

THE LEGAL FRAMEWORK ISSUES OF PMSC: INDONESIAN PRACTICE

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Abstract

A form of private security contractor exists for maritime security called Private Maritime Security Company (PMSC). PMSCs are not abundant in maritime law scholarly discourse. This underappreciation happens despite the importance of PMSC in Malacca Strait that conducts its services in the jurisdiction of the three littoral states of Indonesia, Malaysia, and Singapore. Hence, this research article will find out the legal frameworks of the PMSC industry both in the international regime and Indonesian regime and the legality of PMSC business in Indonesia. The method used in this research is normative legal research method with statute approach, historical approach, conceptual approach, and comparative approach with sources from secondary sources which include but are not limited to primary legal sources and secondary legal sources. The result from this research highlights the existence of an international non-binding legal framework for PMSC and a legal framework for PMSC in Indonesia. However, there are legal problems concerning the status of passage and PMSC compliance with domestic laws. A recommendation for a legally binding multilateral treaty about PMSC would be a start to increase the legal certainty of PMSC business internationally. At the same time, a domestic regulation in Indonesia that has specific scope in PMSC would allow PMSC business to be better regulated and grown in Indonesia as a legitimate sector.

Keywords: *PMSC, Maritime Security, Malacca Strait, Indonesia*

Intisari

Sebuah bentuk keamanan swasta untuk keamanan maritim disebut Private Maritime Security Company (PMSC). PMSC kurang dibahas dalam wacana ilmiah hukum maritim. Kurangnya apresiasi ini terjadi meskipun PMSC di Selat Malaka sangat penting dalam menjalankan tugasnya di wilayah hukum *littoral states* yaitu Indonesia, Malaysia, dan Singapura. Oleh karena itu, artikel penelitian ini akan menganalisis kerangka hukum industri PMSC baik di hukum internasional maupun hukum Indonesia serta legalitas bisnis PMSC di Indonesia. Metode yang digunakan dalam penelitian ini adalah metode penelitian hukum normatif dengan pendekatan undang-undang, pendekatan historis, pendekatan konseptual, dan pendekatan komparatif dengan sumber-sumber dari sumber sekunder yang meliputi tetapi tidak terbatas pada sumber hukum primer dan sumber hukum sekunder. Hasil dari penelitian ini menyoroti adanya kerangka hukum internasional yang tidak mengikat bagi PMSC dan kerangka hukum bagi PMSC di Indonesia. Namun, ada masalah hukum mengenai status bagian dan kepatuhan PMSC dengan hukum domestik. Rekomendasi perjanjian multilateral yang mengikat secara hukum tentang PMSC akan menjadi awal untuk meningkatkan kepastian hukum bisnis

PMSC secara internasional. Pada saat yang sama, regulasi domestik di Indonesia yang memiliki ruang lingkup khusus dalam PMSC akan memungkinkan bisnis PMSC diatur dengan lebih baik dan tumbuh di Indonesia sebagai sektor yang sah.

Kata Kunci: PMSC, Maritime Security, Malacca Strait, Indonesia

A. Introduction

Private Maritime Security Companies (PMSC) is a reemerging phenomenon in dealing with maritime security threats. They came into prominence because of risks present in the maritime industry in commercial shipping from pirates and other criminals, especially in dangerous areas such as the Gulf of Aden and the Malacca Strait.¹ The threats to commercial shipping and the development of the Blue Economy gave rise to the growth of the maritime security industry in the foreseeable future.² The current PMSC sector contains several legal issues caused by *lacuna* despite its increasingly important role in the Blue Economy, which includes but not limited to the absence of their status and specific code of conduct compared to Private Military Companies (PMC).³ This section will discuss the brief introduction of maritime security and the issues that arise with maritime security companies' existence and growth, with particular attention to the Malacca Strait and intersections between Indonesia's regulations and The United Nations Convention on the Law of the Sea (UNCLOS 1982) clauses on transit passage and innocent passage.

Maritime security must shift from traditional notions of naval power and armed competition to a more comprehensive approach after the Brundtland Report 1987 to pursue sustainable development goals.⁴ The Brundtland Report generally discusses both sustainability and long-term environmental issues.⁵

1 Michael L. Mineau, "Pirates, Blackwater and Maritime Security: The Rise of Private Navies in Response to Modern Piracy," *The Journal of International Business & Law* 9, no. 1 (2010): 63–65.

2 Michelle Voyer et al., "Maritime Security and the Blue Economy: Intersections and Interdependencies in the Indian Ocean," *Journal of the Indian Ocean Region* 14, no. 1 (January 2, 2018): 28–48, <https://doi.org/10.1080/19480881.2018.1418155>.

3 Mazyar Ahmad, "Maritime Piracy Operations: Some Legal Issues," *Journal of International Maritime Safety, Environmental Affairs, and Shipping* 4, no. 3 (July 2, 2020): 62–69, <https://doi.org/10.1080/25725084.2020.1788200>.

4 Dirk Werle et al., eds., *The Future of Ocean Governance and Capacity Development* (Brill | Nijhoff, 2018), 413, <https://doi.org/10.1163/9789004380271>.

5 World Commission on Environment and Development (ed), *The Brundtland Report: "Our Common*

One such case about sustainability is that security policy must transcend ‘traditional emphasis on military power and armed competition.’⁶ According to Elisabeth Mann Borgese, a more comprehensive approach entails a security policy at a higher level that must be grounded locally where potential troublemakers live, are educated, and work.⁷ This is realized by maritime security actors in measures to help the implementation of aid programs for local communities to deter Illegal Unreported and Unregulated (IUU) fishing,⁸ and the role of maritime security actors as a constabulary force to protect the ocean environment.⁹ Furthermore, a comprehensive approach also touched the classical threat of maritime security which is piracy by employing cooperative measures against Somalian pirates consisting of coordination with local coastguards and constabulary units.¹⁰

Before elaborating further, it is essential to note that PMC and PMSC are not necessarily the same. Aliya Brown states that PMC is a security service provider for military and security functions.¹¹ Another definition by Spicer, the former head of Sandline International, clarifies PMC as corporate bodies with business in providing military skills to legitimate government.¹² Other descriptions are more classifying. Schwartz divides PMC into two categories: armed service and unarmed service.¹³ In comparison, Singer divides PMC into three categories: military providers of armed security, military consulting

Future” (New York: Oxford University Press, 1987), 5, <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf>.

6 World Commission on Environment and Development (ed), 239–40.

7 Werle et al., *The Future of Ocean Governance and Capacity Development*, 413.

8 Voyer et al., “Maritime Security and the Blue Economy: Intersections and Interdependencies in the Indian Ocean.”

9 Voyer et al.

10 Voyer et al.; Christian Bueger and Timothy Edmunds, “Beyond Seablindness: A New Agenda for Maritime Security Studies,” *International Affairs* 93, no. 6 (2017): 1293–1311, <https://doi.org/10.1093/ia/iix174>.

11 Aliya Brown, “Prosecuting Private Armies : Could the Uniformed Services Employment and Reemployment Rights Act of 1994 Provide a Template for Prosecution of Private Military Contractors ?,” *The Georgetown Journal of Legal Ethics* 32, no. 435 (2018): 436, <https://www.law.georgetown.edu/legal-ethics-journal/wp-content/uploads/sites/24/2019/10/GT-GJLE190022.pdf>.

12 M. A. Nebolsina, “Private Military and Security Companies in UN Peacekeeping Operations: Problems and Perspectives,” *Journal of International Analytics* 11, no. 3 (December 31, 2020): 63, <https://doi.org/10.46272/2587-8476-2020-11-3-61-77>.

