

The use of private maritime guards as an innovative means to fulfil states duty to cooperate in the repression of maritime piracy. Part 1

Katinka Svanberg

Visiting Scholar at University of Melbourne, Law School
Asia Pacific Center for Military Law, Australia

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Abstract

This article discusses the use of PCASPs as an alternative or additional layer of protection on board ships in the fight against maritime piracy and armed robbery at sea from an international law perspective based on legal positivism. A concern is that clear-cut, international legal rules are missing on PCASPs. A particular concern is the use of force by PCASPs.

The IMO, the shipping- and PMSC industry have had to resort to soft law instruments and self-regulations. The perceived lack of legal rules concerning PCASPs and PMSCs has resulted in a lot of criticism. But does international law on maritime piracy need to develop binding international legal rules' that are directly applicable to PCASPs? My findings are that the existing legal framework, in the Law of the Sea, SOLAS Convention, customary international law on self-defence together with the non-binding IMO guidelines and the shipping industry's and PMSC's self-regulations, as implemented by national laws, gives the necessary framework to adequately address the issue of PCASPs as protection against maritime piracy.

The article describes maritime piracy, piracy hotspots and how intervention against piracy differs according to regions. It analyses the current legal framework on maritime piracy and armed robbery at sea in UNCLOS and the SUA Convention, flag-state jurisdiction and national laws. It defines "soft law" and goes through regulations on PCASPs from the Montreux Document and ICoC to regulations that directly address the use of PCASPs on board ships, as the IMO Guidelines, ISO Standards, the industries standard agreements and Guidance on the use of force

Corresponding author: Katinka Svanberg

Email address for corresponding author: ksvanberg@unimelb.edu.au

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Introduction

Privately Contracted Armed Security Personnel (PCASPs) and their employers, Private Maritime Security Companies (PMSCs) are used in the fight against maritime piracy on board ships.¹ PCASPs have been praised as a successful tool since no ship with PCASPs on board has been highjacked.² But the use of PCASPs in principal, have been focused on the high risk area of Somali piracy, in the Indian Ocean and Red Sea, so on a worldwide basis the practice is not yet extensive.

A concern is that clear-cut, international legal rules, such as treaties, are missing on this subject. The concern is particularly the use of force by PCASPs.³ The IMO and the shipping and PMSC industry have had to resort to soft law instruments and self-regulations, because there is no international mandatory legal regime that target their operations and business.⁴ The perceived lack of legal rules concerning PCASPs and PMSCs has resulted in suggestions such as the reintroduction of letters of marques.⁵ Another proposal is that maritime nations should embark on agreements to investigate, extradite and prosecute

unlawful use of force by PCASPs.⁶ But does the international legal framework on maritime piracy and armed robbery need to develop binding international legal rules' that are directly applicable to PCASPs, or are existing norms and the industry's current self-regulation enough?

This article will examine the legal issues pertaining to the successful use of PCASPs in the fight against maritime piracy. It will argue that the current legal framework is enough.

My findings are that the existing legal framework, in the Law of the Sea, the SOLAS Convention, customary international law on self-defence read together with the non-binding IMO rules and the shipping industry's and PMSC's self-regulations, does give the necessary framework to address the issue of PCASPs on-board vessels as a protection against maritime piracy, both at the international and national level. The use of PCASP's against maritime piracy is considered in IMO documents, ISO standards, voluntary soft law documents on PCASPs, as well as in the private industries own guidelines, such as their Best Management Practices, (BMP) and Contracts.

The current soft law and self-regulatory instruments on PCASPs, PMSCs, do not operate in a vacuum. As is well known, all states have a *duty to cooperate to combat piracy* in Art.100 of the UNCLOS.⁷ I argue that if states are failing to comply with this obligation using their own law enforcement, it is up to private actors like the shipping industry, which is the target for piracy, to fill that vacuum. PCASPs are needed as a tool to protect against piracy on the high seas in the wake of states shouldering that responsibility with their forces or law enforcement, as it is often too expensive and hard for navies to effectively patrol the high seas.⁸ We should perceive states' tolerance of PCASPs as a modern and innovative way to fulfil states' duty to cooperate in the repression of piracy on the high seas, or in any other place outside the jurisdiction of any state. This may not be the most comfortable and "politically correct" position to take, but legally it is reasonable. Such an argument will please many flag states, smaller coastal states, shipowners, PMSCs and others involved.

UNCLOS is a flexible treaty with 'constructive ambiguity' and conduciveness, that allows for domestic contextualization, interpretation, and implementation.⁹ What is needed is not any changes to the UNCLOS. "There is no "gap" in the law for PCASP's or their use of force against pirates, but rather an additional analytical step or legal overlay that merely points to the need for more nuanced legal assessment", as Robert McLaughlin points out, emphasizing that current research on the topic has to respond to this need.¹⁰

This article will investigate what rules are applicable to PCASP's when they use force against maritime pirates on the high seas. How international and national legal rules apply to the use of force used by PCASPs on board ships in their fight against maritime piracy? Focus is on the interpretation of the RUF and self-defence, as self-defence is found to be the legal threshold for PCASPs use of force against pirates. Is there a common understanding and interpretation of self-defence derived from the international legal principle of self-defence? Another finding is that PCASPs use of force should be considered law enforcement operations, distinct from IHL and LOAC.

Several sets of norms in international law will be examined, such as the *jus cogens* prohibition on piracy, the UNCLOS rules, applicable human rights, Chapter VII in the UN-Charter concerning threats to the peace with UN sanctions and principles of international law, such as the question of individual self-defence. Soft law and its development will be covered as a description of the existing regulative framework on PMSCs and PCASPs.

Today's Maritime Piracy and Interventions Against It

Maritime piracy is defined in UNCLOS Art.101, as acts of violence or detention, or depredation, committed for private ends by the crew or passengers of a private ship directed against another ship on the high seas or outside the jurisdiction of any state.¹¹It is an *erga omnes* crime that all states can claim

jurisdiction over. The crime of maritime piracy conducted in internal waters is referred to as “armed robbery at sea”, which is a crime that the coastal state will have jurisdiction over.

Maritime piracy and armed robbery at sea, in modern times are organized crimes and a lucrative business conducted by piracy groups and networks. The global damage caused by piracy is estimated at \$ 6.6 to \$ 6.9 billion through commercial fraud, loss of cargo and delays. Pirates can cause political instability due to state officials' corruption or as a source of income for insurgents and terrorists.¹² There is also a link between illegal fishing and piracy that e.g. the UN Security Council (UNSC) has highlighted.¹³

Piracy is a crime that is directly sponsored by the socio-economic conditions of coastal states.¹⁴ The presence of weak governments embroiled in political violence, widespread economic hardship and easy access to weapons, are conditions that pave the way for piracy.¹⁵ A vivid example is Somalia, where law and order broke down 30 years ago, and a recent example is Venezuela.

