

Christian Cornelius Wirtz

(WRTCHR007)

Master of Laws (LL.M.)

‘International Public Law’

Blackwater versus Blackbeard:

Which international regulations exist for the use of private maritime security companies in vessel protection operations?

Supervisor: Ms Cathleen Powell

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the Master of Laws in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of Master of Laws dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

Cape Town, 7 March 2016

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List of Abbreviations

| | |
|--------|-----------------------------------------------------------------------------------------------|
| ASIS | American Security Industry Society |
| BIMCO | The Baltic and International Maritime Council |
| EESC | European Economic and Social Committee |
| EU | European Union |
| HRA | High Risk Areas |
| IAMSP | International Association of Maritime Security Professionals |
| ICRC | International Committee of the Red Cross |
| ICJ | International Court of Justice |
| ICTY | International Criminal Tribunal for the former Yugoslavia |
| ILC | International Law Commission |
| IMB | International Chamber of Commerce's International Maritime Bureau |
| IMO | International Maritime Organisation |
| ISO | International Organisation for Standardisation |
| NATO | North Atlantic Treaty Organisation |
| NGO | Non-government Organisation |
| PCASP | Privately contracted armed security personnel |
| PMSC | Private maritime security company |
| ReCAAP | Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia |
| RUF | Rules for the use of force |
| SAMI | Security Association for the Maritime Industry |
| U.K. | United Kingdom |

UNCLOS
U.S.A.

United Nations Convention on the Law of the Sea
United States of America

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Questionnaire about the use of private security personnel on board of commercial vessels

Dear Mr. Cook,

Thank you for helping with my Master thesis. I would like to ask you a couple of questions regarding piracy and the use of armed guards as a counter-mechanism.

1. Getting reliable data about pirate attacks seems to be difficult, but generally it is said that the problem of piracy recently moved from Africa over to Asian waters. Is that true? I agree it isn't that easy to get accurate data about the number of teams being used by vessels around the globe. This is partly because the PMSCs don't really advertise it and shipping companies are reluctant to tell people they are using PCASP as well. I have attached a couple of slides that will show the level of global piracy and how many teams are being used at present.
2. It is estimated that in 2012 around 40 % of the commercial ships passing through HRA used PMSC personnel. How many vessels do really use private security guards nowadays? When I attended the launch of the OBP 2014 report in June the international shipping associations and EUNAVFOR agreed that it is still around 35-40% of ships transiting the HRA have PCASP embarked (see attached slides)

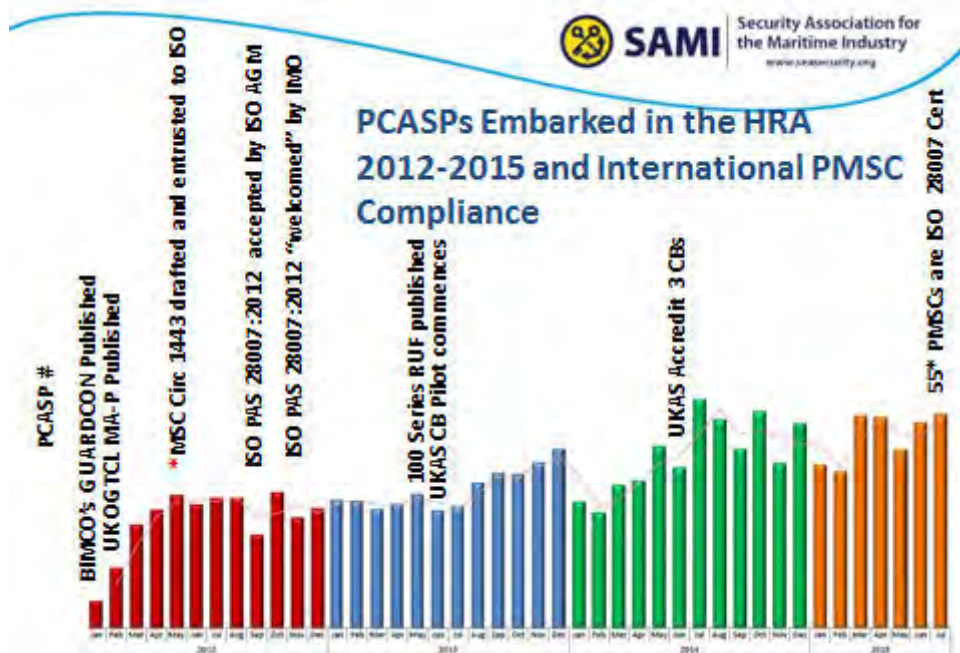
3. In the media, one often finds the worry about potential misconduct of PMSC operators during their employment and comparisons are made with Blackwater contractors in Iraq and Afghanistan. Does this risk really exist? Whilst of course there will have been some incidents historically of excessive force being used by PCASP, I think that is mostly in the early days of the use of PCASP. At the Contact Group for Piracy off the Coast of Somalia (CGPCS) meeting at the UN in New York last July the report from UNODC told us that the pirates they interviewed were most scared of the navies rather than armed guards. This indicates to me that the guards no longer overstep the mark as it were and work within the 100 Series RUF. I have also added a slide that shows the introduction of the regulatory structure for PMSCs and PCASP.
4. The IMO seems to disapprove the use of armed guards. Has this view changed with the increasing employment? The IMO were initially reticent to endorse the use of armed guards because that is what their flag State membership felt. The IMO is a secretariat that provides the collective mouthpiece for its members rather than forming its own independent opinion. I do have regular conversations with members of the IMO secretariat and many of them can completely see the utility of the armed guards as long as they are correctly managed.
5. In my thesis, I analyse the legal foundations of the use of PMSC personnel in international law, but as you know, there are no existing legal standards, only soft law. Do we need concrete laws for the use of PMSC on a national or even international level? Are soft law standards, like BMP, sufficient? The main law that is used on the High Seas, in international waters is English or Common Law and this is built on precedent, which requires cases to be taken to court. This has not happened yet and so the body of law has not been built. We do have the contract BIMCO's GUARDCON, which is existing contract law. We have the standard ISO 28007, which is a standard that PMSCs may be measured against in the conduct of operations should their case be taken to court. We also have the 100 Series Rules for the Use of Force (www.100seriesrules.com) that is being used regularly. The problem is that no one has brought a case to court. There was a case in the Seychelles last Jan/Feb but this did not focus on the armed guards as their actions were successful in deterring the pirates.
6. Are floating armouries commonly used? Floating Armouries are commonly used and there are around 17-20 at sea today in three key points; Southern Red Sea, Off the port of Fujairah and Sri Lanka. The Floating Armouries are being used because the adjacent nations will not allow weapons, ammunition and security related equipment to be unloaded and stored in their ports. SAMI is in the process of conducting a comprehensive survey of Floating Armouries for the Marshall Islands, which will be presented to the IMO next year.
7. My thesis is obviously very abstract and getting profound details about the daily work of PMSC operators is fairly difficult. But in reality, do these operators face many obstacles in terms of customs and controls of local governments or is it more of a hidden industry? There are many complex rules and requirements that PMSC and PCASP have to work with in order to get the job done. How easy is it to traverse through multiple territorial waters and to anchor in ports with weapons on board? Each

