obvious that a *status quo* only leads towards the increase of the attacks, and the insurance payments regarding ransoms or direct payments by shipowners/operators only serve to settle an individual case at hand. For more on this issue, see: Article, *Tacit agreement*, Lloyd’s List, August, 11 (2010), and, Article, *UK hints at some flexibility on ransoms*, Lloyd’s List, August, 10 (2010). The court practice offered an opinion over this issue through a decision made by Justice Steel in: *Masefield v Amlin*, *supra note 9*, where one claim was asserting that the payment of ransoms should be viewed as opposite to public policy. Such a claim was based on a notion that “... a transaction will only be held illegal as contrary to public policy if the harm to the public interest is “substantially incontestable” (*Fender v St John Mildmay [1938] AC 1, 12 per Lord Atkin*)” [in: Dunn, *Paying ransom not illegal*, Maritime Risk International, April, 13 (2010)]. Justice Steel did not agree with such a notion, seeing no alternative available in practice [cf.: Stoian, *Mugged Twice?: Payment of Ransom on the High Seas*, American University Law Review, 59, 5 (2010)], and not wanting to proclaim the K&R insurance as unenforceable. In addition, the court also established that a pirate detention is not by itself a sufficient cause to claim a total loss [see: Salmon, *Capture by pirates is not enough to make a claim for total loss*, Insurance Day, March, 26 (2010), and, Editor, *Total loss and piracy*, Insurance Law Monthly, August, 12 (2010)]. Concerning the notice of abandonment during pirate detentions, see: Henshaw, *Marine insurance – Piracy – Vessel seized by Somali pirates – Cargo owners serving Notice of Abandonment during negotiations between shipowner and pirates for release of vessel – Whether cargo became actual or constructive total loss at date of Notice of Abandonment*, Lloyd’s Maritime Law Newsletter, March, 19 (2010).

<sup>175</sup> “There is a general average act when, and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure. General average sacrifices and expenditures shall be borne by the different contributing interests as the basis hereinafter provided”, York Antwerp Rules 1994, Rule A, see: Lex Mercatoria: *The York-Antwerp Rules 1994*, CMI, available at: <http://www.jus.uio.no/lm/cmi.york.antwerp.rules.1994/doc.html>, last visited on 20 September 2011.

costs as Sue and Labor (S&L) costs<sup>176</sup> (this is due to: (a) the fact that sole kidnapping is different as it does not involve cargo, thus disabling the application of general average, (b) cargo interest can pursue the option of proclaiming the vessel “unseaworthy”<sup>177</sup>, thus, “forcing” the P&I cover). Due to the increasing costs of ransoms for kidnapped crewmembers and the unwillingness of P&I Clubs to participate in total claims’ compensation, a specialized type of marine ransom coverage emerged, the so-called Kidnap & Ransom (K&R), often offered by insurance companies specialized in this particular field of practice<sup>178</sup>, and often accompanied by additional services such as the negotiation and settlement services, medical costs coverage, payment and transportation costs coverage, and similar<sup>179</sup>. Closely related is the so-called Loss of Hire piracy insurance, effective during the period of detention and paid by the charterer, established to cover losses occurring during the detention of the vessels under charter, when off-hire cannot be established (e.g. the BIMCO Piracy clause [discussed in the following text] requires the charterer to pay hire for 90 days following the pirate detention<sup>180</sup>). The Loss of Hire can be purchased as a stand-alone insurance, or an extension to the K&R insurance policy.

The P&I cover does not include piracy as a named risk<sup>181</sup>, but offers cover for certain damage that might result from the pirate-related activity. Thus, the P&I pol-

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<sup>176</sup> For an excellent legal analysis of the pirate related S&L costs, see: Gauci, *Piracy and its Legal Problems: With Specific Reference to the English Law of Marine Insurance*, J. Mar. L. & Com. 541, 41, 4 (2010).

<sup>177</sup> See: Practice, *Charterparty piracy clauses and maritime insurances*, MARSH Global Marine Practice, MARSH Global Marine Practice, 2009, at 5. However, it is important to note that in order for the cargo interests to get involved in general average, it is necessary to show damage to the cargo (this has resulted in generally lower increase in premiums for sole cargo insurance, see: MARSH, *id.*). See also: Steer, *Piracy and general average*, Maritime Risk International, October, 6 (2009). In addition, legal payment of ransom may be recoverable as S&L expense from hull and cargo insurers (*Royal Boskalis Westminster NV v Mountain* [1999] QB 674). Also, on the issue of cargo interests pursuing the “unseaworthy” notion, see: *INCE & CO*, *supra note 64*, at 3.