The pirates are often from a poor background or fishermen, organised by criminal networks. It is approximated that only about 30% of the loot or ransom paid goes to the individual pirates, while the main share is taken by the piracy group/network. In cases of armed conflicts like in Somalia, when terrorists or insurgents are involved in the piracy, or in the Philippines, the piracy can serve as a source of income that feeds their struggle. Most of the UNSC resolutions on Somalia emphasize the connection between peace, a functioning state with law and order as a precondition for the elimination of piracy.¹⁶

There is a growing trend in violence with pirates using machine guns, grenade launchers, machetes and knives¹⁷ Known hotspots for maritime piracy are Africa and the Red Sea, the South East Asia and Indian Sub-Continent, Latin America and the Caribbean. The East and West African coasts are notorious for the most dangerous piracy attacks, carried out with automatic weapons and fast-moving motorboats with the aim to hijack vessels and crew to get a high ransom, ranging to above 1 million USD in some cases.¹⁸ These so-called “High Risk Areas” are in the Red Sea, the Gulf of Aden, the Indian Ocean and the Arabian Sea.¹⁹

There was an overall decline in piracy incidents in 2019, but a 24% increase in the first three months of 2020, due to the COVID-19 pandemic.²⁰

There are different ways to fight violent maritime piracy. It can be done by military and law enforcement forces deployed in the area. Such forces could either be the coastal state's own military and law enforcement forces that a ship can alert by voluntarily report to the Voluntary Reporting Areas (VRAS) upon entering a piracy prone area.²¹

In some High Risk Areas (HRA) a ship can alert joint international military forces deployed due to an international mandate, from the UNSC, like the EU Naval forces (EUNAVFOR), in the Gulf of Aden, or the regional naval forces in the Gulf of Guinea based on the ‘Yaoundé Process’, which aims to tackle maritime criminal activity in a coordinated fashion,²² or country specific naval forces like the Chinese Navy Vessels Escort Arrangement of protection. A ship can also carry its own enforcement protection team of PCASP's or VPDs, (protection by a states' armed personnel) to deter and defend against piracy attacks. Some states, like Italy, provide for hire of VPD's in their national legislation. Compared to the Navy and VPDs, PCASP are not law enforcement officials and their rules of engagement only allow for self-defence. The use of PCASP's is dependent on permission from flag state authorities before PCASP deployment on board. In addition, PCASP's need to be permitted by the governments of all states (littoral states) through whose waters the ship may pass, but the majority of littoral states do not allow PCASP to operate within their territorial waters.²³

East Africa

In East Africa, in the Red Sea/Gulf of Aden, Somalia, Arabian Sea, Indian Ocean, Somali piracy attacks used to be frequent, peaking in 2011. In the last years attacks have declined. The Maritime security consultant Dryad Global, found a 73 % fall in maritime security incidents in the Indian Ocean in 2019.²⁴

Maritime piracy was tackled with joint international efforts. The UNSC took unprecedented action when it for the first time ever decided that maritime piracy is a threat to international peace and security, although its determination was linked to the internal conflict in Somalia. It used its enforcement powers under Chapter VII to let states deploy military forces in the Gulf of Aden to protect ships, both in Somalia's territorial waters and on the high seas, see UNSC Resolution 1844 (2008).²⁵ The resolution gives a mandate to states that cooperate with the Somali Transitional Government to forcefully intervene against pirates and seize their boats and ensure that the pirates are prosecuted. Military surveillance at sea and by air was initiated by the EU and its naval force EUNAVFOR in Operation "Atalanta", by NATO in "Operations Allied Protector" and "Ocean Shield", and by AU forces and the South Africa's Development Community, in "Combined Maritime Forces "and "Combined Task Force", as well as by individual states, like Russia.²⁶

However, the shipping industry's use of PCASPs on board ships is considered the most decisive factor in the dramatical decline in piracy attacks in the Horn of Africa.²⁷ The UNSC openly supported the use of PCASPs, in Resolution 2020 (2011) and in resolution 2077 (2012), it pronounced a clear and positive approach to the deployment of PCASPs.²⁸ The UNSC has continued to support the use of PCASPs, recognizing that flag states and port states should consider developing regulations for their use in cooperation with IMO.²⁹

Taken together, the UNSC intervention with international naval patrols, as well as its backing of the shipping industry's own guidelines and practices and of the deployment of PCASP's have proven successful with a sharp decline in maritime piracy and armed robbery in the area, even if the war in Yemen has contributed to boost piracy. However, the threat of piracy attacks still exists, rising 2020 because of the COVID-19 pandemic.³⁰

West Africa

The Gulf of Guinea stretches from Senegal to Angola, covering over 6,000 km of coast line. In 2019/20 it was the most dangerous waters, where Nigerian, and pirates from neighbouring states operate. In 2019 it accounted for about 90% of crews taken hostage and more than 80% of crew kidnappings globally.³¹ The pirates are often heavy armed and organized by criminal networks.³² Piracy in West Africa costs an estimated \$818.1 million, with contracted maritime security the biggest expense.³³ Rich pickings at sea, such as oil and gas tankers from Nigeria, political instability, the lack of law enforcement and poverty, are all factors that have contributed to the increase in piracy.³⁴ The main area of piracy has been the coast of Nigeria and Cameroon.³⁵ Most of the attacks in the Gulf of Guinea occur in internal waters, which have prompted a regional approach, not least because Nigeria has hindered intervention by international naval forces and by PCASPs. In 2013, West and Central African leaders committed to the 'Yaoundé Process', which aims to tackle maritime criminal activity in a coordinated fashion. Information-sharing endeavours such as the creation of regional centres for maritime security for West Africa in Abidjan, Ivory Coast, and for Central Africa in Pointe-Noire, Republic of Congo. Such efforts to improve intra-regional cooperation have been supported by international engagement, in particular by the United States and European nations.³⁶

The UNSC resolutions supported measures already taken by coastal regional organizations, such as ECOWAS, ECCAS and GGC, to "suppress" piracy, measures which the UNSC "encouraged" as it "stressed" the importance of "regional cooperation", through resolutions 2018 (2011) and 2039 (2012).

Particular attention was paid to the efforts of Nigeria and Benin through military surveillance. Thus, the UNSC recognized regional organizations right to take joint action against pirates in accordance with relevant international law, both in internal waters and on the high seas, and to take enforcement action, invoking UNCLOS provisions on piracy.³⁷ This distinguishes it from an *ex post facto* authorization by the UNSC, because the UNSC emphasizes that the regional organizations prior enforcement action against maritime piracy was legal, founded on UNCLOS provisions and coastal state jurisdiction. Thus, the used Chapter VII authorization, was not strictly necessary. However, the UNSC resolutions works as a *de jure* seal legitimization of regional and state enforcement operations. The operations have been extended as the attacks are rising, calling on the regional states to “make fully operational the Gulf of Guinea counter-piracy mechanisms as soon as possible”.³⁸ But the UNSC has not been able to adopt any more resolutions on piracy in the Gulf of Guinea. The reason is that most piracy deeds occur in the coastal states’ territorial sea, and coastal states object to a mandate that would super-seed UNCLOS exclusive jurisdiction in territorial waters. Nigeria in 2019 banned the presence of embarked private maritime security contractors at its seaports, effectively preventing Gulf of Guinea vessel operators from using PCASPs. Instead Nigeria is permitting for-hire Security Escort Vessel (SEV) services using civilian boats and armed Nigerian Navy service members.³⁹ Crews under attack must wait for military or law enforcement assistance.⁴⁰ West African navies still lack the experience needed to carry out complex maritime operations and their navies are inexperienced and underfinanced.⁴¹

Asia

In Asia, maritime piracy rose substantially in the first quarter of 2020 compared with 2019.⁴² The Regional Cooperation Agreement on Combating Piracy and Armed Robbery Against Ships in Asia (ReCAAP) is a treaty signed in 2006 between 14 Asian states and 4 European countries plus the US and Australia). It is the first regional government-to-government agreement to promote and enhance cooperation against piracy and armed robbery against ships in Asia.⁴³ Its Information Sharing Center (ISC), conducts information sharing on incidents of piracy and sea robbery. Through information sharing it can issue warnings and alerts to the shipping industry and facilitate the responses by the law enforcement agencies of littoral states. ISC provides statistics and analysis of the piracy and armed robbery situation in Asia by its periodical reports. ISC addresses piracy on the high seas as well as armed robbery within a state's jurisdiction.⁴⁴

In South East Asia, Indonesia, Malaysia, Thailand and Singapore, share on the Straits of Malacca. It stretches from the westernmost corner of Malaysia to the tip of Indonesia’s Bintan Island and serves as global shipping superhighways with about a third of the world’s marine commerce each year. The Malacca and Singapore straits are known for piracy deeds, thefts such as oil siphoning or the taking of a whole vessel and its cargo but also hijacking. The pirates could be armed with, guns, knives and machetes.