country has its own rules regarding the carriage of weapons, ammunition and security related equipment that apply in its TTW but Coastal States don't always let the industry know what those rules are (a selection of the information provided to the IMO can be found here:

<http://www.imo.org/en/OurWork/Security/PiracyArmedRobbery/Pages/Responses-received-on-Private%20Armed%20Security.aspx>)

Slides added by Peter Cook:

Slide 1:



Comment by Peter Cook: An excellent example of how this “blending public and private maritime security activities..... into an integrated effort that addresses all maritime threats.” can be seen in this slide. The coloured bars at the bottom show the trend of PCASP employment by vessels crossing the HRA between Jan 12 and Jul 15, we think the overall increase is partly due to more ships transiting the HRA because of the general economic improvement. The dips in spring and autumn correlate with the monsoon periods. It was agreed by BIMCO and EUNAVFOR in June that the percentage of vessels carrying PCASP is still around 35-40% although team sizes have dropped from 4 to 3 and in some cases only two team members. There is also a difference in the nationalities of team members from Anglo Saxon (which are expensive) to other cheaper nationalities such as Eastern Europeans, Indians and Filipinos.

You can also see the gradual introduction of the regulatory structure for the provision of private maritime security on ships from the publishing of BIMCO's GUARDCON in Jan 12, right through to the introduction of ISO 28007 and we now have 55 PMSCs (44 of which are SAMI members) that have been certified.

The red star May 12 denotes the last successful hijacking of a large commercial ship SMYRNI, which was released in May 13.

One other thing I think this slide demonstrates is that there is under reporting, otherwise why would so many ship owners still be paying for armed teams?

Slide 2:



Comment by Peter Cook: Piracy and maritime security are global, whilst the number of reported incidents in the HRA have decreased the piracy networks have not been destroyed or dismantled and could easily be reinvigorated were circumstances to change and the risk v return equation swing back in favour of the pirates. Piracy and armed robbery at sea in the Gulf of Guinea continues and in the OBP report for 2014 around half of the reported incidents have taken place outside TTW. However the piracy business model is very different and so the counter piracy model also has to be different. It is likely that the problems in the GoG will continue for some considerable time. The number of incidents in the SE Asia region are also increasing and whilst the level of violence is much less than other areas but crews on

ships are becoming progressively worried and an increasing number of enquiries are being made to our members about security options in the region.

Koch, Christopher, *Hearing before the House Subcommittee on Coast Guard and Maritime Transportation* regarding “International Piracy on the High Seas”, 04 February 2009.

Sekimizu, Koji, *Maritime Safety Committee*, 90th session, Opening address, 16 May 2012, available at: <http://www.imo.org/en/MediaCentre/SecretaryGeneral/Secretary-GeneralsSpeechesToMeetings/Pages/msc90highlevel.aspx> (last seen: 20 August 2015)

Blackwater versus Blackbeard: Which international regulations exist for the use of private maritime security companies in vessel protection operations?