<sup>178</sup> Since their introduction, the K&R premiums saw a ten-fold increase due to the popularity and high demand. Only recently has the price started to settle down, due to the increased number of K&R providers, see: *Sakellaridou*, *supra note 16*, at 9.

<sup>179</sup> For a case where a payment of a ransom has been held to be recoverable as a S&L expense, see: *Royal Boskalis Westminster NV v Mountain*, [1999] QB 674.

<sup>180</sup> For more on this issue, see: Ellevsen, *A contractual view on piracy*, Shipping & Trade Law, January, 23 (2009).

<sup>181</sup> However, piracy as such is not excluded. As an example, see: SSM, *Rules and List of Correspondents*, Rules and Cover, Steamship Mutual, 2011/2012, Rules Calls I, Protection and Indemnity (21-25): “... there shall be no recovery from the Club in respect of a Member’s liabilities, costs or expenses ... when the incident in respect of which such liability arises, or such costs or expenses are incurred, was caused by: ... ii. capture, seizure, arrest, restraint or detention (barratry or piracy excepted) and the consequences thereof or any attempt thereat”.

icy covers the following risks: injury/illness/death of crew and/or passengers, crew repatriation and substitution, loss of effects, pollution, wreck removal, and liability to cargo for loss/general average contribution. The P&I cover normally excludes the liability for loss caused by certain types of “weapons of war”<sup>182</sup>, such as is the example of an RPG.

## b. Legal Issues

Legal difficulties, such as the issue of frustration of the contract and off-hire, can arise out of charter contracts when pirates detain vessels. In the *Saldanha* case<sup>183</sup>, the charterers refused to pay hire for the duration of the vessel’s detention by pirates, relying on Clause 15 of the NYPE form of charterparty<sup>184</sup> (the establishment of off-hire in cases of total loss). The charterer’s claim failed<sup>185</sup>. According to the MARSH study<sup>186</sup>, charterers in voyage and time charters are responsible for the choice of ports and routes (to ports), and shipowners are responsible for the prosecution of voyage with dispatch. It is however still uncertain to what extent the risk of piracy may affect the inter-relationship between the charterer and the owner of the vessel<sup>187</sup>. In response to this legal uncertainty, the industry came up with a number of model

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<sup>182</sup> “Mines, torpedoes, bombs, rockets, shells, explosives or other similar weapons of war...”, in: Carden, *supra* note 142.

<sup>183</sup> *Cosco Bulk Carrier Co Ltd v Team-Up Owning Co Ltd (The M/V ‘Saldanha’)*, [2010] EWHC 1340 (Comm).

<sup>184</sup> “That in the event of the loss of time from default and/or deficiency of men including strike of Officers and/or crew or deficiency of ... stores, fire, breakdown or damages to hull, machinery or equipment, grounding, detention by average accidents to ship or cargo, dry-docking for the purpose of examination or painting bottom, or by any other cause preventing the full working of the vessel, the payment of hire shall cease for the time thereby lost...”. In the Time Charter New York Produce Exchange Form 1993 (NYPE 1993), off-hire stipulation is present in the Clause 17, see: Association of Ship Brokers and Agents (U.S.A.), Inc.: *Time Charter New York Produce Exchange Form 1993 (NYPE 1993)*, available at: [http://www.shipsworld.com/shipbroking\\_forms/NYPE93.pdf](http://www.shipsworld.com/shipbroking_forms/NYPE93.pdf), last visited on 20 September 2011.

<sup>185</sup> For more on the case, see: Georgiou, *Piracy and off-hire*, Shipping & Trade Law, July, 30 (2010), and, Lewis, *Cosco Bulk Carrier Co Ltd v Team-Up Owning Co Ltd (The “Saldanha”) – QBD (Comm Ct)(Gross J) – 11 June 2010*, Lloyd’s Maritime Law Newsletter, June, 24 (2010).

<sup>186</sup> MARSH, *supra* note 177.