Practice has proved that regional co-operative law enforcement in East Asia is an effective and feasible way of combating piracy in the Straits of Malacca because most of it is internal waters of each state. Thus, the co-operation among the littoral states in the Straits of Malacca serves as an example of effective joint cooperative measures taken by Singapore, Malaysia, Thailand, Indonesia, with coordinated patrols, “Malacca Straits Patrol” (MSP). The MSP patrols are coordinated, meaning that each state only patrol its own waters under a national command.⁴⁵ It also contains an "Eyes in the Sky" program, that is aerial surveillance of the straits. There is the MSP Intelligence Exchange Group (IEG), which is an information system which enables participating states to exchange intelligence with one another on a real-time basis.⁴⁶ The MSP has been deemed a successful model of maritime security cooperation as piracy attacks have declined almost to zero.⁴⁷

Piracy is a frequent problem in the South China Sea, the Sulu Sea and Sulawesi (Celebes) Sea. Not least is a problem terrorist groups, like the Abu Sayyaf Group from the Philippines, who supports their struggle through piracy. Mostly fishing vessels have been the target for pirates and kidnappings occurs.⁴⁸ In June 2017, Indonesia, Malaysia, and the Philippines launched the Sulu-Sulawesi Seas Patrol (SSSP), a framework of maritime security cooperation aimed at protecting the Sulu Sea and Sulawesi (Celebes) Sea from maritime crimes.⁴⁹ It is modelled after the MSP program in the Malaccan straits. Here the SSS maritime patrols would take the form of coordinated patrols, as opposed to joint patrols, which means that they will use their respective national commands and coordinate their actions with each other by, *inter alia*, sharing intelligence and information.⁵⁰

The Bay of Bengal outside India and Bangladesh is plagued by pirates who catch fishermen and their trawlers. The Bay of Bengal is increasing in economic and strategic significance. It is critical sea lines of communication for the transit of trade and energy supplies from the Middle East, Europe and Africa to the economic powerhouses of East Asia. The piracy in the Bay of Bengal does usually not target the high seas, but in first half of 2020 armed robbery and piracy was on the rise with a 1/3 of the reported maritime incidents in the Indo-Pacific.⁵¹ In the Bay of Bengal littoral states are strengthening their maritime ties through a series of bilateral and multilateral alliances, naval exercises, and memorandums of understanding.⁵²

Latin America and the Caribbean

In the Caribbean piracy is rising. This is explained by the political and economic instability in Venezuela and in other states like Brazil, that paves way for criminal gangs, dedicated to the theft of goods mostly in the territorial sea of Latin American nations.⁵³ Worst hit so far is Venezuela and Peru, also Surinam, Guayana, and the Gulf of Mexico saw an increase in robbery of fishing vessels and illegal boarding of oil-platforms.⁵⁴ The highest number of incidents in Latin America and the Caribbean were against yachts with petty thefts. In Latin America and the Caribbean there are no joint mechanisms or regional cooperation against maritime piracy. However, there is joint cooperative maritime security in the Caribbean regional organization CARICOM against drugs as well as cooperation with the US coastguard and its support for surveillance.⁵⁵

Who are the PCASPs?

PCASPs are usually ex-military personnel or ex-law enforcement personnel but those from other relevant backgrounds may be equally suited to the task, so there are no common background conditions required. National law as well as private initiatives might offer qualifications for PCASPs.⁵⁶ Most PMSCs have vetting with back-ground checks to remove unfit recruits, as provided for in the IMO and ISO standards, and the industry's self-regulations, as will be shown in part 2 of this article. No one with a history of alcohol or drug abuse should be selected and usually there is an age limit of 18+. A prominent standard contract, GUARDCON sets the limit to a security team of a minimum of four members, although the normal is usually 2-3.⁵⁷ They should have a team-leader (TL) that is more experienced, and competent in ship vulnerability and risk assessments. It is recommended that one of the PCASP be qualified as the team medic.⁵⁸ PCASPs do also need to be trained for their mission.⁵⁹

However, it is evident that most states have given the responsibility to the shipping industry and the PMSCs to control the use of PCASPs at sea.⁶⁰

But scholars and practitioners point out the problem of the quality of PCASPs, as Brown notes: "The boom in PMSCs responding to the piracy threat in the Indian Ocean raises serious questions about the quality of the contractors."⁶¹ It has been argued that PCASPs get lesser or not proper training for their mission in contrast to military personnel.⁶² In the context of landbased PCASPs several incidents have resulted in court cases due to misconduct by the PCASPs, such as in Iraq. Recently, the *Enrica Lexie* case

shows that armed vessel protection (VPDs) used in the fight against maritime piracy can cause liability.⁶³ Some PMSCs sidestep regulations by using their own floating armoury ships on the high seas and others acquire weapons illegally.⁶⁴ Moreover, it can be difficult “to prosecute illegal behaviour by private contractors or the companies that support them because their legal status is unclear and there are so many overlapping jurisdictional issues associated with their use”, to cite Brown.⁶⁵ Another problem can be the dire conditions guards have to endure on board substandard vessel based armouries, as was a fact in the M/V Seaman Guard Ohio case, when the PCASPs on board got arrested and imprisoned for four years, for breaking Indian weapons control laws due to the shipowners negligence and illegal refueling.⁶⁶ A related problem is if PCASPs fall under the Maritime Labour Convention 2006 (MLC) that came into force in 2013 - the question if they are to be considered “seafarers” protected by the MLC? The shipping industry and the PMSCs so far have denied them status as “seafarers” because of the extra economic burden involved.⁶⁷ Currently, PCASP are not seafarers for UK purposes, but as each flag state can chose to classify PCASPs as seafarers for the purposes of MLC, the classification is an open question., up to each state.⁶⁸

The Prohibition in International Law against Piracy and Armed Robbery at Sea

The international law on piracy is found in both the United Nations Convention on the Law of the Sea (UNCLOS) and the prior 1958 Convention on the High Seas, each of which reflects customary international law in this regard.⁶⁹ Indeed most of UNCLOS is considered to be customary law, which it's number of parties shows, as well as that no reservations to the convention are possible.⁷⁰

Maritime piracy is defined in UNCLOS Art.101, as acts of violence or detention, or depredation, committed for private ends by the crew or passengers of a private ship or aircraft directed against another ship or aircraft, on the high seas or outside the jurisdiction of any state:

"(a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or passengers of a private ship or a private aircraft on the high seas, and directed: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;

(b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;(c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b)."

The prohibition on maritime piracy is a *jus cogens* norm.⁷¹ *Jus cogens* are peremptory rules from which no derogation is permitted, and that take primacy over other norms in international law.⁷² The prohibition on piracy also gives rise to universal jurisdiction being an *erga omnes* obligation. *Erga omnes* obligations are based on the ICJ's ruling in the Barcelona Traction case: "... all States can be held to have a legal interest in their protection;"⁷³ *Erga omnes* norms, are rules which, if violated, give rise to a general right of standing amongst all states.⁷⁴ Oppenheim wrote: "Piracy is a so-called 'international crime;' the pirate is considered the enemy of every State, and can be brought to justice anywhere".⁷⁵ However, the ICJ has emphasized that the mere fact that a norm is *just cogens* and an obligation *erga omnes* does not change the rule of consent to jurisdiction.⁷⁶ So states are not obliged to prosecute pirates even if the prohibition against piracy gives rise to universal jurisdiction, which gives every state a *right* to prosecute them but *no corresponding obligation* to do so.