I. Introduction

Although piracy was a neglected issue in the twentieth century, especially in the last two decades it gained attention as a serious threat to global shipping.¹ A key date for modern piracy was 2008 in particular. In this year alone, 293 total attacks against ships occurred: 49 vessels were hijacked, 889 crew members were taken as hostages, 11 were shot and 21 went missing.² Compared to 2007, the number of attacked ships rose by 11 %. Similar numbers exist for the year 2009.³ All of a sudden piracy gained the attention of the international community and the media.

Modern piracy consists mainly of capturing a ship and selling its cargo, as well as hostage taking. It is estimated that in the Horn of Africa only, pirates made between \$339 million and \$413 million in ransom profits in the last few years⁴, a sum between \$ 30 million and \$ 150 million of ransoms paid is estimated for 2008.⁵ Famous piracy attacks include the hijacking of the Maersk Alabama in 2009, which is known as the first successful pirate seizure of a ship registered under the American flag since the early nineteenth century.⁶ Other known cases are the kidnapping of the German container ship Hansa Stavanger in 2009 and of the French luxury yacht Le Ponant in 2008.

The cost of piracy for the shipping industry increased enormously with the rise of these attacks.

¹ O'Meara, Richard M., 'Maritime piracy in the 21st century', *Journal of Global Change and Governance*, 2007, p. 2 (hereafter: O'Meara); Geiß, Robin & Petrig, Anna, *Piracy and Armed Robbery at Sea*, 2011, p. 1, 7 (hereafter: Geiß & Petrig).

² ICC Commercial Crime Services, IMB reports unprecedented number of hijackings, 16 January 2009, available at: https://icc-ccs.org/index.php?option=com_content&view=article&id=332:imb-reports-unprecedented-rise-in-maritime-highjackings&catid=60:news&itemid051 (last seen: 16 June 2015).

³ Geiß & Petrig, p. 7.

⁴ UN News Center Report, 01 November 2013, available at: <http://www.un.org/apps/news/story.asp?NewsID=46402&Cr=somalia&Cr1> (last seen: 16 June 2015).

⁵ Isenberg, David, 'The Rise of Private Maritime Security Companies', *Somalia Report*, 26 May 2012, (hereafter: Isenberg).

⁶ See movie *Captain Phillips* released by Columbia Pictures (2013).

Even though the cost of piracy for the world's economy is fairly difficult to estimate due to a lack of consensus on how to quantify the financial implications and a shortage of data, the approximated costs are alarming. Reports of the non-profit organisation Oceans Beyond Piracy, estimate a total economic cost of US\$7–US\$12 billion for 2010 and even in 2014 a number of roughly US \$ 3, 2 billion is estimated, excluding the costs of attacks in South East Asia.⁷ The costs include ransoms, insurance premiums, the deployment of national navies, the prosecution of pirates, the re-routing of ships and the costs of deterrence and security equipment.

As a result of these incidents, shipping companies, governments, insurances and maritime organisations have approached the problem in different ways. Navies have been dispatched to waters where incidents occur most frequently, multinational operations have been set up, piracy reporting centres have been established and crews have been trained for worst case scenarios, such as hijackings on the open water.

Unsurprisingly, the increase in criminal activities on the high seas also whetted the appetite of private maritime security companies (PMSCs).⁸ A PMSC, in the context of this study, is a company which provides protection for ships or oil rigs against pirates or other threats, especially with the employment of armed teams under a private contract stipulated with the ship owner.⁹ The guards who protect the ships are often called Privately Contracted Armed Security Personnel (PCASP) or simply contractors.

In this respect, they differ from private military companies (PMC), which often serve armies under a public contract stipulated by government authorities, even though contracts are sometimes signed with private corporations or international organisations.¹⁰

Companies such as Background Asia Risk Solutions, HollowPoint Protective Services, Drum Cussac or Hart Security provide professional shipping protection.¹¹ Furthermore,

⁷ *Reports of Oceans Beyond Piracy*, available at: http://oceansbeyondpiracy.org/obp-reports?field_region_tid=All&field_obp_type_of_document_tid=113&field_obp_author_tid=All&field_subject_tid=All (last seen: 10 July 2015).

⁸ In many publications, one finds terms such as private military companies (PMC) or private security companies (PSC). In this thesis, the PMSC is used exclusively.

⁹ Francioni, Francesco & Ronzitti, Natalino, *War by contract*, 2011, p. 44 (hereafter: Francioni & Ronzitti).