13 Nebolsina, 63.

firms in advisory and training services, and military support firms doing non-lethal aid and assistance.¹⁴ Meanwhile, PMSC is a term for PMC which protects ships, according to Leung.¹⁵ Vijaya Singh Gautam and Vijay Mishra also possess a similar position, and they further argue PMSC classification as ‘other members’ regarding the applicability of International Humanitarian Law towards PMSC.¹⁶ Therefore, all PMSCs are PMC, but not all PMC are PMSC.

Nowadays, the maritime security function is no longer held exclusively by states because there are now maritime security companies that fill the demand. These maritime security companies conduct protections for vulnerable ships and anti-piracy repression measures, and their offered services are not confined to a mere ship guard.¹⁷ Thus, such companies gave rise to legal questions, both international and domestic, as they often conduct services not in armed conflict.

There is no legally binding international legal framework regulating the use of private maritime security companies, aside from those few from mostly voluntary guidelines and recommendations.¹⁸ Previous attempts in formulating international convention about private security companies (including PMSC) failed because of issues on state monopoly on the use of force, despite PMSC growing industries in recent decades.¹⁹

Among such issues are the use of force threshold during the present and imminent attack. Clause 6(a)(iii) of the Baltic and International Maritime Council (BIMCO) GUARDCON standard contract for PMSC services obliges PMSC contractors to monitor ‘suspicious vessels or craft during the transit,’

14 Nebolsina, 63.

15 Yue Kiu Mark Leung, “Legal Challenges with the Use of Vessel Protection Detachments and Private Maritime Security Company Guards for on Board Ship Protection against Piracy” (The Arctic University of Norway, 2018), 2, <https://munin.uit.no/handle/10037/14252>.

16 Vijaya Singh Gautam and Vijay Mishra, “Revisiting the Legal Framework for Private Military and Security Contractors: Maritime Perspective,” *Groningen Journal of International Law* 8, no. 1 (September 30, 2020): 171–79, <https://doi.org/10.21827/GroJIL.8.1.166-182>.

17 Yoshifumi Tanaka, *The International Law of the Sea*, 3rd ed. (Cambridge: Cambridge University Press, 2019), 461, <https://doi.org/10.1017/9781108545907>.

18 L. J. Bouchez and L. Kaijen, *The Future of the Law of the Sea*, ed. Gemma Andreone (Cham: Springer International Publishing, 2017), 196, <https://doi.org/10.1007/978-3-319-51274-7>.

19 Bouchez and Kaijen, 196.

but there is no threshold on what constitutes the necessity of the use of force from such monitoring activities.²⁰ While there is an occasion where the ship successfully evaded the attack, such as the Strait of Hormuz case, a misjudgment in *Enrica Lexie* case where two Italian guards shot an innocent fisherman off the Indian coast serves as a stark reminder of the need for a threshold.²¹

Another issue is regarding the application of the use of force between extreme cases and proportional reasonability. In a typical balanced scenario such as the Gulf of Oman case, ‘gradual’ steps before using force such as evasion attempts followed by return fire measure has successfully deterred pirates from boarding the vessel.²² However, in cases such as the Nigeria oil platform siege and attack towards *SP Brussels* where pirates came heavily armed and successfully boarded the ship, it is unrealistic to ask the PMSC to follow a gradual threshold in such events.²³

While some states regulate PMSC under their domestic legal framework, including but not limited to the United States, United Kingdom, Croatia, India, Italy, and Norway,²⁴ Indonesia does not have domestic regulations on PMSC. Therefore, PMSC conforms to the laws of their flag state in operating within Indonesian waters in the Malacca Strait. This law unconformity is not solely Indonesia’s problem, as Singapore and Malaysia have similar issues. Aside from the three countries’ strict firearms law, Singapore does not allow PMSC to operate in its territorial waters, while both Indonesia and Malaysia tolerate the activities of PMSC through dubious ‘permissions’ after their activities became publicly known in 2005.²⁵

From the introduction, there is a question of whether the PMSC legal framework is adequate. The article will answer the question by examining

20 Bouchez and Kaijen, 206.

21 Ahmad, “Maritime Piracy Operations: Some Legal Issues,” 64–65; Bouchez and Kaijen, *The Future of the Law of the Sea*, 206–7.

22 Bouchez and Kaijen, *The Future of the Law of the Sea*, 207.

23 Bouchez and Kaijen, 208.

24 Bouchez and Kaijen, 199–200.

25 Carolin Liss, “The Privatisation of Maritime Security in Southeast Asia: The Impact on Regional Security Cooperation,” *Australian Journal of International Affairs* 68, no. 2 (March 15, 2014): 202–4, <https://doi.org/10.1080/10357718.2013.831810>.

the existing international legal framework before delving into Indonesian practice. To answer the question on PMSC's legal framework adequacy abroad, it shall be discussed first on the brief history, role, and existing legal basis of PMSC on the international stage and draw examples from various countries that already have PMSC legal framework. On the other hand, to answer the adequacy of the PMSC legal framework in Indonesia, it shall be first elaborated on the activities of PMSC in Malacca Strait before delving into the existing regulations about PMSC under Indonesia's law.

B. Private Maritime Security Industry Under Existing International Legal Framework

PMSC, despite its rising nature in the last few decades, is not a new phenomenon. PMSC could trace its popularity back in the 17th century when European countries started their interest in increasing trade in the Indian ocean without chartering an Arabian intermediary.²⁶ Among the first to use them are the British. They hired the British East India Company to run their private warship to protect British trade routes from rival states and pirates in 1612.²⁷

From the late 18th to early 19th century, PMSC which is also known as "private anti-piracy navies",²⁸ became more popular with figures such as William Kidd, Sir Francis Drake, and Lord Cochrane chartered by their sovereign countries to conduct privateering, authorized by Letter of Marque. The Letter of Marque authorization allows individuals to lead ships to protect state trade routes and recover their treasure should they come across a pirate ship.²⁹ Thankfully, this practice is unsustainable because some men are prosecuted because they attack their state trade routes, such as William Kidd, and fall to oblivion by the late 19th century.³⁰ The downfall of PMSC in the

26 John J Pitney Jr and John-Clark Levin, *Private Anti-Piracy Navies: How Warships for Hire Are Changing Maritime Security* (Lexington Books, 2013), 8.

27 Pitney Jr and Levin, 8–9.

28 David J. Hebert, "John J. Pitney and John-Clark Levin, Private Anti-Piracy Navies: How Warships for Hire Are Changing Maritime Security," *The Review of Austrian Economics* 28, no. 3 (September 25, 2015): 365–66, <https://doi.org/10.1007/s11138-014-0272-x>.

29 Theodore T Richard, "Reconsidering the Letter of Marque: Utilizing Private Security Providers Against Piracy," *Public Contract Law Journal* 39, no. 3 (2010): 412, <https://www.jstor.org/stable/25755773>.

30 Pitney Jr and Levin, *Private Anti-Piracy Navies: How Warships for Hire Are Changing Maritime Security*, 9–10.

19th century can be attributed to the Letter of Marque ban under International customary law after the Paris Declaration of Respecting Maritime Law in 1856.³¹

After a long hiatus, PMSC resurfaced after the end of the cold war because of higher demands for security at sea due to increasing piracy incidents, especially since 1999.³² Unlike their counterparts before the 19th century, the PMSC is more noble and subservient to a sovereign government. The role of PMSC in Southeast Asia is as follows. First, as a security and business actor, by providing services normally done by militaries and local law enforcement such as anti-piracy actions, vessel protection detail, and overseas installation guard.³³ Second, they influence public perception of maritime security issues and government decision-making based on published reports, statements, and risk assessments.³⁴ However, despite their increasingly significant role, the same could not be said about their legal framework.