Pirate ships are, in effect, an exception to the general rule that ships on the high seas fall under the exclusive jurisdiction of the ship's flag state, according to Art.92 in UNCLOS, and requires the consent of the flag state to be boarded, searched, and detained. On the high seas applies the *freedom of navigation*, see Art.87(1a). that are extended to exclusive economic zones (EEZ). International law allows for all states to board, search, and detain vessels and individuals suspected of piracy, see UNCLOS Art.110.⁷⁷ This is

because, on the high seas maritime piracy impedes the freedom of the high seas and the equality of use of the high seas.⁷⁸ Acts of piracy can be seen as affecting *all states* involved in shipping, thus opening for universal jurisdiction on the commonality of the high seas. If an act of piracy is suspected, *hot pursuit* is allowed, but as the Permanent court of Arbitration, (PCA) notes in the *Enrica Lexie* case, this right is rather limited.⁷⁹ It does not extend to PCASPs, as they are not law enforcement officials with a right to seize and detain pirates.

The definition of maritime piracy in UNCLOS Art.101 is considered a codification of customary international law but it only covers acts committed on the high seas or outside the jurisdiction of any state.⁸⁰ The distinction between territorial waters and international waters is then crucial in establishing whether a criminal act against a vessel constitutes piracy under international law. Intervention against pirates in the territorial waters of a state is a subject for national laws and the criminal act is defined as "*armed robbery at sea*".

In UNCLOS the coastal state exercises sovereignty over its territorial sea, archipelagic and internal waters. States are entitled to a territorial sea up to a limit not exceeding 12 nautical miles from the baselines.⁸¹ Internal waters are waters on the landward side of the baseline and means the following maritime zones; the contiguous zone; the EEZ; and high seas, but excluding the territorial and internal waters.⁸² The high seas are defined negatively in UNCLOS Art.86, as: "all parts of the sea that are not included in the exclusive economic zone, in the territorial sea or in the internal waters of a State, or in the archipelagic waters of an archipelagic State."

According to Art.87 in UNCLOS there exists freedom of the high seas, which includes a freedom of navigation in Art.90 in UNCLOS.

As regards the geographic scope for the definition of piracy, Art. 101(a) (i) refers to acts committed "on the high seas" while Art. 101(a) (ii) refers to acts committed "in a place outside the jurisdiction of any State". The United Nations Division for Ocean Affairs and the Law of the Sea (UN-DOALOS) in its *Report on Piracy, and national legislation pursuant to UNCLOS*, concludes that Art. 101 should be read to include the exclusive economic zone (EEZ) of any State.⁸³ UNCLOS rules on defining international and territorial waters are customary international law and trump claims in contravention of UNCLOS, as the Permanent Court of Arbitration (PCA) found in the *South Chinese Arbitration Award*.⁸⁴ Thus, in the *Enrica Lexie* case, an incident that occurred in India's EEZ, was found not to violate India's sovereign rights, when two Indian fishermen was shot by two Italian VPDs, that mistook them for pirates.⁸⁵

Actions akin to piracy conducted within a state's internal waters, archipelagic waters and territorial sea constitute *armed robbery at sea*. These are acts that the coastal state should have domestic laws in place to deal with. IMO has provided a recognised definition of "armed robbery at sea:

"Armed robbery against ships" means any of the following acts: 1. any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such a ship, within a State's internal waters, archipelagic waters and territorial sea; 2 any act of inciting or of intentionally facilitating an act described above."⁸⁶

The different laws that apply to piracy in relation to armed robbery at sea, is one of the pertinent problems concerning the use of PCASPs on board ships. It is about national laws controlling the use of PCASPs, as well as the treatment of pirates in the territorial sea, where national jurisdiction applies. The coastal states' sovereignty over its territory is a cornerstone in international law that includes the territorial sea, as ICJ has found in *Military and Paramilitary Activities in and Against Nicaragua, being firmly established and longstanding tenets of customary international law*.⁸⁷

On the other hand, there exists a right to *innocent passage* under UNCLOS and customary international law.⁸⁸ So UNCLOS grants that ships of all states are allowed continuous and expeditious

passage through the territorial sea of a foreign state as long as the movement is innocent, meaning that it does not prejudice "the peace, good order, or security of the coastal State", according to Art.19:1.⁸⁹ Passage is not considered innocent according to Art.19:2(b):" [i]f there is the exercise or practice with weapons of any kind". Hence, the use of armed PCASPs can do that a ship is not allowed innocent passage. The coastal state may take the necessary steps in its territorial sea to prevent passage which is not innocent according to Art.25:1. However, the coastal state can pass regulations that allow for PCASPs in internal waters, see Art.21:1. Moreover, according to Art.21:2, "*Laws and regulations of the coastal State relating to innocent passage shall not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules or standards*". Thus, it could be argued that the mere use of armed PCASPs on board ships does not affect the right to innocent passage when the PCASPs do not take offensive action against maritime pirates and robbers. For example, in the *M/V Seaman Guard Ohio*, the Indian Madras High Court found that the PCASPs on board the ship used as a floating armory, was innocent passage, as it participated in the fight against piracy as authorized by the UNSC.⁹⁰ Also, it could be argued that their exercise of defensive use of force against assailants will fall under a narrowly interpreted right to self-defence established under customary international law for individuals, even though it occurs in internal waters.⁹¹ However, the mere presence of armed PCASPs *per se* does seem to violate the right to innocent passage, because they are prepared to use weapons.

Today, the common view is to find interventions against pirates and armed robbers at sea as *law enforcement operations* against criminals distinguishing the rules applicable from the use of force admissible in armed conflicts. This is explained by the private ends' requirement in UNCLOS Art.101 (a), a crime committed by *private actors against other private subjects*.⁹² But when PCASPs intervenes, PCASPs only have the right to self-defence, because they are not official law enforcement agents of the state. Liability is based on flag state jurisdiction on the high seas according to UNCLOS, where Art. 92 gives each flag state, "exclusive jurisdiction on the high seas" and the freedom of navigation which also stretches into the EEZ. In territorial waters the coastal state has jurisdiction over the crime of armed robbery. So, if a vessel is mistakenly deemed a pirate vessel, and shot at, the same rules apply to that vessel, that is, flag states jurisdiction and freedom of navigation, as was shown in the *Enrica Lexie* case.⁹³

Does the Duty to Cooperate Against Piracy in UNCLOS Give a Green Light to PCASPs On Board Ships?

All states have a *duty to cooperate to combat piracy*, as Art.100 of the UNCLOS sets out in a restatement of customary international law: "All States shall cooperate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State."

This shows that there is substantial room for cooperation on counterpiracy. It generally obliges states to cooperate in the repression of piracy and grants them the right to seize pirate vessels, arrest pirates and seize property on board.⁹⁴ According to Art.105 in UNCLOS appropriate punishment in national courts can be imposed by the seizing state. UNCLOS allows warships of any state to approach commercial vessels in order to determine their nationality and to board commercial ships on the high seas, irrespective of their national flag in order to prevent or reverse serious international law crimes, including piracy.⁹⁵ According to a traditional interpretation it is the duty of states to fight piracy using its navies and law enforcement.