¹⁰ Francioni & Ronzitti, p. 1.

probably the most notorious private security company, Academi (formerly Blackwater Worldwide¹²), has also entered the maritime security sector to provide security against piracy at sea on board vessels.¹³ Another widespread service is the use of escort vessels, which convoy ships through certain areas.¹⁴ Academi bought a 183-foot vessel, the McArthur, equipped for counter-piracy missions to provide escort services.¹⁵ Even U.S. military officials, for example, General David Petraeus, former chief of the U.S. Central Command, have recommended the employment of private firms for counter-piracy protection.¹⁶

The use of Private Military Companies rose significantly during the Iraq and Afghanistan wars.¹⁷ Generally, their main tasks consist of engaging in combat and protection services, providing advice and training and providing logistics and transportation.¹⁸ This involvement has resulted in concerns over the management, accountability and transparency of the PMC industry, resulting from reports about excessive force, cultural

¹¹ Francioni & Ronzitti, p. 38; Mineau, Michael, Pirates, 'Blackwater and maritime security: The rise of private navies in response to modern piracy', *Journal of International Business and Law*, 2010, p. 67f. (hereafter: Mineau).

¹² *Associated press*, 'Another name change for former Blackwater firm as CEO explains how new title is inspired by Greek warriors', 13 December 2011, available at: <http://www.dailymail.co.uk/news/article-2073440/Another-change-Blackwater-firm-CEO-explains-new-title-inspired-Greek-warriors.html> (last seen: 16 July 2015).

¹³ Mineau, p. 66; Spearin, Christopher, PMSCs v. International Naval Endeavors v. Somali Pirates., *Journal of International Criminal Justice*, 2012, p. 828 (hereafter: Spearin).

¹⁴ Spearin, p. 827.

¹⁵ Mineau, p. 66.

¹⁶ Keyes, Charly, 'Petraeus tells shipping companies to 'get more serious' about piracy', *CNN*, 24 September 2009, available at: <http://edition.cnn.com/2009/WORLD/africa/04/24/petraeus.pirates/index.html?iref=24hours> (last seen: 16 July 2006); also see: Mineau, p. 64.

¹⁷ Singer, Peter W., 'Outsourcing War', *Foreign affairs*, March/April 2005, p. 1f. (hereafter: Singer 2005); Singer, Peter W. 'The Private Military Industry and Iraq: What have we learned and where to next?' *Geneva Centre for The Democratic Control Of Armed Forces Policy Paper*, November 2004, p. 1f. (hereafter: Singer 2004).

¹⁸ Nimkar, Ruta, 'From Bosnia to Baghdad', *Journal of Public and International Affairs*, 2009, p. 4 (hereafter: Nimkar).

insensibility and lack of oversight.¹⁹ Claims arose that the PMC industry would be ‘less regulated than the cheese industry’.²⁰

In 2014, four former on-land contractors of Blackwater were convicted and sentenced to long prison terms for killing 14 unarmed civilians during a fire fight in Baghdad in 2007.²¹ Similar concerns that animated the debate over PMC forces in Iraq and Afghanistan may apply to the high seas. Incidents in which pirates got shot by PMSC personnel had already occurred, for instance one on the *Avocet*, a vessel traversing the Indian Ocean in 2011,²² and another on the *Almezaan*²³ in the Gulf of Aden. Furthermore, a report about the killing of a Somali fisherman was published in 2014, shot by an armed contractor who mistook him for a pirate.²⁴

Hence, legal questions about the seizing of pirates, the use of force, criminal jurisdiction and the carrying of weapons arise. The actual practical relevance of this question is demonstrated by the arrest of six security guards in India, employed on the U.S.-owned ship *MV Seaman Guard Ohio*.²⁵ The former British servicemen were providing anti-piracy protection in the Indian Ocean when the ship was intercepted and undeclared weapons and ammunition were found.

¹⁹ Coito, Christopher Joel, ‘Pirates vs. Private Security: Commercial Shipping, the Montreaux Document, and the Battle for the Gulf of Aden’, *California Law Review*, 2013, p. 183f. (hereafter: Coito); Franciconi & Ronzitti, p. 1.

²⁰ Singer 2004, p 14.

²¹ *The United States Department of Justice, Justice News*, ‘Four Former Blackwater Employees Found Guilty of Charges in Fatal Nisur Square Shooting in Iraq 22 October 2014’, available at: <http://www.justice.gov/opa/pr/four-former-blackwater-employees-found-guilty-charges-fatal-nisur-square-shooting-iraq> (last seen: 16 June 2015).

²² Mahard, Sean Patrick, ‘Blackwater’s new Battlefield’, *Vanderbilt Journal of Transnational Law*, 2014, p. 333f. (hereafter: Mahard); Wiese Bockmann, Michelle & Katz, Allan, ‘Shooting to Kill Pirates Risks Blackwater Moment’, *Bloomberg*, 09 May 2012, available at: <http://www.bloomberg.com/news/articles/2012-05-08/shooting-to-kill-pirates-risks-blackwater-moment> (last seen: 08 July 2015) (hereafter: Wiese & Katz).

²³ Coito, p. 176; Franciconi & Ronzitti, p. 44.

²⁴ *The Economist*, ‘Laws and Guns’, 14 April 2014, available at: <http://www.economist.com/node/21552553> (last seen: 08 July 2015).

²⁵ *BBC News*, ‘India drops arms charges against British crew’, 11 July 2014, available at: <http://www.bbc.com/news/uk-28270337> (last seen: 08 July 2015).