Internationally, PMSC regulations began with private security contractors in general. It is surprising that despite their historical role, PMSC is not regulated directly under UNCLOS. Moreover, what regulatory framework exists in matters of PMSC are soft law guidelines. In 2008, the Montreux Document existed as a guideline in affirming private security contractors must comply with international humanitarian law and human rights in times of war.³⁵

Initially, the Montreux Document is only applicable for PMC in armed conflict and serves as a soft law restating state obligations under International

31 Christian Cornelius Wirtz, "Blackwater versus Blackbeard: Which International Regulations Exist for the Use of Private Maritime Security Companies in Vessel Protection Operations" (University of Cape Town, 2016), 56, <https://open.uct.ac.za/handle/11427/20773>.

32 Ioannis Chapsos, "The Privatisation of International Security: The Regulatory Framework for Private Maritime Security Companies, Using Operations off Somalia, 2005-13, as a Case Study" (Coventry University, 2014), 69, <https://curve.coventry.ac.uk/open/items/4d43bb00-e16b-4326-aaa8-3ef5ec5026ac/1/Chapsos+2014.pdf>.

33 Carolin Liss, "The Privatisation of Maritime Security-Maritime Security in Southeast Asia : Between a Rock and a Hard Place" (Perth, 2007), 15; Liss, "The Privatisation of Maritime Security in Southeast Asia: The Impact on Regional Security Cooperation," 202.

34 Liss, "The Privatisation of Maritime Security in Southeast Asia: The Impact on Regional Security Cooperation," 202.

35 James Kraska, "International and Comparative Regulation of Private Maritime Security Companies Employed in Counter-Piracy," in *Modern Piracy* (Edward Elgar Publishing, 2013), 223-24, <https://doi.org/10.4337/9781849804936.00019>.

Humanitarian Law (IHL).³⁶ On the applicability of the Montreux Document to PMSC, there is a position such as by Marin and others declaring the Montreux Document to be irrelevant in the maritime sector.³⁷ But others, such as Vijaya Singh Gautam, Vijay Mishra, and Anna Petrig, disagree because the Maritime Working Group adapts the Montreux Documents applicability to naval practice.³⁸

The Montreux Document 2008 became the basis of The International Code of Conduct for Private Security Service Providers (ICOC) in 2010, aiming to establish independent oversight to private security contractors.³⁹ Specific instruments for PMSC began in development in 2009, with the International Maritime Organization (IMO) and the Contact Group on Piracy off the Coast of Somalia (CGPCS) as the primary actors in developing and coordinating more effective anti-piracy measures.⁴⁰

Another soft law guideline is the 100 Series Rules: An International Model Set of Maritime Rules for the Use of Force (RUF). The rules set a threshold for conducting deterrence measures and when using force becomes permissible. Rule 100 emphasizes the importance of PMSC in advising the ship's master on the invocation of the use of force, Rule 101 provides methods of deterrence without the use of firearms such as brandishing weapons, Rule 102 on warning shots, and Rule 103 regulates the use of force.⁴¹

Aside from soft law guidelines, the development of the PMSC regulatory

36 "The Montreux Document on Private Military and Security Companies Ref. 0996," ICRC Resource Center § (2008), 9–10, <https://shop.icrc.org/the-montreux-document-on-private-military-and-security-companies-pdf-en>; Ian Ralby, "What Went Wrong When Regulating Private Maritime Security Companies," in *Operational Law in International Straits and Current Maritime Security Challenges* (Springer, 2018), 164, https://doi.org/10.1007/978-3-319-72718-9_9.

37 Bouchez and Kaijen, *The Future of the Law of the Sea*, 193.

38 Anna Petrig, "Looking at the Montreux Document from a Maritime Perspective," *Maritime Safety and Security Law Journal* 2016, no. 2 (2016): 1–3, http://www.marsafelawjournal.org/wp-content/uploads/2016/10/Issue2_PETRIG_Article.pdf; Singh Gautam and Mishra, "Revisiting the Legal Framework for Private Military and Security Contractors: Maritime Perspective," 173.

39 Kraska, "International and Comparative Regulation of Private Maritime Security Companies Employed in Counter-Piracy," 224–25.

40 Kraska, 226.

41 100 Series (ed), "The 100 Series Rules: An International Model Set of Maritime Rules for the Use of Force (RUF)" (n.d.), 5–6, https://www.humanrightsatsea.org/wp-content/uploads/2015/04/20130503-100_Series_Rules_for_the_Use_of_Force.pdf.

framework further relies upon standardization instead of binding law. This trend has shown since 2011 when IMO accepted the Security Association for the Maritime Industry (SAMI) Accreditation Programmed for PMSC, which PMSC can earn through national or third-party certification bodies.⁴² Unfortunately, unless industry standard is a requirement before PMSC could operate in a state,⁴³ its influence as a driving force for more comprehensive regulation is ineffective.

SAMI is an industry association for maritime security companies responsible for maintaining its quality. A decisive role of SAMI is its inclusion in the drafting of the naval security standard of ISO/PAS 28007 that ascertains the credibility and professionalism of PMSC by risk-reducing measures.⁴⁴ However, because of its success in maintaining the quality of PMSC and reduced piracy threat, resulting in a trend of consolidations among PMSCs and SAMI membership decreased to the point of SAMI voluntary liquidation in 2016.⁴⁵ Presently, PMSC standard accreditation uses ISO/PAS 28007 from third-party certification bodies, including but not limited to LQRA and MSS Global.⁴⁶

Another relevant industry standard is the International Association of Maritime Security Professionals (IAMSP) 2011-01-UOF-001 v2.0 standard, also known as the IAMSP Rules.⁴⁷ Unlike the ISO standard, which focuses on risk-reduction measures, the IAMSP Rules focus on risk assessment before using force. PMSC with IAMSP Rules accreditation could only use force

42 Kraska, "International and Comparative Regulation of Private Maritime Security Companies Employed in Counter-Piracy," 241–42.

43 Alex Gould, "Sovereign Control and Ocean Governance in the Regulation of Maritime Private Policing," *Policing and Society* 31, no. 3 (March 16, 2021): 340, <https://doi.org/10.1080/10439463.2020.1732975>.

44 Gould, 345–46; Singh Gautam and Mishra, "Revisiting the Legal Framework for Private Military and Security Contractors: Maritime Perspective," 178.

45 Maritime Cyprus (ed), "The Security Association for the Maritime Industry (SAMI) Announces Voluntary Liquidation," *Maritime Cyprus*, April 19, 2016, <https://maritimecyprus.com/2016/04/19/the-security-association-for-the-maritime-industry-sami-announces-voluntary-liquidation/>.

46 LRQA (ed), "ISO 28007 CERTIFICATION SERVICES," LRQA, 2021, <https://www.lrqa.com/en/iso-28007/certification/>; MSS Global (ed), "Security Services Certification ISO 18788, PSC-1, ISO 28000 & ISO 28007," MSS Global, 2021, <https://www.mssglobal.com/security-services-certification>.