However, it could be argued that if states are failing to comply with the duty to cooperate in Art. 100, it is up to private actors like the shipping industry, to fill that vacuum since the obligatory force of Art. 100 is vague and UNCLOS is mostly permissive of state conduct.⁹⁶ Hence, PCASPs are needed as a tool to protect ships against piracy on the high seas in the wake of states shouldering that responsibility effectively. Although it is not an obligation upon shipowners and merchant mariners to fight piracy, it can

be an alternative or at least supplement, in piracy ridden waters not unlike armed security guards patrolling airports or the subway.

Of course, it could be interpreted as a sign of failure by coastal states and the international community when the states own law-enforcement capacities are not enough and vessels need to hire private security. But today with shrinking resources, it is too expensive and hard for navies to effectively patrol the vast high seas.⁹⁷ Why not then, perceive states' tolerance of PCASPs as a modern and innovative way to fulfil states' duty to cooperate in the repression of piracy on the high seas, in UNCLOS Art.100? The use of PCASPs is less intrusive, as they do not have the wide law enforcement powers as a state's navy, but just defensive powers. It would comply with the Law of the Sea's preparatory works by the International Law Commission that: "allowed a certain latitude as to the measures it should take to this end [cooperation against piracy] in any individual case".⁹⁸ The PCA in the recent *Enrica Lexie* awards, finds support from UNCLOS that Art.100 is prescribing "[a] duty to cooperate as a duty of a continuing nature - an obligation of conduct rather than a one-time commitment or result".⁹⁹ However, a counterargument is that: "[t]he threshold for accusing a State of violating Article 100 of UNCLOS is relatively high", according to the PCA.¹⁰⁰ So in giving a wide latitude of measures to the states to fulfil their duty to cooperate against piracy, national legislation allowing for the use of PCASPs fits in.

Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA)

The SUA Convention from 1988 may be used by states to cooperate in the extradition and prosecution of pirates.¹⁰¹ The treaty was created by the IMO to target maritime terrorism. It was made as a reaction to the hijacking of the Italian cruise-ship *Achille Lauro* by politically motivated terrorists.¹⁰² The SUA was intended to plug gaps in existing laws relating to piracy.¹⁰³ It responded to the need to create jurisdiction for crimes that fell outside of the definition of piracy or armed robbery at sea, such as hijacking, hostage-taking and murder, when the "two ships or aircraft" or the "private ends" requirements are not fulfilled.¹⁰⁴ Two of the criminal offenses under the SUA are particularly relevant to the issue of piracy. Its Art. 3 creates the offense: "(a) when a person unlawfully and intentionally seizes or exercises control over a ship by force or threat thereof or any other form of intimidation, (b) or performs an act of violence against a person on board a ship if that act is likely to endanger the safe navigation of that ship (Art. 3.1.1-3.2). States shall cooperate to ensure that individuals responsible for such offenses will be arrested and prosecuted if they enter the territory of any state that is party to the convention, including their territorial waters.¹⁰⁵ State parties shall either prosecute a violation or extradite the offender. The SUA contains obligatory provisions that can be used to enforce the duty to cooperate in the repression of piracy in UNCLOS Art.100 and 105. However, the SUA unlike UNCLOS, does not create universal jurisdiction, even if Art. 5 provides that state parties shall make SUA offenses punishable by appropriate penalties.¹⁰⁶ This, because it is not sure if the SUA is customary international law even though the convention is ratified by over 160 states, as some important coastal states are not parties.¹⁰⁷

The International Convention Against the Taking of Hostages

This convention is from 1979 and is another treaty that can be applied against pirates. With wide recognition,¹⁰⁸ it is a UN treaty by which states agree to prohibit and punish hostage taking. The treaty includes definitions of "hostage" and "hostage taking" and sets out the principle of *aut dedere aut judicare*: a party to the treaty must prosecute a hostage taker if no other state requests extradition for prosecution of the same crime.¹⁰⁹ Piracy hostages taking is seen as a criminal offense that falls under the Hostages Convention.¹¹⁰

A problem with PCASPs as a filling-in for law enforcement is that they are not authorized to seize or arrest pirates. That can only be a side-effect of their defensive actions, and it is a role they are neither

paid to do. Moreover, when the ship is hijacked and PCASPs are taken hostages they end their duty and should be perceived as being in the same position as the crew.¹¹¹

Flag State Jurisdiction and National Laws Governing the Use of PCASPs

Art.87 in UNCLOS declares the freedom of the high seas. Art. 92 in UNCLOS gives each flag state, "exclusive jurisdiction on the high seas" and the "freedom of navigation" in Art.90, which extends into a state's EEZ. In a state's EEZ the coastal state do have some rights, according to Art.58, such as fishing rights, as "it is an area beyond and adjacent to the territorial sea", ranging up to 200 nautical miles from the baselines, see Art.55 in UNCLOS. However, a coastal state's enforcement jurisdiction in its EEZ is limited, based on Arts.58(3) and 73 in UNCLOS. It concerns the right to artificial islands, installations and structures, and marine scientific research.¹¹² A coastal state has a right to have its EEZ reserved for peaceful purposes under Article 88 in UNCLOS. In its territorial waters the coastal state has jurisdiction according to UNCLOS Art 2.

Article 94 in UNCLOS refers to "duties of the flag state". Thus, the flag state makes the decision if to allow PCASPs on board. Also, the use of PCASPs is dependent on the laws of the state where the PCASP are registered, the state in which operations are conducted or managed, and the state where the PCASP may transit.¹¹³ Ships have a right to innocent passage in territorial waters in UNCLOS Art.19, but the use of PCASPs is not considered innocent when they are armed.¹¹⁴ Also, the nationality of the victim, as well as the nationality of the PCASP, may regulate claims from third parties. Interestingly, in a state's EEZ, the right to peaceful purposes does not supersede a right to use force to go after pirates, which is evidenced by Article 301 in UNCLOS, that allows for the legal use of force, when it is not in contravention with UNCLOS or the general prohibition on the use of force in Art.2(4) of the UN Charter. This interpretation was given by the PCA in the recent *Enrica Lexie* case: "It clearly follows from the articles of the Convention related to the fight against piracy that all States can take the necessary measures, including enforcement measures consistent with the Convention and the Charter of the United Nations, to protect their vessels against pirate attacks."¹¹⁵ This interpretation seems to give states a right to use force against pirates, including the use of armed VPDs and PCASPs on the high seas, as well as a state's EEZ.

About 25 flag states today allow for PCASPs on board ships in their national legislation, among them European states, such as the UK, Germany, France, Italy, Spain, Greece, Belgium, Poland, as well as the Scandinavian countries, Sweden, Norway, Finland and Denmark. The US, Canada, Japan, Philippines, Singapore and India (which do allow for PCASPs but not foreign flagged vessels to embark or disembark PCASPs in Indian waters), also allows PCASPs. Most flags of convenience allow them, such as Antigua and Barbuda, Bermuda, Bahamas, Cyprus, Isle of Man (only in the HRA), Jamaica, Liberia, Marshall Islands, Malta and Panama. However, some important states like China, Indonesia, Russia, and most of African states, do not allow for PCASPs on board.