This study aims to find the international legal foundations and requirements for the use of PMSCs on the high seas. To begin the analysis, a legal definition of piracy will be given and its causes and consequences will be outlined. Afterwards, the counter methods against piracy will be highlighted and a categorisation of the PMSC industry with its costs and benefits will be given. This is followed by a legal analysis of the present legal foundations and requirements for the use of PCASPs in international law. The first question is whether humanitarian law could be applied to actions of modern piracy, after which we will examine the question of the applicability of the Montreux Document²⁶ for PMSCs. Thereafter, the United Nations Convention on the Law of the Seas²⁷ rules concerning the use of maritime guards will be analysed in order to determine whether the use of force and self-defence against pirates can be justified. Moreover, key mechanisms and regulations for the use of PMSCs will be proposed and an overview and analysis of existing international soft law standards will be provided and discussed followed by a short overview of regional regulations concerning PMSCs. The study will conclude with a summary of the investigation.

II. The use of PMSCs against piracy

1. The act of piracy

a) What is piracy?

For the purpose of this paper, one has to define the term piracy in the context of international law. Art. 101 of the UNCLOS provides a narrow legal definition of piracy. It is described as:

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:

²⁶ The Montreux Document on pertinent international legal obligations and good practices of States related to operations of private military and security companies during armed conflict, 17 September 2008 (hereafter: Montreux Document).

²⁷ United Nations Convention on the Law of the Seas signed on 10 December 1982 (hereafter: UNCLOS).

²⁷ Bennett, Thomas W. & Strug, Jonathan, *Introduction to International Public Law*, 2013, p. 379 (hereafter: Bennett & Strug); Mahard, p. 338.

- (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).

This definition enjoys universal acceptance, even in States which have not adopted UNCLOS and can therefore be regarded as international customary law.²⁸ The ‘high seas’ include any area which is outside territorial waters and not within the jurisdiction of any State.²⁹ More precisely, they exclude the exclusive economic zone, in the territorial sea or the internal waters of a State, or in the archipelagic waters of an archipelagic State, art. 86 UNCLOS.

According to art. 103 UNCLOS, a ship or aircraft is considered a pirate ship or aircraft if it is intended by the persons in dominant control to be used for the purpose of committing one of the acts referred to in art. 101 UNCLOS. The same applies if the ship or aircraft has been used to commit any such act, so long as it remains under the control of the persons guilty of that act.

If the piracy acts described in art. 101 UNCLOS occur in territorial waters, they can be categorised as banditry or armed robbery.³⁰ The same counts for persons who mutiny or commit acts of banditry without the involvement of a second ship, due to a lack of the so called “Two-Ship-Requirement” in art. 101 (a) UNCLOS.³¹ In art. 3 of the Rome Convention of 1988, one can find a broader definition of piracy.³² The Rome Convention established a legal basis for prosecuting maritime violence that did not fall within the UNCLOS piracy

²⁹ Art. 105 UNCLOS.

³⁰ Franciconi & Ronzitti, p. 39.

³¹ Geiß & Petrig, p. 62; Franciconi & Ronzitti, p. 39.

³² Convention for the suppression of unlawful acts against the safety of maritime navigation of 1988 (hereafter: Rome Convention; also known as SUA Act).

framework. Nevertheless, the key definition of the term remains as an “act of violence, depredation committed for private ends”.³³

If acts of a ship or its crew against another ship are motivated by political ends, they can be qualified as acts of insurgency or even terrorism.³⁴ But it has to be mentioned that the categorisation of these incidents is blurred and highly theoretical and, a strict distinction can often be difficult.³⁵ Defeated insurgents can turn to pirates and vice-versa. Furthermore, political motivation can be used as a fig leaf for committing criminal acts. For example, one of the justifications raised by the Somali pirate community is that illegal fishing or dumping dangerous waste by foreigners in the coastal zone has encouraged piracy by the local population.³⁶

PMSCs are employed to protect ships and crews against any kind of violent attacks and attempted hijackings on the high seas and even in coastal waters. During on-going attacks, the contractors do not distinguish between pirates, bandits, insurgents or terrorists. They will try to repel the attackers as quickly and effectively as possible. In this paper, it is argued that pirates are the main threat for the global shipping industry. Therefore, this analysis will be based exclusively on protection against pirate attacks under the UNCLOS definition, even though it can be argued that the majority of piratical acts do occur in territorial waters and ports.³⁷ In cases, where actions or examples are qualified as robberies or other kind of attacks, this will be specifically outstated.

b) The causes for piracy

Piracy has become a highly lucrative business in certain areas of the world. The Horn of Africa, particularly the coast of Somalia, the Gulf of Guinea, the Indian Ocean, as well as the

³³ Skaridov in Long et al., *Legal Challenges in Maritime Security*, 2008, p. 481 (hereafter: Author in Long et al.).

³⁴ De Than Claire & Shorts, Edwin, *International Criminal Law and Human Rights*, 2003, p. 261 (hereafter: De Than & Shorts); Franciconi & Ronzitti, p. 39; Geiß & Petrig, p. 61.