<sup>187</sup> On the side note, it is possible to conceive a notion where a carrier might try to rely on the Hague-Visby and Rotterdam Rules’ excepted perils, namely the so-called “Act of public enemies” [as per Hague-Visby rules, Article 4/2(f)], or “piracy” (as per Article 17/3(c) Rotterdam Rules), for more on this issue, see: Grabovac, *Piratstvo - suvremena prijetnja sigurnosti plovidbe i događaj koji utječe na odgovornost pomorskog prijevoznika u prijevozu stvari*, Zbornik radova Pravnog fakulteta u Splitu, 48, 3 (2011), at 468 *et seq.*

clauses aimed at clarifying the position of the charterer and the shipowner. A typical example is the BIMCO Piracy clause<sup>188</sup>. The BIMCO Piracy Clause for Time Charter Parties requires the consent of the owners (based on reasonable judgment) when a passage through a high-risk area is chosen. This is particularly important (and regularly present [as a rule] in standard insurance covers), since a breach of charter and contract of carriage caused by unauthorized deviation can potentially lead to, for example, the loss of P&I cover<sup>189</sup>. The BIMCO Piracy Clause further regulates that charterers remain liable to indemnify the Bills of Lading or third party claims, as well as additional costs related to pirate attacks' prevention. In addition, the charterers are liable for delays and related costs caused due to piracy attacks' prevention measures and additional insurance surcharge (extra coverage layer). Finally, if the vessel is attacked and/or captured by pirates, it remains on hire, and charterers remain liable for costs<sup>190</sup>. Another example is the Vela Security Clause<sup>191</sup>, similar to the BIMCO Piracy Clause, according to which the charterers are responsible for all additional payments, including the bunkers, and 50% of crew payments. The Shell Piracy Clause sv6<sup>192</sup> includes a specialized rule regarding the use of PCASPs: "5. *It is a condition of this Charter that if Owners deploy Guards or Protection personnel to sail on the vessel such Guards or Protection personnel shall be at Owners' expense and shall not be armed and any equipment they employ shall be non-lethal*"<sup>193</sup>.

## G. CONCLUSION

Taking all the previously stated statistical and related data into consideration, it is possible to derive a simple formula of the risk/security investment. A ship-

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<sup>188</sup> For more information on the mentioned and other relevant piracy related clauses, including the BIMCO Piracy Clause for Consecutive Voyage Charter Parties and COAs, BIMCO Piracy Clause for Single Voyage Charter Parties, BIMCO Piracy Clause for Time Charter Parties 2009, INTERTANKO Piracy Clause - Time Charterparties, INTERTANKO Piracy Clause - Voyage Charterparties, and BIMCO CONWARTIME 2004 & VOYWAR 2004, see: SKULD: *Charterparties - Piracy*, available at: <http://www.skuld.com/Insight/Piracy/Charterparties/>, last visited on 20 September 2011.

<sup>189</sup> *INCE & CO, supra note 64*, at 3. The study mentions legal uncertainties present at cases concerning the pirate hijacking of vessels during deviation.

<sup>190</sup> For a detailed overview, see: Missailidis, *Piracy clause: a contractual solution?*, Shipping & Trade Law, March, 30 (2009).

<sup>191</sup> Available in: Roche, *Charterparty Piracy Clauses & Private Armed Guards at Sea*, Presentation, 15 March, Norton Rose LLP, 2011.

<sup>192</sup> Available in: Roche, *ibid.*

<sup>193</sup> Roche, *id.*

ping company/operator, whose vessel is passing through pirate-infested waters, also known as high-risk or listed areas, needs to take into consideration a number of factors in order to formulate a decision regarding the investment in security.

The primary risk or a pirate attack (pA) consists of the costs related to the damage (hull and cargo) sustained during the pirate attack (pD), as well as secondary damage (spD) caused by a breach of various carriage related contracts (charter, carriage, etc.). Secondary costs (sC) involve the insurance coverage (iC) and investment in security equipment (E). Tertiary costs occur when pirate attacks are successful (cRH), and crewmembers are taken hostage (R) and/or vessel is hijacked (H).