47 Bouchez and Kaijen, *The Future of the Law of the Sea*, 205.

when a suspicious vessel has weapons and boarding equipment, the PMSC already exhausting non-violent means, and provides warning shots.⁴⁸

Unlike the international regulatory framework, several countries already regulate the use of PMSC either directly or as the same entity as their land-based counterpart in the form of regulations or guidelines. Countries such as Norway have rules on PMSC in the form of amendments to Arms Regulation 904/2009 and Ship Security Regulation 972/2004 in 2011,⁴⁹ and Norwegian Provisional Guidelines Use of Armed Guards on Board Norwegian Ships.⁵⁰

Both regulations are about provisions for companies that wish to hire armed guards to ship to and from high-risk areas.⁵¹ The rules clarified command responsibility, which was previously unclear between ship's master and shipowner, demands on weapon storage, oversight by the Norwegian Maritime Authority (NMA) in approval for using PMSC, and the use of force as a last resort in legal provision.⁵² At the same time, the Norwegian guideline set a distance of 2000 meters as a minimum distance for PMSC to determine if an object is a threat.⁵³ Unfortunately, the laws did not make procedural requirements to select PMSC as approval requirements by the NMA, and the lack of report transparency by the PMSC unless there is an incident.⁵⁴

Italy by their Regulation on the employment of contractors on board Italian-flagged ships sailing in international waters under piracy risk of 2013 allows proportional use of force for self-defense conduct by PMSC, using the self-defense threshold inside the Italian general criminal law.⁵⁵ The provision is an implementing regulation that enables the hiring of PMSC from EU states and is subject to approval by the interior ministry.⁵⁶ The law authorized lethal

48 Bouchez and Kaijen, 206.

49 Åsne Kalland Aarstad, "Who Governs Norwegian Maritime Security? Public Facilitation of Private Security in a Fragmented Security Environment," *Cooperation and Conflict* 52, no. 2 (2017): 269–70, <https://doi.org/10.1177/0010836716652425>.

50 Bouchez and Kaijen, *The Future of the Law of the Sea*, 199–200.

51 Aarstad, "Who Governs Norwegian Maritime Security? Public Facilitation of Private Security in a Fragmented Security Environment," 269.

52 Aarstad, 269.

53 Bouchez and Kaijen, *The Future of the Law of the Sea*, 200.

54 Aarstad, "Who Governs Norwegian Maritime Security? Public Facilitation of Private Security in a Fragmented Security Environment," 270.

55 Bouchez and Kaijen, *The Future of the Law of the Sea*, 200.

56 Giorgia Bevilacqua, "Armed On-Board Protection of Italian Ships: From an Apparent Hybrid

force only after the master of the vessel who holds the PMSC weapons in a storage order it to happen and after exhausting all non-lethal deterrence.⁵⁷

India regulates PMSC in Guidelines on Deployment of Armed Security Guards on Merchant Ships. The guideline obliges all reasonable steps to avoid using force and that the use of force may only happen after an imminent danger exists.⁵⁸ The guideline also orders any ship passing through Indian EEZ or Indian Search and Rescue Region with armed persons and deadly arms and ammunition to report to the Indian Navy and Indian Coast Guard.⁵⁹

In comparison, Croatia has the Croatian Ordinance on the requirements for legal persons providing the services of boarding armed escort on Croatian-flagged vessels. This ordinance is similar to Italian law. The master of the vessel held final authority in determining the use of force, and the threshold of self-defense is subject to Croatian general criminal law.⁶⁰

The UK through their Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend against the Threat of Piracy in Exceptional Circumstances recognizes the master of the vessel's overall authority, similarly to Italian and Croatian regulations, setting a threshold over the use of force, but allows pre-emptive strike if the attack from a hostile power is imminent.⁶¹ The guide also obliges PMSC personnel to understand port state and coastal state laws and any firearms and other security equipment requirements.⁶²

Finally, the USA has *the Port Security Advisory (3-09) Guidance on Self-Defense or Defense of Others by U.S. Flagged Commercial Vessels Operating in High-Risk Waters*.⁶³ Like UK regulation, the guidance recognizes the master

Model to a Regulated Rise of Private Contractors," ed. Michiel van der Wolf, *Erasmus Law Review* 11, no. 4 (December 2018): 254, <https://doi.org/10.5553/ELR.000108>.

57 Bevilacqua, 254–55.

58 Bouchez and Kaijen, *The Future of the Law of the Sea*, 200.

59 Sony Vijayan, "The Use of Armed Forces on Merchant Vessels without Strict Rules for the Use of Force," *Journal of Maritime Law and Commerce* 45, no. 1 (2014): 27, https://heinonline-org.ezproxy.ugm.ac.id/HOL/Page?public=true&handle=hein.journals/jmlc45&div=5&start_page=15&collection=journals&set_as_cursor=0&men_tab=srchresults.

60 Bouchez and Kaijen, *The Future of the Law of the Sea*, 199.

61 Bouchez and Kaijen, 199.

62 Vijayan, "The Use of Armed Forces on Merchant Vessels without Strict Rules for the Use of Force," 27.

63 Bouchez and Kaijen, *The Future of the Law of the Sea*, 199–200.

of the vessel's overall authority.⁶⁴ It provides a threshold for the use of force when the attacker possesses means such as climbing gear, weapons, and taking the opportunity to accost the ship.⁶⁵ Aside from the guidelines, the USA also obliges armed PMSC to obey the U.S. Gun Control Act, the National Firearms Act, and the International Traffic in Arms Regulations (ITAR).⁶⁶

Unlike these countries, Indonesia currently does not have regulations on PMSC. This vacuum happens despite having PMSCs in the form of foreign companies, PMSCs linked to the Indonesia National Armed Forces (TNI) apparatus, and PMSCs set up by former members of TNI, but the national companies only provide services nationally and in short term assignments.⁶⁷

This vacuum happens despite the importance of Malacca Strait. Annually, Malacca Strait hosts 50% of the world's oil tanker traffic, 40% of the world's seaborne commerce and is recognized by the USA as a vital strategic interest because it connects Japan (an ally to the USA) to its Middle East energy suppliers.⁶⁸ Aside from its significance, Malacca Strait is famous for its greater vulnerability because of its narrowness. The narrowness of Malacca Strait increase the chance for accidents even as the ships slow down because they are easier to be targeted by pirates and other criminals and increase environmental damage due to the combination of narrowness and traffic volumes.⁶⁹

The current framework on PMSC in Indonesia's jurisdiction is that of 'understanding,' where PMSC cooperates and receives assistance from local authorities without a clear regulatory basis.⁷⁰ There is no specific national maritime security legal instrument in Indonesia yet.⁷¹ The government also

64 Bouchez and Kaijen, 199.

65 Bouchez and Kaijen, 199

66 Vijayan, "The Use of Armed Forces on Merchant Vessels without Strict Rules for the Use of Force," 27.

67 Alban Sciascia, "Monitoring the Border: Indonesian Port Security and the Role of Private Actors," *Contemporary Southeast Asia* 35, no. 2 (2013): 177–79, <https://doi.org/10.1355/cs35-2b>.

68 Alice D. Ba, "Governing the Safety and Security of the Malacca Strait: The Nippon Foundation between States and Industry," *Journal of Contemporary Asia* 48, no. 2 (2018): 256, <https://doi.org/10.1080/00472336.2017.1407956>.

69 Ba, 256.

70 Liss, "The Privatisation of Maritime Security in Southeast Asia: The Impact on Regional Security Cooperation," 204.

71 Dhiana Puspitawati, "Urgent Need for National Maritime Security Arrangement in Indonesia:

alleges that PMSCs are illegally operating in Indonesia since their companies are from foreign countries and imply the government's inability to control the sea, challenging state sovereignty.⁷² It is unfortunate that instead of being a building block for a regulatory framework, PMSC is seen as a hindrance to interstate regional cooperation because of the issue of legality.⁷³

Considering that the PMSC industry would see significant growth in the coming years, it is paramount for Indonesia to support their potential rather than shunning it as Indonesia has done so far.⁷⁴ Indonesia needs to address the status issue of foreign PMSCs whether it needs to be subjected to provisions of 'transit passage' or 'innocent passage.' Furthermore, activities of PMSC need legal boundaries or at least guidelines that can be adapted from the current understanding between PMSCs and local authorities so the PMSC sector in Indonesia could grow.