³⁵ Geiß & Petrig, p. 65f.; Wolfrum in Long et al., p. 7ff.

³⁶ Geiß & Petrig, p. 9.

³⁷ Hohenstein, James H., ‘Private Security Companies at Sea: Unseen and Unregulated’, *International Bar Association, Singapore, Maritime and Aviation Law Section, Maritime and Transport Law Committee, Session: Piracy and Crimes at Sea including Pollution Liability*, 18 October 2007, p. 2 (hereafter: Hohenstein).

Malacca and the Singapore straits are the most affected water routes for ships, called high risk areas (HRA).³⁸

The main causes are manifold and complex. From a security and economic perspective, coastal countries such as Somalia, Indonesia and the Philippines, they remain highly unstable.³⁹ States are unable to control their territorial waters due to a lack of naval or coast guard fleets.⁴⁰ The absence of an effective executive and judicial system allows the pirates to have their bases on land and to prepare their attacks from land. People in countries like Somalia are simply desperate and used to war due to on-going regional conflicts, making Somalia a perfect environment for piracy to thrive.⁴¹ Another factor supporting piracy is the availability of light weapons in wider East Africa, which facilitates the work of pirates to board and hold even the largest ocean-going carriers. In addition, the willingness of ship owners to pay ransoms and the amount of ships which lack safety measures strongly encourages the piracy industry.⁴² Therefore, the shipping industry faces serious threats to ships, crew and cargo when traversing the high risk areas and the demand for protection has risen significantly in the last two decades.

2. The naval response of the international community

The rapid increase in armed attacks on sea resulted in a set-up of various national and multinational naval counter-piracy operations. The main naval multinational operations include the Combined Task Force 151, mainly consisting of frigates from the U.S. and the U.K., the European Operation ATALANTA and the NATO Operation Ocean Shield.⁴³ Apart from these, a number of other States have sent warships to protect and/ or escort shipping in the Horn of Africa.⁴⁴ But the use of these initiatives faces two major problems. On the one

³⁸ Menefee in Long et al., p. 445f.

³⁹ Brown, James, 'Pirates And Privateers: Managing The Indian Ocean's Private Security Boom', *Lowy Institute for International Policy Analysis*, 2012, p. 4 (hereafter: Brown); Hohenstein, p. 3.

⁴⁰ Franciconi & Ronzitti, p. 37; Mahard, p. 338f.

⁴¹ Chalk, Peter, Piracy off the Horn of Africa: Scope, Dimensions, Causes and Responses, *Brown Journal of World Affairs*, 2010, p. 94 (hereafter Chalk).

⁴² Chalk, p. 94-96.

⁴³ In detail: Geiß & Petrig, part 1, chapter II, section A.

⁴⁴ Chalk, p. 98; Franciconi & Ronzitti, p. 39, mentioning India, China, Russia, Saudi Arabia, the UAE and others.

hand, they are far too small to monitor the high risk areas and the vast number of vessels traversing the region. Only 20 frigates are deployed in the Gulf of Aden and the Indian Ocean, which have to patrol an area ten-times the size of Germany.⁴⁵ One American politician stated that not even all the navies of all the countries of the world would be able to cover the seas off of the East African nation's shores.⁴⁶ In addition, the pirates expand their operational area far into the Indian Ocean to avoid an interference of the naval ships.⁴⁷

On the other hand, the cost of the military deployment is estimated to be more than \$ 1.25 billion for 2011 and is thereby a burden on the decreasing spending's for defence in many European governments.⁴⁸ Therefore, it can be concluded that the naval operations cannot serve as an effective long-term solution for the problem.

Besides that, several different approaches were introduced to fight piracy, mainly in the coordination counter-piracy mechanisms and in the criminal repression of piracy and armed robbery at Sea.⁴⁹ For example, a Contact Group off the Coast of Somalia was built up to address the regional situation. Regarding the criminal prosecution, Kenya entered into agreements with the U.S., the U.K. and the EU to serve as a third-party prosecutor for individuals suspected of maritime crimes.⁵⁰

But these approaches do not serve as an overall solution for the piracy problem. They might help to oppose the problem, but do not efficiently prevent ships from being attacked.

3. Categorisation of the PMSC industry

The limitations and problems of counter-piracy naval forces have not only allowed piracy to continue, but have also created the conditions for a private response. The use of PMSCs rose

⁴⁵ Brown, p. 4f.; Coito, p. 180f.; Priddy, Alice and Casey-Maslen, Stuart, 'Counter-Piracy operations by PMSC's', *Journal of International Criminal justice*, 2012, p. 1 (hereafter : Priddy & Casey-Maslen); Spearin, p. 824.

⁴⁶ Ake, David C., Defense Official: More Private Security Needed Aboard Ships to Combat Piracy, *National Defense*, 16 June 2011, available under <http://www.nationaldefensemagazine.org/blog/Lists/Posts/Post.aspx?List=7c996cd7-cbb4-4018-baf8-8825eada7aa2&ID=447> (last seen: 27 August 2015).