Thus, a principle formula of a basic cost assessment involves the following elements: (a) pirate attack ( $pA = pD + spD$ ), (b) secondary costs ( $sC = iC + E$ ), and, (c) costs of kidnapping and hijacking ( $cRH = R + H$ ). The sC element is generally fixed (due to the standard shipping companies/operators' practice of purchasing a certain insurance coverage and making elementary/advanced investments into the on board security [equipment/specialized security training of the crew]<sup>194</sup>), whereas the pA element is pretty low due to the low statistical possibility of being attacked<sup>195</sup>, and the cRH element is even lower due to a small statistical chance of a pA being successful<sup>196</sup>. When pA and cRH do occur, the costs are high<sup>197</sup>, and potentially higher if the iC element is not sufficient to provide full cover (forcing the shipowner/charterer to bear the costs above the coverage amount). The E element can contribute to the reduction of probability of pA and cRH from occurring.

Another element that can contribute to the reduction of pA and cRH actualization is the choice of an alternative route (aR), which, however, brings upon separate costs (cA). Shipping companies that choose aR, seek to lower the costs of sC, and lower the probability of pA and cRH from occurring. If cA is lower than  $pA + sC + cRH$ , shipping companies might rely on the aR option<sup>198</sup>.

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<sup>194</sup> See: *supra* F.a.

<sup>195</sup> See: *supra* D.b.

<sup>196</sup> See: *supra* C.a.

<sup>197</sup> See: *supra* A.a.

<sup>198</sup> See: *supra* A.b. Although such an option was preferred by a certain part of the shipping industry (the aR + the risk of bad weather at the Cape of Good Hope, despite the fact that it was greater than iC when passing through the Gulf of Aden + the pA + the cost of the Suez Canal passage, was welcomed by certain big shipping companies due to the size of their fleet using this SLOC), as a result of the IRTC, the high-risk area has shifted more along the Somalia coast (as shown previously). Thus, aR does not anymore necessarily circumvent the threat of pA and CHR present during the passage along the Somalia SLOC.

Alternative option is the use of armed guards (G), which bears a certain cost (cG)<sup>199</sup> and a certain benefit (bG). The bG element eliminates (according to the statistics) the probability of a successful cRH (bG  $\neq$  cRH)<sup>200</sup> at the present moment. Another advantage of bG is the reduced cost of sC<sup>201</sup>. The cG consists of the wages for the armed guards, as well as possible pA (pD as a consequence of a firefight, and/or spD as a consequence of temporary re-routing to avoid a pA).

The G element has an additional value of providing the safety to seafarers (sS)<sup>202</sup>. The sS value should be higher than pA + sC + cRH on any account (meaning that the lives and safety of seafarers should be treated as a paramount value, and not placed in comparison with the value of material assets). The often mentioned *contra* argument regarding the use of G, the escalation of violence (V), might lead to a situation where the use of armed guards prompts pirates to use heavier weaponry and thus create more danger to both the sS and safety of the vessel and goods on board (G + V > sS + -pA). The practice however shows that the rise of V is occurring irrespective of the use of G<sup>203</sup>.

The conclusions arising from the above stated (simplified) formulas are self-evident: the use of armed guards is a welcomed option to: (a) preserve the lives and safety of crewmembers, and, (b) offer considerable protection to the shipowner/operator and cargo interests. Furthermore, the use of armed guards: (c) considerably lowers the costs of the shipowner/operator, who is not forced to use the alternative route method anymore, (d) can lead to considerable reductions in insurance premium prices (both through the special deals offered by insurance companies/PSCs, and through the increased insurance market competition), (e) can lead to considerable reductions in the safety equipment investment costs (the specialized security training of the crew is still a welcomed/advised option), and, (e) currently, provides guarantee that no surcharge in terms of the K&R coverage will be needed, as there are no reported incidents of vessel/crew hijacking whilst protected by the PCASPs.

Is the use of armed guards a necessary option? The answer depends on the size of the fleet and economic strength of the shipping company/operator, the type and average speed of vessels, and the number of vessels making monthly/annual passages through high-risk areas. If the number of vessels/number of passages is rela-

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<sup>199</sup> See: *supra* note 139.

<sup>200</sup> See: *supra* E.a.

<sup>201</sup> For both iC and E, see: *supra* E.c.

<sup>202</sup> For more on the issue of the effects of piracy on seafarers, see: *Odeke, supra* note 45, at 141-142.

