

Two tides are turning

John AC Cartner

Government response to piracy remains patchy and unconvincing, while the underlying problems remain

MAYBE two tides are turning. Piracy seems to be declining — depending on the scale one uses for calculating. One would be fatuous to think armed guards are responsible simply because another tide is turning.

Some flag state's policies on armed guards seem to be on a trickling flood. These are no spring tides. Neither the tepid utterances of the International Maritime Organization nor the acts of states flagging most ships are realistic. Without the blessings of good laws the situation with owners has reached the tipping point.

The speed of commerce has exceeded the speed of thought of bureaucrats and legislators.

Estimates vary as to how many vessels are carrying armed guards off East Africa. Some sources place the proportion as great as 40%; others have lesser fractions.

It appears though that either with occasional, quite mild flag-state grudging approvals or ostrich-like hiding, vessels are carrying armed guards. Those which carry them report no hijackings and few incidents.

Why the lack of flag state enthusiasm? There is a pervasive fear that there will be an erosion of the monopoly on violence states enjoy. States exist to control. The situation now is uncertain and therefore difficult to control. Hence, the conservatism, scuttlebutt, rumour and fear-mongering of loosing cowboys, gun-slinging buckaroos and latter-day Rambo's going berserk on our ships.

The matter also has some basis in legal theory. The armed guards remain private and liable. Such laws create a special class of private actors and foster private behaviours which may or may not be under the control of governments and therefore the rule of law.

But the fact of greater import is that governments refuse to place regular military persons aboard private ships to defend them. Those kinds of guards are immune if acting within their scope of duties. Part of the refusal is political and lies in the nature of vessels which are not extraterritorial possessions but extraterritorial private chattel usually owned by those not of the flag state.

States are in the dilemma of protecting property of those not its citizens with public monies or of performing traditional flag state duties of protection. The states' dilemma therefore becomes the owners' dilemma of great magnitude. It almost dictates self-help.

Neither are the cowboys and buckaroos thoughts unfounded. There have been abuses of the private system and there will continue to be abuses until that endeavour cleans up. However, unless flag states make clear and unambiguous rules of law to regulate armed guards, the invitation for deviate behaviour is open to the aggressive class.

This further means that the order of the armed guards remains with their company managements with little binding government guidance. This is a tricky and untenable proposition which will in the end fail.

In such situations states have a record of tending to overreact and harshly so. They go against the easy targets — owners, **masters** and guards whom they can reach. Pirates are hard to reach, especially when dead.

Some commentators have noted that owners are hiring mercenaries. That is not the case for private armed guards. Under the Mercenaries Convention, mercenaries must have the backing of a sovereign and be involved in meddling in the affairs of another sovereign.

Private guards may meddle in state affairs but they are not yet state-backed and therefore not mercenaries.

So states still walk a quite thin and excursive line. Matters are evolving but await real cases to see how things will turn out. I am not hopeful it will be good for either states or armed guards as things stand now.

States have only themselves to blame. Had the rational thing been done – placing state-employed entities on state-flagged vessels to keep the contracts flag states have traditionally had with their merchant ships – the situation would not have evolved as it has.

After getting over the out-of-sight and out-of-mind mentality and setting aside willful blindness, some states have sent ineffective and extraordinarily expensive naval ships and their accoutrements to keep trade going.

Sovereigns with few exceptions simply cannot afford that today. Further, neither the despatching states nor the underfunded naval forces done a very good job of it. It makes one curious as to the reasons for the Second World War knee-jerk response of sending in the heavy guns for a great deal of money when a few good men well-placed for a few pounds could have done the job.

These are the ambiguities of the evolving New World Order one must conclude even though we are still muddling through.

Where does this put us? A fraction of the ships are carrying armed guards **with apparent good effect in the short term**. However the majority of ships have no flag state policies as to the use of armed guards. The fraction carrying guards under even vague forms of law – most of which rest on after-the-fact concepts of self-defence – are perhaps in a slightly better position for owners and guards than vessels flagged in states having no policies. The problem remains: self-defence is **argued in court after charge for an** armed guard **or master** or owner.

A good law would protect these parties against their molestation of putative pirates and preclude charges. Weak laws are as bad in these cases as no law because the new and weak laws are untested. The old laws have been around and have been tested. Some states have put out a path for owners to follow – then strewn it with quicksand.

So the armed guard's debate continues. The success in suppressing pirates on individual ships is fairly clear. The success of the current regime of patchwork laws, old laws and willful blindness will not work in the long run.

Again, where is the IMO? It is putting out bland memoranda from London. The matter of armed guards has not been resolved and this developing part-solution may end up being as bad as no solution. Yet, dum spiro spero.

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