⁴⁷ Coito, p. 180; Geiß & Petrig, p. 35; Spearin, p. 824.

⁴⁸ Brown, p. 5; Mahard, p. 341f.; Priddy & Casey-Malsen, p. 1.

⁴⁹ Chalk p. 98.

⁵⁰ Chalk, p. 98.

significantly since 2008.⁵¹ It is difficult to determine how many individual private security contractors are currently working in the Indian Ocean, as there is no central registry for their licensing or qualification.⁵² About 40 per cent of the 42,500 ships that transited HRA in 2012 used armed guards, compared to 15 per cent the year before.⁵³

The hiring of private guards seems reasonable when looking at the risk of hijackings. Companies lose millions in foregone chartering income while their vessels are held to ransom. They also suffer from high costs in hiring specialist ransom negotiators, lawyers, and support for crews once released. Hiring a highly equipped protection team for between \$10, 000 and \$100,000 for a passage is a comparatively small price to pay to avoid these costs.⁵⁴ Additionally, the costs of a detour around the Cape of Good Hope to avoid the Gulf of Aden are enormous.⁵⁵ Another problem is that insurance companies have increased insurance premiums over the last years to reflect the dangers of piracy, by calling the HRA “war-risk zones”.⁵⁶ Some insurance companies now tend to lower the premiums for vessels having PCASP on board while passing through HRA.⁵⁷ However, the strongest argument for the use of PMSCs remains the fact and often-chanted mantra that no ship has yet been successfully hijacked which employed armed guards.⁵⁸

Consequently, the use of PMSCs presents a fiscally sound solution to the problem of piracy and armed robbery for the shipping industry.

In the meantime, the use of armed security guards remains highly controversial in the world of maritime commerce. Especially the International Maritime Organisation⁵⁹ (IMO), the International Chamber of Commerce’s International Maritime Bureau⁶⁰ and the

⁵¹ Brown, p. 6; Coito, p. 181; PMSC were even used at the Volvo Ocean Race in 2011 to protect the high-tech yachts, see: *The Australian*, ‘Volvo ocean race uses armed ship for pirates’, 29 December 2011, available at: <http://www.theaustralian.com.au/news/world/volvocean-race-uses-armed-ship-for-pirates/storye6frg6so-1226232732198> (last seen 15 July 2015).

⁵² Brown, p. 6.

⁵³ Wiese & Katz, ‘Shooting to Kill Pirates Risks Blackwater Moment’.

⁵⁴ Hohenstein, p. 11; Mahard, p. 341; Spearin, p. 828.

⁵⁵ Coito, p. 180.

⁵⁶ Chalk, p. 93f.; Mahard, p. 340.

⁵⁷ Brown, p. 6.

⁵⁸ Mahard, p. 341; Priddy & Casey-Maslen, p. 840.

⁵⁹ Hereafter: IMO

⁶⁰ Hereafter: IMB

International Chamber of Shipping disapprove of the employment of PMSCs.⁶¹ Concerns include the fear of an escalation of violence, the risk of personal injury or damage to ship and cargo and issues of liability.⁶² Additional costs will uprise in cases of crimes committed by armed guards or if the use of PMSC guards collides with domestic legislations, in the worst case leading to a loss of the ship's insurance cover.⁶³ Moreover, worries about operational problems exist, especially in areas like command and control, rules of engagement, the use of deadly force, weapon security and intra port/ship transfer of weapons and guards.⁶⁴

Further concerns remain about eventual incidents on the open water involving PMSC. It is difficult to gather evidence on, and adjudicate, operations on the High Seas compared to land-based operations. On reputation, potential clients might shy away from shippers that employ PMSCs in a haphazard, unrestrained way.⁶⁵

But over the last years, all major shipping industry groups have accepted that PMSCs are an elementary part of the global response to piracy, and they have acknowledged that many shipping companies were using PMSCs.⁶⁶

4. Are PMSCs a temporary phenomenon?

Interestingly, the number of piratical attacks has declined off the horn of Africa for various reasons, the vast use of PCASP being one of them. In 2014, no ship was successfully hijacked in the coast off Somalia.⁶⁷ 245 actual and attempted attacks of piracy and armed

⁶¹ Coito, p. 181.

⁶² Brown, p. 6; Coito, p. 182f; Spearin, p. 833.

⁶³ Koenig & Salomon, p. 15.

⁶⁴ Koch, Christopher, *Hearing before the House Subcommittee on Coast Guard and Maritime Transportation* regarding "International Piracy on the High Seas", 04 February 2009, p. 5, Fn. 4; see also Sekimizu, Koji, *Maritime Safety Committee*, 90th session, Opening address, 16 May 2012, available at: <http://www.imo.org/en/MediaCentre/SecretaryGeneral/Secretary-GeneralsSpeechesToMeetings/Pages/msc90highlevel.aspx> (last seen: 20 August 2015).

⁶⁵ Spearin, p. 832.

⁶⁶ Brown, p. 6.