<sup>203</sup> See: *supra* D.a.

tively low, and vessels are relatively modern and fast, and having in mind the low statistical probability of a pirate attack, shipping companies/operators are unlikely to contract the PSC services, and are more prone to rely on the BMP standards and the use of options like the IRTC armed convoy. If, on the other hand, the passages are frequent, and the vessels slow (and/or low-decked), shipping companies/operators are more likely to contract individual-vessel services, in order to secure an adequate protection, with hopes of attracting the attention of “pirate-reckon missions” that will hopefully mark their vessels on the “*armed guards – avoid*” list. However, regardless of the above suggested model, a shipping company/operator that has witnessed a successful pirate attack and the resulting (K&R and related) costs, is more likely to contract the PSC services in any case.

Is the use of armed guards a definite answer to the piracy threat? The answer is a categorical “no”. Whereas some pirate-infested areas may be classified as a regional problem, piracy occurring at important maritime lanes (SLOCs) is a global problem, requiring a global and public/public-private solution. The issue of maritime security must not be resolved through a completely private-based solution (the use of PSCs) as such an option opens considerable public security issues. The sole public option (states’ navies in the region) has proven ineffectual due to the size of the area affected and the size of the merchant fleet presence in the region, and due to the fact that such an option addresses only the consequences of the piracy scourge, and not the causes. As a result, the maritime industry has resorted to the use of private security means, a *de facto* occurrence now steadily approved by all relevant stakeholders. This, however, should neither undermine the international efforts to improve the conditions in the Somalia region nor reduce the international presence in the region, which should be ready to prevent any possible negative effects of the private maritime security options.

Regarding possible legal issues arising from the use of armed guards, the practice should be able to produce definitive or acceptable solutions as the issues develop and provide enough data for consideration. This is particularly true regarding the liability issues, as, for example, the marine insurance industry has proven to be quick in response and adaptation to new conditions, offering new and/or revised policies and clauses tackling the present legal issues resulting from the use of PSCs services. A pure theoretical debate over the *pro* and *contra* arguments regarding the use of armed guards should not prejudice the use of this security option, as the prime concern should always focus on the safety of life at sea, and support the use of an option that provides definite/best available/only available remedy in crisis situations.

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**Sažetak:**

**NAORUŽANI STRAŽARI NA BRODOVIMA: OSIGURANJE I ODGOVORNOST**

*Rad proučava pitanja osiguranja i odgovornosti uslijed uporabe naoružanih stražara na brodovima. Elaborat započinje pregledom dostupnih podataka o ključnim ekonomskim pokazateljima koji predstavljaju pretpostavljene ukupne godišnje gubitke uslijed piratskih operacija. Pažnja se zatim usmjerava prema pitanju odnosa javne i privatne sigurnosne zaštite, pri čemu se detaljno raspravlja o pojedinim opasnostima koje privatna sigurnosna zaštita donosi. Nakon što se pojašnjava zašto Somalija zaslužuje posebnu pozornost pri usporedbi s ostalim područjima gdje prijete opasnost od napada pirata, daje se kratak osvrt na međunarodne operacije usmjerene na borbu protiv pirata, te detaljan pregled uporabe privatne sigurnosne zaštite u pomorskom sektoru. Jedan oblik privatne pomorske sigurnosne zaštite jest i uporaba naoružanih stražara na brodovima. Ova se opcija proučava s političkog (u pogledu prihvata interesnih skupina) i pravnog stajališta (u pogledu pravnih pitanja koja nastaju prilikom uporabe naoružanih stražara). Važno pomoćno sredstvo brodarskim kompanijama i brodarima kojima prijete opasnost od napada pirata jest postojanje pristupačnih i efikasnih specijaliziranih pomorskih polica osiguranja. Nakon analize pomorskih polica osiguranja, daje se uvid u relevantnu sudsku praksu i ostala bitna pravna pitanja koja se otvaraju uslijed piratskih napada, a koja bi mogla biti od značaja prilikom sagledavanja pravnih posljedica uporabe naoružanih stražara. Za kraj, predstavlja se pojednostavljena ekonomska analiza dostupnih sigurnosnih opcija, te konačna ocjena beneficija koje donosi uporaba naoružanih stražara.*

**Ključne riječi:** *naoružani stražari, piratstvo, pomorsko osiguranje, privatne zaštitarske kompanije, Somalija.*