C. The Roles of Maritime Security Companies in Malacca Strait

This section will elaborate on various activities conducted by PMSC in Malacca Strait and their impact on the Blue Economy, including the maritime shipping industry and PMSC as a sector. This section will also highlight issues such as the use of firearms by the PMSC, the unclear legal status of PMSC as a sector in Indonesia, and the question of whether PMSC abroad in Malacca Strait would be subject to provisions of 'transit passage' or 'innocent' passage under UNCLOS.

PMSC plays a role in tackling four main issues in Malacca Strait: piracy, armed robbery, environmental effects associated with the shipping industry, and the threat of terrorism.⁷⁵ From the four issues, it is terrorism that stands as an emerging and increasingly important problem since the 9/11 Terrorist

Towards Global Maritime Fulcrum," *Indonesian Journal of International Law* 14, no. 3 (April 30, 2017): 343, <https://doi.org/10.17304/ijil.vol14.3.697>.

72 Liss, "The Privatisation of Maritime Security in Southeast Asia: The Impact on Regional Security Cooperation," 204-5; Muhammad Thorik Effendi, "Fenomena Peningkatan Transnational Organized Crime (TOC) Piracy Di Selat Malaka Tahun 2010- 2014," *Jurnal Analisis Hubungan Internasional* 6, no. 1 (2017): 158, <http://repository.unair.ac.id/67779/>.

73 Liss, "The Privatisation of Maritime Security in Southeast Asia: The Impact on Regional Security Cooperation," 204.

74 Voyer et al., "Maritime Security and the Blue Economy: Intersections and Interdependencies in the Indian Ocean."

75 Ba, "Governing the Safety and Security of the Malacca Strait: The Nippon Foundation between States and Industry," 255-56.

Attack.⁷⁶

According to UNCLOS Article 101, there are three elements of piracy (i) committed for private ends, (ii) happens in the high seas, (iii) done by one ship on another ship.⁷⁷ This definition by UNCLOS implies that piracy is committed in the high seas, not territorial waters, because sea robbery terminology would be used instead of the commission of the crime that took place in territorial waters.⁷⁸

For the sake of clarity, I shall refer to the term piracy as the extended definition by the International Maritime Bureau (IMB), which is ‘*an act of attempting to board a ship with the intent to commit theft or any other crime and with the attempt or capability to use in the furtherance of that act.*’⁷⁹ This definition has similarities with an armed robbery at Sea under Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ship in Asia (ReCAAP) Article 1(2).a. It classifies armed robbery as an illegal act of violence detention and depredation against ships, which is still within a country’s jurisdiction.⁸⁰ The similarities between such definitions are still under matter of scholarly debate.⁸¹

Piracy in Malacca Strait is a long issue in Indonesia, even before the publicization of PMSC in Indonesia by 2005. In 2002, Indonesia suffered 16 cases of piracy in Malacca Strait; the number hiked to 28 cases in 2003 and reduced to 20 cases in 2004.⁸² Recently, the numbers increased to 61 in 2011 for crude oil tankers alone, and by 2017 there were 52 cases of piracy to both crude oil tankers and product oil tankers,⁸³ and a total of 30 attacks in 2019

76 Ba, 256.

77 Ahmad, “Maritime Piracy Operations: Some Legal Issues,” 62.

78 Uni W Sagena, “Memahami Keamanan Tradisional Dan Non-Tradisional Di Selat Malaka: Isu-Isu Dan Interaksi Antar Aktor,” *Jurnal Interdependence* 1, no. 1 (2013): 79.

79 Sagena, 78.

80 Gerald Aldytia Bunga, “The Regulation of Piracy and Armed Robbery At Sea in International Law,” *Jurnal Hukum Dan Peradilan* 9, no. 3 (January 4, 2021): 427, <https://doi.org/10.25216/jhp.9.3.2020.425-448>.

81 Sagena, “Memahami Keamanan Tradisional Dan Non-Tradisional Di Selat Malaka: Isu-Isu Dan Interaksi Antar Aktor,” 78–79.

82 Sagena, 80.

83 Mengjie Jin et al., “Marine Piracy Prediction and Prevention: Policy Implications,” *Marine Policy* 108, no. July (October 2019): 2, <https://doi.org/10.1016/j.marpol.2019.103528>.

alone.⁸⁴

Meanwhile, armed robbery is also an issue in Malacca Strait. Armed robbery possesses a broader definition formulated by IMO in 2012, which is acts of armed robbery allegedly committed in the Sea, port areas, or attempts of an armed robbery that includes actions against vessels in port or at anchor either attacked in territorial waters or outside territorial waters.⁸⁵ From 1998-2018, there were 134 reported armed robbery cases in Malacca Strait port areas.⁸⁶ From the 134 reported cases; chemical tankers are more often targeted (31%), followed by bulk carriers (22%), regular tankers (17%), product tankers (8%), oil tankers (5%), container ships (4%), general cargo ship and dry ship (3%), tug ships (2%), and other vessels (5%).⁸⁷

Environmental effects in Malacca Strait are not a neglected sector by the PMSC, and it is just as crucial as other hostile issues. Such is the importance that member states to the UNCLOS, particularly Indonesia, Malaysia, and Singapore, could justify the closure of Malacca Strait if the passage of ships caused significant damage to the environment of Malacca Strait under Article 233 of UNCLOS 1982.⁸⁸

Maritime accidents mainly cause problems within the environmental sector in Malacca Strait. From 2001-2007, collisions, groundings, foundering, and explosions claimed 235 casualties.⁸⁹ These incidents are especially hazardous for accidents that cause oil spills. For example, in 1993 oil spill by a Singaporean oil tanker caused environmental damages to Sentosa Island,

84 Kalu Kingsley Anele, "Addressing the Issue of Piracy off Indonesia and Nigeria: The Need for a Paradigm Change," *Indonesian Journal of International & Comparative Law* 7, no. 2 (2020): 247, https://heinonline-org.ezproxy.ugm.ac.id/HOL/Page?public=true&handle=hein.journals/indjicl7&div=15&start_page=245&collection=journals&set_as_cursor=0&men_tab=srchresults.

85 Jin et al., "Marine Piracy Prediction and Prevention: Policy Implications," 1.

86 Mohammad Ali Zohourian, "Legal Issue Comparison of Piracy and Armed Robbery with Emphasis on the South China Sea-Malacca Strait and the Persian Gulf -Strait of Hormuz," *Fiat Justisia : Jurnal Ilmu Hukum* 14, no. 2 (2020): 122, <https://doi.org/10.25041/fiatjustisia.v14vno2.1813>.

87 Zohourian, 123.

88 Mohd Hazmi Bin Mohd Rusli, "Protecting Vital Sea Lines of Communication: A Study of the Proposed Designation of the Straits of Malacca and Singapore as a Particularly Sensitive Sea Area," *Ocean & Coastal Management* 57, (March 2012): 81, <https://doi.org/10.1016/j.ocecoaman.2011.12.003>.

89 Rusli, 81.

damaging hotel owners 1.5 million united states dollars, the Nagasaki Spirit oil spill in 1993, and the Evoikos incident in 1997 caused around 1.5 million in united states dollars and 1.5-million-pound sterling, respectively.⁹⁰

Next on matters of terrorism, it is not defined under UNCLOS 1982. However, according to Council for Security Cooperation in the Asia Pacific (CSCAP), terrorism in maritime context is undertaking of terrorist activities ‘... (1) within the maritime environment, (2) using or against vessels or fixed platforms at Sea or in port, or against any one of their passengers or personnel, (3) against coastal facilities or settlements, including tourist resorts, port areas, and port towns or cities.’⁹¹

There has yet to be a successful terrorist attack in Malacca Strait. However, there is a correlation between pirate and terrorism cases in Indonesia. Research by Regan in 2018 has shown that increasing rates of terrorism corresponds with the increasing rates of maritime piracy.⁹² The supporting factor to the rise of terrorism is weak state institutions enforcing their policies, making it easy for a terrorist to get their fund sources.⁹³ Indonesia needs to strengthen its government institution, increase its naval presence in Malacca Strait, and craft policies to prevent possible armament materials from falling to pirates and terrorist hands. Institution strengthening measures would reduce the frequency of piracy cases and, in turn, have a correlative effect on terrorist attacks in Indonesia.⁹⁴

PMSC plays a two-fold role in mitigating the four issues above. First, as both security and business actors. Second, as influencers of public perceptions and government policies.