However, many states do not allow them in their internal waters. Malaysia, Indonesia do not allow use of PCASPs in the Malaccan straits. In Africa most states, do not allow for PCASPs in their waters, but Djibouti sells licenses to rent their arms and get permits. India do not allow foreign flagged vessels embark and disembark weapons in its waters, but Sri Lanka allows PMSCs to rent domestic weapons and a Sri Lankan retired military personnel to operate in its territorial waters.¹¹⁶ Australia and the US, do not allow them in their waters, but let PMSCs obtain licenses for embarking or disembarking arms in one of its ports. In Brazil ships carrying PCASP can travel through the territorial waters, but only with their arms sealed.¹¹⁷

This indicates that states permitting PCASPs on board their ships are yet limited. On the other hand, those that does, represent a vast majority of the world's commercial shipping fleet. Moreover, through the mandatory UNSCs resolutions with an enforcement mandate under mandatory Chapter VII

in the UN Charter, that authorizes intervention against maritime piracy in the HRA outside of Somalia, the use of PCASPs have been legalized in a high risk area, even superseding coastal states objections.

Soft law

The lack of specific international legal rules on PCASPs does not come as a surprise as international law does not attribute wrongful acts of private actors to either the states or organizations employing them.¹¹⁸ The UN in 2008 acknowledged the lack of oversight noting that PCASPs only being held accountable to their employers.¹¹⁹ But there is an extensive framework of specific and detailed regulations on PCASPs done in Guidelines from the IMO, the ISO, and self-regulations from the shipping- and PMSC industry. These regulations should be perceived as soft law.

Often soft law precedes the development of hard law. The notion of emanates from the end of the 20th century.¹²⁰ Soft law is non-legally binding instruments, often used when there is uncertainty or ineffective hard law.¹²¹ Klabbers offers a good definition of what soft law is: "The term soft law, thus (admittedly loosely) delimited, denotes those instruments which are to be considered as giving rise to legal effects, but do not (or not yet, perhaps) amount to real law: " ¹²² He adds that soft law, to distinguish it from non-law, must have a legal aim or similarity to hard law.¹²³ Soft law reflects the globalization of law, and the presumption of different legal orders according to Robillard: "the striking multiplication of producers of law and, in turn, of bodies of law and the privatization of legal regimes. A negative concept of soft law usually amounts to a critique of the state-centered vertical and hierarchical law-making model."¹²⁴ Francis Snyder gave a celebrated description according to which soft law is defined as "those rules of conduct which, in principle, have no legally binding force but which nevertheless may have practical effect".¹²⁵

There are some prominent opponents to the notion of soft law, such as hard-core legal positivists like Prosper Weil, that describes soft law as no law at all.¹²⁶ But it is obvious that the notion of soft law has prevailed and plays an important role. Parties to soft law often behave in ways they negotiate and voluntarily agree to. Timothy Meyer, highlights the quasi-judicial ambition of soft law: "Soft legal obligations are those international obligations that, while not legally binding themselves, are created with the expectation that they will be given some indirect legal effect through related binding obligations under either international or domestic law."¹²⁷ This definition fits the framework of provisions on PCASPs that different international organizations, individual governments, and private actors, adopted. The topic of PCASPs on board ships as a tool to fight maritime piracy, is primarily at this stage influenced by a number of soft law rules and regulations. The maritime security industry together with the shipping industry, have proactively created standards and best management practices, pre-empting government involvement. These soft law standards have even helped shape government and international regulatory policies toward the use of PCASP.¹²⁸ IMO have endorsed these policies and national law picked up on their provisions. Most important, national laws of about 25 flag states, have accepted the use of PCASPs. Many of those states have also put in place basic provisions from the international voluntary regulations on the use of PCASPs, such as vetting and licensing.¹²⁹

Soft law being a tool to connect and transfer legal competence from the official rule makers in international law, the states - to private actors and organizations directly affected by maritime piracy. This fits the explanation of soft law as an instrument to forego law making, leaving it to the parties to solve the issues, usually explained by arguing that hard law commitment is sometimes too costly, that states prefer more flexible commitments, and that soft law is cheaper to produce.¹³⁰ The expansion of use of PMSCs and PCASPs is relatively new why legislation is lagging behind. The disadvantage of soft law is that it does not require compliance by states or parties who do not want to change, which ironically are often the targets of the instrument.¹³¹ However, soft law regulations often develop out from a kernel of hard law. At

some point, they may also convert into hard law in the future, as Shelton points out: “Moreover, soft law norms may harden, being frequently incorporated into subsequent treaties or becoming customary international law as a consequence of state practice.”¹³²

The Existing Soft Law Documents on PCASPs

The Montreux Document

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*, 2008, is an important soft law document applicable to PMSCs, as it is a statement of the interpretation of existing international rules in the area of PMSCs focused on humanitarian and human rights law and their operation during *armed conflict*.¹³³ It is a non-binding instrument addressed to states and limited to armed conflicts but its restatements of IHL reflects *lege lata*.¹³⁴

Its applicability to PCASPs guarding against maritime piracy is more complicated. The Montreux Document’s primary focus is armed conflict on land. Operations against maritime piracy is mostly done outside of an armed conflict. Moreover, human rights do not bind private actors *per se* since human rights apply vertically between individuals and states rather than horizontally between affected individuals and groups and private security providers (PSCs).¹³⁵ Thus, the Montreux Document it is not immediately binding on PMSCs and PCASPs because PCASPs on board ships deployed against piracy, are seen as *private* law enforcement rather than military operations during *armed conflict*. However, in its Q & A’s, the Montreux Document notes that contracting of PMSCs to protect merchant shipping against acts of piracy is an example of law enforcement where the Montreux Document’s statements on jurisdiction Article 5, remains a practical guidance.¹³⁶ Its voluntary applicability to PCASPs on board ships is also showed by that states such as the Bahamas, the Marshall Islands and Cook Islands have signified the Montreux document’s provisions in their recommendations to the IMO.¹³⁷ However, the Montreux document is not binding on PCASPs so long as they are not participating in an armed conflict.

The International Code of Conduct for Private Security Service Providers (IcoC)

ICoC from 2010, is a set of principles for PSCs, created through a multi-stakeholder initiative convened, like the Montreux Document, by the Swiss government.¹³⁸ The Code will later create a governance and oversight mechanism. But does the ICoC apply to private maritime security services? It could be put in doubt as ICoC, p. 7, points out that this area is contemplated for development of additional principles and standards.¹³⁹ The IMO has declared that it finds ICoC not directly applicable to the peculiarities of PCASPs on board merchant ships to protect against acts of piracy and armed robbery at sea.¹⁴⁰ This was clearly stated in IMO Maritime Safety Committee (MSC) Circular 1443, when the MSC agreed that ICoC was written in the context of “self-regulation for companies deploying armed guards on land only”.¹⁴¹ However, the Security Association for the Maritime Industry, SAMI, in statements after the adoption of ICoC found it: “...there is increasing scope for its provisions to be applied in the marine context.”¹⁴² Thus, voluntarily, ICoC can be applicable to PCASPs on board ships.

Regulations for PCASPs deployed On Board Ships to Guard Against Maritime Piracy

Here will be presented the different regulations that applies to PCASPs on board ships fighting piracy, that is the IMO regulations, ISO standards and the industries self-regulations. These documents are lengthy with detailed provisions pertinent to PCASPs in the maritime setting deployed against pirates. To save space the most important provisions are then compiled and analyzed under the heading on *the uniformity of the regulations*, where the similar rules of these documents are reviewed. It will appear in subsequent Part 2 of this article.

The IMO Guidelines

The IMO is a specialized agency under the UN responsible for regulating shipping and maritime issues. Thus, its provisions on PCASPs have bearing on the development of international law. It has provided recommendations on measures against piracy in three of its Circulars.¹⁴³ The first Circular is named *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 (2009). The second circular is called *Recommendations for Preventing and Suppressing Piracy and Armed Robbery Against Ships*, MSC.1/Circ.1333/Rev.1 Annex, (2015).

