



# Clingendael

Netherlands Institute of International Relations

## CONFERENCE REPORT

Seminar International trends on the use of private armed security companies for the protection against maritime piracy

31 May 2013, The Hague

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### ***Seminar International trends on the use of private armed security companies for the protection against maritime piracy***

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The seminar, which was a follow-up to the recently published Clingendael report "[State or Private Protection against Maritime Piracy?](#)" focused on the international developments concerning regulations for private security companies (PSCs) and on the experiences of several European countries in regulating this. Since the Dutch government recently announced a [change in policy](#), moving from an absolute ban on the use of PSCs to legitimizing the use on specific vessels under specific circumstances, special focus during this seminar was on the questions concerning the responsibility of the master and the experiences with different frameworks so far, in order to identify the do's and don'ts in regulating the use of PSCs against maritime piracy. All stakeholders in the debate were present, thereby contributing to an public platform in which pros and cons could be shared and concerns could be addressed in the discussion. The seminar was divided along two major themes: the legal questions and the practical experiences and implications of the regulations allowing the use of PSCs.

The first part of the day focused on the legal aspects concerning the use of force in self-defence against maritime piracy in the High Risk Area [HRA]. Although there are only a few international regulations and laws concerning the sea (e.g. UNLCOS, SOLAS, SUA Convention) these were not drafted with the activities of private armed contractors and their interaction with the master and the crew in mind. As a result, the language in the international legal conventions is unclear with regard to the legal position of both the private security contractor (PSC), and the master. How should, for instance, a member of a PSC team be qualified? Is he a crewmember, a passenger, or *sui generis* category? With regard to the master, there is a lack of clarity in international law on the scope of his responsibility and possible liability for the actions taken under his command. Beyond the legal questions, the special position of the master was also debated in light of the operational problems and the division of tasks between the team leader of the PSC and

the master. Lack of knowledge and experience with regard to the command over a PSC team and the use of force, language issues or the different attitudes of masters during pirate attacks were all identified as issues that need to be addressed in order to avoid problems in a later stage.

The legal debate also touched upon the question of the extent of force that is allowed in self-defence by the crew of the vessel and members of a PSC in a case of an attack by pirates. Concerning the use of force a possible solution was proposed in the way of gradual response, starting with warning signals leading up to the use of lethal force as an *ultimum remedium*. Complicating factor is the fact that despite clear instructions and norms in the national legislation of the home and/or flag states, the legislation of the coastal state (as the example of the Indian marines shows) might use a different threshold for the legitimate use of force. A degree of unclarity will therefore always remain. Furthermore, the application of a gradual response is mostly unknown to the master. This is further complicated by the fact that there seems to be a lack of a clear distinction between the authority of the master and the leader of the PSCs. Some participants henceforth, reiterated the need for training for the master to deal with these situations.

During the discussion, some participants expressed the opinion that the master should not at all be involved in authorizing the use of force, since he is not trained to make a good assessment of the situation. Others also argued that there is no further need for clarification in national law with regard to the extent or the gradual use of force in self-defence, since the basic rule as it is laid down in international law in itself is enough. Reference was for instance made to the SAMI's 100 Series for the Rules of the Use of Force.

In an attempt to plug the holes in international law concerning the role of PSCs, their certification, the oversight and reporting responsibilities, and the regulations concerning the granting of weapon permits and the instructions on the use, several initiatives for workable models and frameworks have been set up already. Although there is a considerable overlap between them (e.g. ISO 28007, ICoC, SAMI, BIMCO), there also remain differences. ICoC, for example, focusses more on the human rights aspect, due to the involvement of human rights civil society organisations in the drafting of the code. Others criticize the fact that the ICoC has so far not yet adopted a maritime sector in the code. The fact that there are multiple initiatives for regulations which are useful from a theoretical perspective, and at least provide a vast variety of regulatory frameworks to choose from, also complicates the situation on a practical level. Since different states make different choices in terms of the regulations that they have adopted into their national legislations, PSCs might need to abide by multiple regulations, which rises their costs. Apart from the financial aspects that PSCs have to deal with, also insurance companies and states would prefer one system, to enhance cooperation, and avoid complications in cases of conflicts.

During the discussion, some participants in particular expressed concerns with regard to the reporting procedures in case of incidents, and the oversight in place.

The second part of the day turned to the practical side of the issue with experiences from different stakeholders and nationalities. From both the British and the Norwegian experience it became clear that the administrative systems that need to process the vetting, registrations and certifications of weapon permits, PSCs or request from shipping

companies, need to be in place and sufficiently equipped with capacities. The speed with which the possibility for the use of PSCs was created in the UK, backlashed when the administrative system was not yet in order to process all the paper work. Norway took a little longer to make the arrangements, and moreover decided to work with a blacklisting system, implicating that shipping companies could in principle hire any PSCs as long as they were not blacklisted. The Italian case is of special interest to the Dutch situation, since they work with a dual system of both VPDs and PSCs. Only when VPDs are not available to provide protection to a ship passing through the High Risk Area (HRA), is it possible to hire a PSC.

Whenever new legislation is created by the government it is advised that in the intermediate period between drafting and implementing there is clarity as to what rules and regulations apply. In order to get to more clarity it is furthermore of importance that more communication takes place between governmental departments, as well as between the government and the industry. Referring back to the legislation, the different stakeholders brought forward several practical niches that need to be solved when international legislation will come in to place. This concerned the way in which, and to whom, incidents need to be reported; and how these incidents can be documented (e.g. via helmet camera's) and the implications this would have for the liability.

Having the different (international) stakeholders together gave way to fruitful discussions, which in the end provided for a good starting point for finding out what the implications of these developments could mean for the Dutch government. Due to the fact that the problem of PSC's (both land and maritime) is rather new, international legislation is lacking behind, but several initiatives have been developed in order to fill this gap. Although there is the need for more harmonisation in regulation, the Dutch government finds itself in a position to 'cherry pick' from all the existing documents and initiatives, and does not need to reinvent the wheel. Even though the different stakeholders are were not in agreement on all aspects, there was some agreement on certain issues. Most importantly, all agreed that the objective is to avoid as much risk as possible.

Key recommendations with regard to the process of legislation:

- 1) Regulate for the worst case scenario
- 2) Embrace clarity (especially with respect to the role of the master and the gradual level of force in self-defence that can be used)
- 3) Avoid duplication
- 4) Look at existing documents and initiatives, and choose what fits best.
- 5) Consult with all stakeholders
- 6) Engage in constant reflection
- 7) Anticipate the quick moving and highly competitive market of the industry, which calls for swift procedures to process requests.
- 8) Consider what to do in the intermediate period.

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