For the role of security and business actors, PMSCs increase naval presence in the Malacca Strait as law enforcers. A lucrative trade in the

90 Rusli, 81–82.

91 Joses Yau and Meng Wee, “Maritime Terrorism Threat in Southeast,” *Pointer Journal of the Singapore Armed Forces* 43, no. 2 (2010): 33, <https://www.mindef.gov.sg/oms/safti/pointer/documents/pdf/V43N2a3.pdf>.

92 Joshua Regan, “The Piracy Terrorism Paradigm: An Interlinking Relationship,” *Behavioral Sciences of Terrorism and Political Aggression* 11, no. 2 (May 4, 2019): 154, <https://doi.org/10.1080/19434472.2018.1445120>.

93 Regan, 154–55.

94 Regan, 154–55.

Malacca Strait since piracy continuously increases from 8 attacks in 2018 to 30 attacks in 2019 in a place where 100.000 vessels carrying a third of the world's trade goods pass annually.⁹⁵ PMSCs contribute to securing business investments and becoming a business sector themselves.⁹⁶ Potential victims hire PMSCs to provide passive and active security services.⁹⁷ Active security services include actual protection for the client's ships delivered either by stationing armed guards in the client's vessels or by escort ships that follow the client's ships.⁹⁸ Their role is so effective that no ship with armed PMSCs personnel onboard is a victim of a hijacking so far.⁹⁹

Indeed, despite their setbacks, PMSCs could provide effective and affordable solutions for maritime security. They could tailor a deal with ship owners to match each need of protection and cooperate with insurance companies for better risk mitigation and insurance coverage.¹⁰⁰ In contrast, the Indonesian Navy's current state is old, underfunded, full of equipment shortage issues, and scattered bases resulting in inadequate coverage and communication.¹⁰¹

However, issues did arise about PMSCs as PMSCs carried lethal and non-lethal armaments to pursue their active services; this becomes an issue when they are entering different jurisdictions.¹⁰² Furthermore, PMSCs themselves can become criminal actors and abuse their legally grey area

95 Anele, "Addressing the Issue of Piracy off Indonesia and Nigeria: The Need for a Paradigm Change," 247; Paul J. Carnegie, Victor T. King, and Magne Knudsen, "Human Security, Marginality and Precariousness in Southeast Asia," *International Journal of Asia Pacific Studies* 17, no. 1 (January 15, 2021): 10, <https://doi.org/10.21315/ijaps2021.17.1.1>.

96 Proshanto K. Mukherjee, Maximo Q. Mejia, and Jingjing Xu, eds., *Maritime Law in Motion*, 1st ed., vol. 8, WMU Studies in Maritime Affairs (Cham: Springer International Publishing, 2020), <https://doi.org/10.1007/978-3-030-31749-2>; Voyer et al., "Maritime Security and the Blue Economy: Intersections and Interdependencies in the Indian Ocean."

97 Carolin Liss, "Regulating Private Military and Security Companies at Sea: New Developments and Challenges," in *A Regional Response to Maritime Piracy: Enhancing Public-Private Partnerships and Strengthening Global Engagement*, ed. Theodore Karasik, Rasha Jammal, and Sabahat Khan (Dubai: Institute for Near East and Gulf Military Analysis, 2012), 88.

98 Liss, 88.

99 Ahmad, "Maritime Piracy Operations: Some Legal Issues," 65.

100 Jan Stockbrugger, "US Strategy and the Rise of Private Maritime Security," *Security Studies* 30, no. 4 (August 8, 2021): 588, <https://doi.org/10.1080/09636412.2021.1976821>.

101 Lyle Morris and Giacomo Persi Paoli, "A Preliminary Assessment of Indonesia's Maritime Security Threats and Capabilities," 2018, 40, <https://doi.org/10.7249/RR2469>.

102 Liss, "Regulating Private Military and Security Companies at Sea: New Developments and Challenges," 88.

in extracting concessions from their clients, such as prolonging conflicts, overbidding, and taking mineral and other natural resources concessions in Malacca Strait.¹⁰³ Furthermore, the presence of armed PMSCs personnel on board would increase the potential of violence, a predicament against states' public interest.¹⁰⁴ For example, 4 PMSC personnel should have fired warning shots against suspicious boats in the MV Avocet incident. Still, they fired at the ship because of an overreaction, resulting in the ship crashing to MV Avocet because the driver had been injured or killed.¹⁰⁵

Meanwhile, in pursuing their role as an influencer in public perceptions and government decision-making policies, PMSCs conduct passive security services, including risk assessment for ships in charting their ways against pirate-risk areas and training ship crews.¹⁰⁶ Still, risk assessments later become accessible for public consumption. At the same time, reports and statements, on the other hand, are technically non-commercial, and such materials are often publicized in the mainstream media to shape public perceptions and government decision-making.¹⁰⁷

Yet even this passive security action's role to the public and government by PMSCs can be problematic. Actual reports sourced by mainstream media from the PMSCs are costly and dubious in their objectivity, making it hard and somewhat unreliable for the public and interested parties to consume.¹⁰⁸ The same is true for PMSCs risk assessment, which has critics for its business interests.

For example, back in 2005- Joint War Committee (JWC) lists Malacca Strait as 'Hull War, Strikes, Terrorism and Related Perils Listed Areas' based on the assessment from a London-based PMSC: *Aegis Defence Services*

103 Carrie R. Woolley, "Piracy and Sovereign Rights : Addressing Piracy in the Straits of Malacca Without Degrading the Sovereign Rights of Indonesia and Malaysia," *Santa Clara Journal of International Law* 8, no. 2 (2010): 469.

104 Mukherjee, Mejia, and Xu, *Maritime Law in Motion*, 8:196.

105 Mukherjee, Mejia, and Xu, 8:196.

106 Liss, "Regulating Private Military and Security Companies at Sea: New Developments and Challenges," 88.

107 Liss, "The Privatisation of Maritime Security-Maritime Security in Southeast Asia : Between a Rock and a Hard Place," 15.

108 Liss, 17.

*Ltd.*¹⁰⁹ This designation justifies ship insurers to raise their premiums, thus significantly affecting the maritime industry in the Malacca Strait area.¹¹⁰ The JWC report receives critics from three littoral states of Indonesia, Malaysia, and Singapore because of questionable research methods by not differentiating maritime security threats and the lack of source variety used by JWC to justify its classification.¹¹¹

The role of PMSCs in environmental protection is considered an element under the scope of maritime security.¹¹² This role is not a traditional sector under PMSCs work, but rather this sector is affected by PMSCs activities in Malacca Strait. For example, the private security company G4S which conducts PMSC activities publishes a corporate social responsibility report explaining their practice that respects human rights and the environment.¹¹³ Unfortunately, there is not much information about whether other PMSCs have the same environmental stance due to the lack of reports.