The first, MSC.1/Circ.1334, is directed towards shipowners. It highlights the urgent need for merchant shipping to take every possible measure of self-protection as the most appropriate deterrent from acts of piracy and armed robbery, see para.1. It is relevant for the High-Risk Area in the Horn of Africa (HRA). The second Circular MSC.1/Circ.1333/Rev.1, is addressed to Governments and is circumscribed to the HRA. It emphasizes the shipping industry's primary responsibility to flag states' overall requirement to take such measures as are necessary to ensure that owners and masters accept their responsibility. However, these two circulars mention the use of PCASPs only in a few paragraphs.

IMO, *Revised Interim Guidance to Shipowners, Ship Operators and Shipmasters on the Use of Privately Contracted Armed Security Personnel on Board Ships in the High-Risk Area*, in IMO Circular 1405 (2012).

This Circular is a detailed Guidance on PCASPs for shipowners, operators and masters.

It endorses their use, while at the same time emphasizes that the use of PCASPs is complex because of "[T]he absence of applicable regulation and industry self-regulation coupled with complex legal requirements governing the legitimate transport, carriage and use of firearms gives cause for concern", see para 1.2. The 1405 Guidelines has had important impact on the development of regulations on PCASPs.

IMO endorsed Best Management Practices (BMP) Adopted by the Shipping Industries

The IMO has approved the Shipping Industries Counter Piracy Guidelines that was adopted due to the piracy off the coast of Somalia. Those Guidelines are made up of three regimes, that the IMO, in its MSC.1/Circ.1601 (8 Dec.2018) endorsed, in their latest version: (1) "*Global Counter Piracy Guidance for Companies, Masters and Seafarers*" (GCPG), see Annex 1, as well as revised and up-dated in Annex 2: "*Best Management Practices to Deter Piracy and Enhance Maritime Security in the Red Sea, Gulf of Aden, Indian Ocean and Arabian Sea*", (BMP5).¹⁴⁴ The IMO also approved in Annex 3: "*Protection against piracy and armed robbery in the Gulf of Guinea region*", in Annex 3. But even though Annex 3 warns that piracy attacks in the Gulf of Guinea are very violent, it does not mention the use of PMSCs or PCASPs, because in the Gulf of Guinea most attacks occur in territorial waters and local states do not allow armed PCASPs on board.¹⁴⁵

These guidelines have been confirmed practice for the shipping industry according to the IMO Committees approval of the *Revised Industry Counter Piracy Guidance* in 2018. The BMPs have also been endorsed by the UNSC in some of its resolutions on Somali piracy.¹⁴⁶ The GCPG is directed towards maritime piracy in general, while the BMPs are targeted at all shipping transiting the high-risk Somali piracy waters. However, as an Australian Government Report on piracy points out: "Piracy is recognised by all stakeholders as a global rather than simply a Horn of Africa problem, these standards ideally should be adopted by ships at all times on the high seas or as a minimum while transiting any waters that pose a realistic piracy or armed robbery threat."¹⁴⁷ However, although the guidelines are detailed on the use of PCASPs they nor endorse neither recommend the use of them.¹⁴⁸

The ISO standards

The international organization for standardisation (ISO) has as its purpose to facilitate and support national and international trade and commerce by developing standards that will be recognized globally.

Thus, ISO standards are prone to be normative. The ISO 28000 is a risk-based quality management system for the security of operations conducted by organizations.¹⁴⁹

Subsequently the ISO adopted ISO 28007, *Ships and marine technology – Guidelines for Private Maritime Security Companies (PMSC) providing privately contracted armed security personnel (PCASP) on board ships (and pro forma contract)*. It fleshes out the ISO 28000, as it presents guidelines for PMSCs who provide PCASPs on board ships. The ISO 28007 is established by the IMO and the international shipping associations together and is very detailed.

The ISO 28007 standard provides for regular internal audit of compliance with its standards. The PMSC shall also address and resolve any complaints and grievances from clients, stakeholders, witnesses and whistle-blowers.¹⁵⁰ The 28007 standard is much detailed. However, there are no penalties, or redress applicable in the case of non-conformance, only the need to “take timely action to prevent a recurrence.”¹⁵¹ The ISO 28007 standards depends on voluntarily auditing through access to a certification system that is run by private certification bodies accredited in accordance with the International Accreditation Forum (IAF) protocols. The certificate shows that the security provider complies with the ISO 28007. The United Kingdom Accreditation Service (UKAS) has drawn up a guidance with provisions that selected bodies who wants to run a 28007 certification system need to fulfil.¹⁵² The certification is quite expensive, why about 20% of the PMSCs have not applied for certification.

Standard Agreements

GUARDCON

BIMCO is the largest of the international shipping associations representing shipowners; its membership controls around 65 percent of the world’s tonnage.¹⁵³ GUARDCON is a standard contract for the employment of PCASPs on vessels made by BIMCO.¹⁵⁴ The aim is to help shipowners choose security that is safe and “to weed out operators who may potentially place shipowners and their crews at risk.”¹⁵⁵ It is an insurance contract,¹⁵⁶ that aims to potentially exclude smaller companies from being able to offer their services using GUARDCON.¹⁵⁷

The GUARDCON appears to be common usage in the trade. Its Explanatory note points out the gap that: “[T]here is no established “best industry practice” in the maritime security sector, as yet.” Thus, its standards have relevance for developments of norms regulating the PCASPs on board ships guarding against maritime piracy and armed robbery. Important, its norms converge with the ISO standards in most cases.¹⁵⁸

Guidance on Rules for the Use of Force

The development of recognised and lawful use of force at sea is an area of soft law which has been much needed in the shipping industry to protect crews, vessels and their cargos. Two voluntary guidance’s for the rules on the use of force have been developed by private organizations. Both contain similar rules.

Guidance on RUF by BIMCO for Privately Contracted Armed Security Personnel (PCASP) in Defence of a Merchant Vessel (MV), is made by BIMCO. This Guidance on RUF aims to be assistance to owners and private maritime security companies when drawing up and agreeing RUF for their own purposes.¹⁵⁹ Thus, there is a blank Annex B, to GUARDCON to which the parties need to attach their agreed RUF to form part of the contract, and where the parties can (if they choose) refer to the BIMCO Guidance on RUF.

The 100 Series Rules: An International Model Set of Maritime Rules for the Use of Force (RUF)

This is an international model set of maritime rules for the use of force (RUF) designed for worldwide use by PCASPs on board ships. The objective is to provide the PCASP, master and crew with guidance on the lawful use of force in accordance with the right of self-defence when subjected to either perceived or actual acts of maritime piracy, armed robbery or hijacking. Also, to reduce risk to the master,

crew, PMSC, PCASP, shipowner, charterer, insurer and underwriters of civil liability claims and/or potential criminal or other charges.¹⁶⁰

A further article will address conclusions about the uniformity of all these agreements, standards and regulations.

To be continued.

¹ Barry Hart Dubner & Claudia Pastorius, On the Effectiveness of Private Security Guards on Board Merchant Ships off the Coast of Somalia - Where Is the Piracy; What Are the Legal Ramifications, *N.C.J. Int'l L. & Com. Reg.*, Vol.39, (2014), p.1029, 1040.

² Birgit Feldtmann, On-board Protection of Merchant Vessels from the Perspective of International Law, *Erasmus Law Review*, No.4, (2018), pp.209, 212, Srilatha Vallabu. Privately Contracted Armed Security Personnel in Indian Ocean Region, Patrick Chaumette (ed.) *ESPACES MARINS: SURVEILLANCE ET PRÉVENTION DES TRAFICS ILLICITES EN MER*, Gomylex, (2016), pp.265-279.