From their roles, there is a question regarding the legal framework of PMSCs in Indonesia. Although there is an ‘understanding’ regarding the PMSCs business model, the regulations regarding PMSCs activities remain unclear under Indonesian law. This unclear regulation status placed PMSCs under grey areas as a business sector in Indonesia and makes it confusing for Indonesian institutions to respond to the PMSC companies. Local authorities even deny that PMSCs services are legal.¹¹⁴ Moreover, besides the lack of potential exploration, the PMSCs are unmotivated to conduct themselves according to the law due to their potential to become criminal actors and abuse their legally grey area.¹¹⁵ It is currently more effortless for them to

109 Liss, 17–18.

110 Liss, 18.

111 Liss, 18.

112 Lutz Feldt, Peter Roell, and Ralph D. Thiele, “Maritime Security-Perspectives for a Comprehensive Approach,” *ISPSW Strategy Series: Focus on Defense and International Security* 49, no. 222 (2013): 2–3.

113 Timon Domela Nieuwenhuis Nyegaard, “Corporate Social Responsibility in Private Maritime Security Companies” (Leiden University, 2020), 48–49, <https://hdl.handle.net/1887/84587>.

114 Liss, “The Privatisation of Maritime Security in Southeast Asia: The Impact on Regional Security Cooperation,” 203; Noor Apandi Osnin, “Private Maritime Security Company (PMSC) in the Strait of Malacca,” *WMU Journal of Maritime Affairs* 5, no. 2 (October 2006): 203, <https://doi.org/10.1007/BF03195104>.

115 Woolley, “Piracy and Sovereign Rights : Addressing Piracy in the Straits of Malacca Without

pay local officials to get dubious permits rather than asking questions on the proper way to conduct business in Indonesia.¹¹⁶

Indonesia is not alone in institutional control over PMSCs. Malaysia faces a similar problem where PMSCs operating in its waters do not use proper procedures in applying for a permit in conformity with national arms control policies.¹¹⁷ However, there is a case where Malaysia took a complete step in cooperating with PMSC when Malaysian local law enforcement worked together with PMSCs personnel in safeguarding a tanker ship.¹¹⁸

Aside from management issues, PMSCs also possess technical issues about their armaments. Indonesia has one of the strictest gun laws, but PMSCs possess lethal armaments in conducting their services. It is known that PMSCs can rent armaments from local agencies,¹¹⁹ but this gave rise to an issue under the law of the Sea regarding the status of the passage of these armed PMSC and the legality of their armaments under Indonesian law.

D. The Practice of Private Maritime Security Companies in Indonesia

This section will answer the issues of PMSC in Malacca Strait highlighted in the previous section to find out the legality of the PMSC industry in Indonesia. This section will refer towards both UNCLOS provisions relevant to maritime security, such as sections regarding innocent passage and transit passage, and Indonesian provisions such as Law No. 27/2007 *jo* Law No. 1/2014 on the management of Coastal Area and Small Islands regarding coastal area responsibility distribution for local and central government,¹²⁰ Law No. 32/2014 on Sea, Head of National Police Regulation No. 4/2020 on Private Security, and Head of National Police Regulation No. 11/2017 on Permit, Oversight, and Control of Non-Organic Firearms of the National Army/National Police of Indonesia and Security Equipment Categorized as Firearms for Other Police Functions.

Degrading the Sovereign Rights of Indonesia and Malaysia,” 469.

116 Liss, “The Privatisation of Maritime Security in Southeast Asia: The Impact on Regional Security Cooperation,” 203.

117 Liss, 203.

118 Liss, 203.

119 Liss, 203.

120 Sciascia, “Monitoring the Border: Indonesian Port Security and the Role of Private Actors,” 168.

Naturally, ships crossing through international straits are under the Transit Passage clause in UNCLOS 1982 Article 39.1. where the vessel requires: (a) it must proceed without delay through or over the transit; (b) refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of States bordering the strait, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations; (c) refrain from any activities other than those incidents to the in normal modes of continuous and expeditious transit unless rendered necessary by force majeure or by distress.¹²¹

However, since the Malacca Strait is under claimed jurisdiction of Indonesia, Malaysia, and Singapore, a question arises whether the Malacca Strait is territorial water of the littoral states in question or whether the Malacca Strait is an international strait. If the Malacca Strait is territorial waters, ships in Malacca Strait are subject to the innocent passage under Article 19 of UNCLOS 1982. A problem might arise as PMSCs presence in the Innocent Passage clause is prejudice to Article 19.2. (b) where the passage of a foreign ship is considered prejudicial to the peace, good order, or security of a coastal state if it conducts exercise or practice with weapons of any kind.¹²² If a ship with PMSCs personnel or escorts passes through Indonesian territory, they are subject to strict Indonesian rules on firearms.¹²³

Indeed, the presence of weapons in a vessel under Malacca Strait could find itself subject to strict gun laws of the three littoral states and theoretically could violate Article 19.2. (b) of the UNCLOS 1982, according to Mineau and Hohenstein.¹²⁴ There is a case where the possession of weapons is contrary to innocent passage; Indian police once seized 35 assault rifles and 5.860 ammunitions from armed guards of MV Seaman Guard Ohio because of this issue.¹²⁵

121 "The United Nations Convention on the Law of the Sea" (United Nations, 1982), https://www.un.org/Depts/los/convention_agreements/texts/unclos/closindx.htm.

122 "The United Nations Convention on the Law of the Sea."

123 Mineau, "Pirates, Blackwater and Maritime Security: The Rise of Private Navies in Response to Modern Piracy," 76–77.

124 Mineau, 76.

125 Sindhura Natesha Polepalli, "Floating Armories and Privately Contracted Armed Security Personnel on Board Ships: Balancing Coastal State Security Concerns Against Navigational

The answer to this predicament exists in Article 37 and Article 38.1. of UNCLOS 1982 regarding the scope of transit passage. Article 37 states, ‘*This section applies to straits which are used for international navigation between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.*’¹²⁶ Exceptions to this article exist in Article 38.1. where ‘*...if the strait is formed by an island of a State bordering the strait and its mainland, transit passage shall not apply if there exists seaward of the island a route through the high seas or an exclusive economic zone of similar convenience concerning navigational and hydrographical characteristics.*’ The Malacca Strait is still under the ‘Transit Passage’ regime because Malacca Strait and Singapore Strait are still considered one strait and fit the scope definition under the ‘Transit Passage’ regime.¹²⁷

This regime could change if a new interpretation declares Malacca Strait and Singapore Strait are treated as two different straits.¹²⁸ This change would result in the non-suspension of innocent passage, allowing Malaysia and Indonesia to impose more shipping control mechanisms over vessels sailing in Malacca Strait.¹²⁹ Furthermore, this would subject PMSCs to a legal dilemma about the legality of their armaments. Fortunately, this interpretation is not adopted, and thus ‘Transit Passage’ is the current regime in Malacca Strait, hence not subjecting the PMSCs to strict requirements under UNCLOS 1982 innocent passage.

Regardless, UNCLOS 1982 only addresses the PMSCs not based on entering territorial waters of Indonesia but rather foreign-based and just happen to transit in the Malacca Strait. From the section about the role of PMSCs in

Freedom,” *Journal of Territorial and Maritime Studies* 6, no. 2 (2019): 79, <https://heinonline.org/HOL/LandingPage?handle=hein.journals/jtms6&div=17&id=&page=>.

126 “The United Nations Convention on the Law of the Sea.”

127 Mohd Hazmi bin Mohd Rusli, “The Application of Transit Passage Regime in Straits Used for International Navigation: A Study of the Straits of Malacca and Singapore,” *Asian Politics & Policy* 4, no. 4 (October 2012): 553, <https://doi.org/10.1111/j.1943-0787.2012.01374.x>; Mohd Hazmi bin Mohd Rusli, Maizatun binti Mustafa, and Wan Izatul Asma binti Wan Talaat, “Replacing the Transit Passage Regime with Freedom of Navigation in the Strait of Malacca: A Case Study with Special Reference to the Korea Strait,” *Ocean and Coastal Management* 78, (June 2013): 26, <https://doi.org/10.1016/j.ocecoaman.2013.03.003>.

128 Rusli, “The Application of Transit Passage Regime in Straits Used for International Navigation: A Study of the Straits of Malacca and Singapore,” 556–57.

129 Rusli, 558.

Malacca Strait, it is known that PMSCs operating in littoral states (including Indonesia) around Malacca Strait are bearing armaments in conducting their services. A legality issue arises in this whether their armaments and activities are legal in Indonesia.

Law No. 27/2007 *jo* Law No. 1/2014 on the management of Coastal Area and Small Islands divides responsibilities of Indonesia's coastal areas. The central government is responsible for the security of the coastal regions from 0 to 200 nautical miles, the provincial government is responsible from 0 to 12 nautical miles, and the Kabupaten is responsible from 0 to 4 nautical miles.¹³⁰

The manifestation of security of coastal regions is also under the scope of protection of the Indonesian Maritime Security Agency (IMSA) under Articles 61 and 62 of Law No. 32/2014 on Sea, where IMSA has the authority to issue regulations.¹³¹ However, IMSA roles, except for the regulatory function, overlaps with the Indonesian Navy function, causing inefficiency and ineffectiveness to Indonesian maritime security.¹³²

PMSCs do not have a law that regulates it in Indonesia despite agencies issuing dubious permissions in Malacca Strait. However, there are regulations about private security contractors as a whole under The National Police Regulation No. 18/2006 on Training and the Curriculum of Private Security Guards,¹³³ aside from the National Police Regulation No. 4/2020 on Private Security and Head of National Police Regulation No. 11/2017 on Permit, Oversight, and Control of Non-Organic Firearms of the National Army/National Police of Indonesia and Security Equipment Categorized as Firearms for Other Police Functions.

PMSCs under the National Police Regulation No. 4/2020 must possess an operational license or SIO, the same license as other private security. According to Article 8 of the regulation *a quo*, there are two types of SIO: SIO

130 Sciascia, "Monitoring the Border: Indonesian Port Security and the Role of Private Actors," 168.

131 "Undang-Undang Republik Indonesia Nomor 32 Tahun 2014 Tentang Kelautan" (n.d.).

132 Muhamad Arif and Yandry Kurniawan, "Strategic Culture and Indonesian Maritime Security," *Asia and the Pacific Policy Studies* 5, no. 1 (2018): 78, <https://doi.org/10.1002/app5.203>.

133 Nigel D. White et al., "Blurring Public and Private Security in Indonesia: Corporate Interests and Human Rights in a Fragile Environment," *Netherlands International Law Review* 65, no. 2 (July 21, 2018): 230, <https://doi.org/10.1007/s40802-018-0107-8>.

for security service providers and SIO for private security training services.¹³⁴

SIO for service providers would allow private security to conduct their services and duties and roles according to the National Police Regulation No. 4/2020 under Article 16. The duties of private security are to ensure physical, personnel, information, and other technical securities of their workplace and environment; and protect civilians in their workplace and environment.¹³⁵ At the same time, the roles of private security are to support security and order of their workplace and surrounding society; and partner with National Police regarding matters of law and order.¹³⁶

The SIO for training services is vital to the legality of private security training requirements. Although aside from private security companies, the National Police could conduct the training services instead under Article 9(2) of the National Police Regulation No. 4/2020.¹³⁷

Regarding firearms regulations for PMSC, according to Head of Police Regulation No. 11/2017 Article 4.c.2., standard equipment for private security is 9 mm rubber ammunition both for long-ranged gun and sidearm, gas ammunition, gas aerosol, and or electric weapon.¹³⁸ Surprisingly, PMSC can ‘borrow’ weapons and ammunitions from Indonesian National Army (TNI) and the National Police (POLRI) according to Article 3(2) *a quo*. Hence, it is legally possible for PMSC to use lethal armaments when necessary.¹³⁹ This regulation is a step forward compared to previous uncertainties of dubious permissions for PMSC activities and equipment and placing the PMSCs under supervision of the TNI and the National Police by leveraging access to lethal armaments.

One could argue that local PMSC has regulations under National Police regulations and additional affirmation of government role as the protector of the seas under Law No. 27/2007 *jo* Law No. 1/2014 on the management of Coastal Area and Small Islands and Law No. 32/2014 on Sea. Undoubtedly,

134 “Peraturan Kepolisian Negara Republik Indonesia Nomor 4 Tahun 2020,” n.d.

135 “Peraturan Kepolisian Negara Republik Indonesia Nomor 4 Tahun 2020,”

136 “Peraturan Kepolisian Negara Republik Indonesia Nomor 4 Tahun 2020,”

137 “Peraturan Kepolisian Negara Republik Indonesia Nomor 4 Tahun 2020,”

138 “Peraturan Kepala Kepolisian Negara Republik Indonesia Nomor 11 Tahun 2017,” n.d.

139 “Peraturan Kepolisian Negara Republik Indonesia Nomor 4 Tahun 2020,”

local private security is in direct regulation by Indonesian law. However, current rules are too general for PMSC due to the lack of use of force threshold, provisions on foreign PMSC, and the role of the master of the vessel present in other countries.¹⁴⁰

Furthermore, corruption regarding permissions relating to private security is still rife due to the lack of National Police institutional capacity and resources and the endemic corruption problem in Indonesia.¹⁴¹ These problems are hampering efforts to regulate the private security sector.¹⁴² Especially that even now, Indonesia has yet to be an effort to at least issue guidelines to PMSCs in their role as security actors in Indonesian territory as a measure to aid local law enforcement in solving issues in Malacca Strait. A solution to this problem could be present by leveraging the IMSA institution as a regulatory body for PMSC, similar to the Norwegian example, which could bound PMSC foreign and local that passes through Malacca Strait in a certain standard.

E. Conclusion

It is conclusive that PMSCs have both domestic and international legal frameworks and thus are legal in Indonesia because they are under Police regulations as part of private security providers. However, there is an insufficient legal framework regarding PMSC in Law of the Sea and Indonesia, despite increasing piracy attempts in recent years, illicit activities of PMSCs, and the strategic role of the Malacca Strait.

Countries should start formulating a legally binding framework to bind PMSCs accountability under international law. A framework of multilateral treaties about PMSC activities similar to ReCAAP would do well in boosting littoral states' confidence in PMSCs as both security and economic actor, thus taking advantage of PMSCs' demands to boost the local security industry. However, multilateral treaties could be challenging, India has proposed an international framework regarding PMSCs and floating armories in 2016,

140 Bouchez and Kaijen, *The Future of the Law of the Sea*, 199–200; Vijayan, “The Use of Armed Forces on Merchant Vessels without Strict Rules for the Use of Force,” 24–28.

141 White et al., “Blurring Public and Private Security in Indonesia: Corporate Interests and Human Rights in a Fragile Environment,” 230–31.

142 White et al., 231.

but its draft has remained a guideline ever since.¹⁴³ To bring legitimacy for a legally binding framework, Indonesia needs to curry its foreign partners, especially the littoral states around Malacca Strait and inter-regional partners' support.

For Indonesia, a start could be done by exploiting current 'understanding' practices between PMSCs and local law enforcement to build a legally binding framework. It is essential to either increase the police funding to increase the effectiveness of the legal framework or to reallocate the responsibilities to other government institutions. This measure will be beneficial in reducing abusive conduct by PMSC in Malacca Strait and raising the service standard of the PMSC industry. Furthermore, a specific legally binding framework of regulations about PMSC would encourage private actors to enter the PMSC market in Indonesia. This solution could reduce issues in Malacca Strait, especially piracy, by clarifying PMSCs' rights and obligations using IMSA as a regulatory body.

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