³ These abbreviations are used by IMO and ISO, see e.g., ISO/PAS 28007-1:2015, *Ships and marine technology Guidelines for Private Maritime Security Companies (PMSC) providing privately contracted armed security personnel (PCASP) on board ships (and pro forma contract)* – Part 1. The abbreviation “PSCs” is used in the *International Code of Conduct for Private Security Service Providers (IcoC)* from 2010, however it is applicable only to land based PCASPs. Also, to avoid confusion, it should be noted that in other literature “PMSC” may be an abbreviation for private military and security companies (PMSC).

⁵ Theodore T. Richard, Reconsidering the Letter of Marque: Utilizing Private Security Provider against Piracy, *Public Contract Law Journal*, Vol.39: 3 (2010): pp.411-464.

⁶ James Kraska; Brian Wilson, Piracy Repression, Partnering and the Law, *Journal of Maritime Law and Commerce*, Vol. 40:1 (2009), pp. 43-58, p.54.

⁷ UNCLOS Article 100, cited *infra*.

⁸ “Partnering is particularly vital against piracy because most of the ocean's surface is not under state jurisdiction, and no single nation has the naval capability to effectively patrol the vast areas affected by piracy,” writes, James Kraska, Brian Wilson, Piracy Repression, Partnering and the Law, *Journal of Maritime Law and Commerce*, Vol.40:1 (2009), p.43, 48.

⁹ Robert McLaughlin, Reinforcing the Law of the Sea Convention of 1982 Through Clarification and Implementation, *OCEAN & COASTAL L.J.*, VOL.25 (2020), pp.130,131.

¹⁰ *Ibid*.

¹¹ Martin Ratcovich, *International Law and the Rescue of Refugees at Sea*, Stockholm University Press, 2019, p.55.

¹² Cuong Manh Nguyen, Tien Quoc Le, Impact of Piracy on Maritime Transport and Technical Solutions for Prevention, *International Journal of Civil Engineering and Technology*, Vol. 10(01), (2019), p.958.

¹³ See e.g. UNSC Res. 2500 (Dec.2019), that notes the complex relationship between illegal and unregulated fishing and piracy in its preamble.

¹⁴ Alejandro Guzmán Woodroffe, *Caribbean Piracy, a Disney Fantasy or a Real Threat?* The Maritime Executive, 07-29-2019, [https://www.maritime-executive.com/blog/pirates-of-the-caribbean-a-disney-fantasy-or-a-real-threat].

¹⁵ Peter Lehr, *Pirates - A New History, from Vikings to Somali Raiders*, Yale University Press, 2019.

¹⁶ For the latest example, see UNSC Res. 2500 (Dec.2019), that writes in its preamble: “Emphasizing that peace and stability within Somalia, the strengthening of State institutions, economic and social development, and respect for human rights and the rule of law are necessary to create the conditions for a durable eradication of piracy and armed robbery at sea off the coast of Somalia.”

¹⁷ Cuong Manh Nguyen, Tien Quoc, *supra*, at p.961.

¹⁸ *Maritime Piracy*, Chapter 9, UNODC Report 2009, pp.193-200 [https://www.unodc.org/documents/data-and-analysis/tocta/9.Maritime_piracy.pdf].

¹⁹ With piracy and armed robbery emerging as persistent threats in the Western Indian Ocean, the Gulf of Guinea and South East Asia, ships are encouraged to report to the centres overseeing the Voluntary Reporting Areas (VRAS) to ensure that the military and law enforcement forces are aware of the vessels’ intended sea passages and their vulnerability to an attack.

- ²⁰ The IMB's Piracy Reporting Centre (PRC) recorded 98 incidents of piracy and armed robbery in the first half of 2020, up from 78 in Q2 2019, see *Crew kidnappings surge in seas off West Africa*, ICC Commercial Crime Service, A Specialized Division of the International Chamber of Commerce, [<https://www.icc-ccs.org/index.php/1293-crew-kidnappings-surge-in-seas-off-west-africa-imb-reports>].
- ²¹ BIMCO, ICS, IGP&I Clubs, INTERTANKO and OCIMF, *BMP5 - Best Management Practices to Deter Piracy and Enhance Maritime Security in the Red Sea, Gulf of Aden, Indian Ocean and Arabian Sea*, (2018).
- ²² See *infra* on piracy in the Gulf of Guinea.
- ²³ BIMCO, ICS, IFSMA, IGP&I, INTERTANKO, INTERCARGO, INTERMANAGER, OCIMF, *Global Counter Piracy Guidance for Companies, Masters and Seafarers*, Witherby publishing Group (2018).
- ²⁴ *Dryad 2019 Maritime Security Report* [<https://dryadglobal.com/2019-annual-maritime-security-incident-report/>].
- ²⁵ UNSC Res. 1844 refers to Chapter VII in the UN-Charter: "Determining that the incidents of piracy and armed robbery against vessels in the territorial waters of Somalia and the high seas off the coast of Somalia exacerbate the situation in Somalia which continues to constitute a threat to international peace and security in the region", a phrase repeated in subsequent UNSC resolutions, see e.g. UNSC Res.2077 (2012), 2500 (Dec.2019).
- ²⁶ See also UNSC Resolution 2020 (2011).
- ²⁷ Yaron Gottlieb, The Security Council's Maritime Piracy Resolutions: A Critical Assessment, 24 *Minn. J. Int'l L.* no.1, 2015, pp.1-72, p. 55.
- ²⁸ The resolution: "Commending the efforts of flag States for taking appropriate measures to permit vessels sailing under their flag transiting the High Risk Area to embark vessel protection detachments and privately contracted armed security personnel, and encouraging States to regulate such activities in accordance with applicable international law and permit charters to favour arrangements that make use of such measures." The UNSC reiterated this position in Resolution 2125 (2013), which cites the use of PCASP's a couple of times.
- ²⁹ See UNSC Res. 2500 (Dec.2019), para.26:" (d)eveloping regulations for the use of privately contracted armed security personnel (PCASP) on board ships, aimed at preventing and suppressing piracy off the coast of Somalia, through a consultative process, including through the IMO and ISO;"
- ³⁰ The Covid-19 pandemic is having an effect, as countries like Somalia where already socio-political conditions and economic dislocation have paved way for piracy. E.g. in May 2020, two pirate skiffs attacked a tanker vessel in the Gulf of Aden, until they were pushed back by the ship's PCASPs.
- ³¹ International Maritime Bureau (IMB) cited in Marine Insurance P&I Club News, Piracy and Security News 06/11/2019.[<https://www.hellenicshippingnews.com/gulf-of-guinea-worlds-most-dangerous-piracy-hotspot/>].
- ³² *Guidelines for Owners, Operators and master's for protection against piracy and armed robbery in the Gulf of Guinea region* (Version 3, June 2018), Annex 3, reprinted in MSC.1/Circ.1601 (8 Dec. 2018).
- ³³ Olivia Konotey-Ahulu, *Pirates Now Prefer Human Hostages Over Ships And Cargo*, Dryad Global, Jan. 11, 2020, [<https://dryadglobal.com/pirates-now-prefer-human-hostages-over-ships-and-cargo/>]. The London School of Economics indicates that the cost of piracy to the shipping industry and end consumers is as much as \$3.3bn, *What's the cost of piracy in West African waters?* Aljazeera News, 03-08-2019, [<https://www.aljazeera.com/programmes/countingthecost/2019/08/cost-piracy-west-african-waters-190803104407391.html>].
- ³⁴ Jose Manuel Sobrino Heredia, *Piracy*, Spanish Yearbook of International Law, Vol. 21 (2017), pp.397, 402.
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