⁶⁷ United Nations Security Council, *Report of the Secretary-General on the situation with respect to piracy and armed robbery at sea off the coast of Somalia*, S/2014/740, 16 October 2014; Katzenellenbogen, Jonathan, 'Has Somali Piracy ended?' *defenceWeb*, 06 February 2015, available at: http://www.defenceweb.co.za/index.php?option=com_content&view=article&id=37870:has-somali-piracy-ended&catid=108:maritime-security&Itemid=233 (last seen: 15 July 2015).

robbery were reported in 2014.⁶⁸ Generally, attacks have moved from the Gulf of Aden into the Gulf of Guinea and into waters of South-East Asia.⁶⁹ But with the on-going regional crisis, e.g. the civil war in Yemen and high pirate activities in other parts of the world, the problem has not disappeared.⁷⁰ The use of PMSCs will continue to play a significant role in maritime security, especially with shrinking defence budgets reducing naval presence. In June 2015, it was estimated by the Baltic and International Maritime Council⁷¹ and the European Union Naval Force that the percentage of vessels carrying PCASP is still around 35-40% although team sizes have dropped from 4 to 3 and in some cases only two team members.⁷² Interestingly, over the last years one can also recognise a shift from in the nationalities of the team members from Anglo Saxon, which are expensive, to other cheaper nationalities such as Eastern Europeans, Indians and Filipinos.⁷³

Regarding the on-going employment of PCASP, an analysis of the existing legal regimes for the use of these contractors on the High Sea is required. In the next chapter, the attempts of the international community to create a legal framework in order to govern the branch will be illustrated and the possibilities of the use of already existing maritime law for the same purpose will be shown.

III. PMSCs under international law

International law consists of a broad variety of codified rules and permanently developing custom. The International Humanitarian Law, also known as the *ius in bello*, is a set of norms regulating combat.⁷⁴ Certain rules from the Humanitarian Law could be applicable to regulate the branch of Private Maritime Security Companies. But first, it shall be analysed if the fact

⁶⁸ ICC International Maritime Bureau, Piracy and Armed Robbery against ships, Report for 2014, p. 5, available at: <https://icc-ccs.org/piracy-reporting-centre/request-piracy-report> (last seen: 28 September 2015).

⁶⁹Cook, Peter, *Interview*, Founder & Director at Security Association for the Maritime Industry (SAMI), London, United Kingdom, 15 September 2015, Comment to Slide 2 (hereafter: Cook, *Interview*); ICC International Maritime Bureau, *Piracy and Armed Robbery against ships, Report for 2014*, p. 6.

⁷⁰ Mahard, p. 367.

⁷¹ Hereafter: BIMCO

⁷² Cook, *Interview*, Comment to Slide 1.

⁷³ Cook, *Interview*, Comment to Slide 1.

⁷⁴ Bennett & Strug, p. 400.

that piracy itself is a universally judicable crime can be taken as a legal foundation for private actors to fight piracy.

1. Pirates as *hostis humani generis*⁷⁵

Any nation may prosecute pirates, even in the absence of a nexus between the pirate attack and the State claiming jurisdiction.⁷⁶ Piracy is universally judicable, the reason for the universal jurisdiction can be based on a specific characteristic, namely the special locus delicti of piracy, the ‘high seas’, where every State has an interest in its own safety, but none has jurisdiction.⁷⁷

Nearly every State is a potential victim of maritime depredations and the security of the free flow of international trade has always been a common interest of the international community. Consequently, it is certain that universal jurisdiction exists over piracy.⁷⁸ But the universal jurisdiction only provides a mechanism for instituting criminal proceedings against persons who have allegedly engaged in piracy attacks. The deployment of armed guards and the use of force to prevent the attacks are not covered by the institute of universal jurisdiction. Hence, it cannot be taken as a legal foundation for the use of PMSCs on the High Seas.

2. International Humanitarian Law

a) Piracy as an armed conflict within the Geneva Conventions

Generally, International Humanitarian Law sets out rules for conduct in armed conflict. Armed conflicts exist whether there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups within a State.⁷⁹ Traditionally, armed conflicts are divided into two categories, international armed conflicts⁸⁰ and non-international armed conflicts.⁸¹

⁷⁵ Latin for “enemies of the human race”.

⁷⁶ De Than & Shorts, p. 257.

⁷⁷ Geiß & Petrig, p. 147.

⁷⁸ Geiß & Petrig, p. 147.

⁷⁹ ICTY, *Prosecutor v. Dusko Tadic*, Decision of the Defence Motion for Interlocutory Appeal on Jurisdiction, 02 October 1995, para. 70; *International Committee of the Red Cross Opinion Paper*, ‘How is the term “Armed Conflict” defined in international humanitarian law?’ March 2008, p. 1 (in short: ICRC Opinion Paper), available at: <https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf> (last seen: 01 August 2015).

⁸⁰ In short: IAC

The Geneva Conventions of 1949 and the subsequent protocols aim to govern the actions of belligerents in armed conflicts.⁸² The Conventions contain rules about the obligations of governments to treat humanely civilians, prisoners of war, and those wounded in battle.⁸³

Art. 2 and 3 of the Geneva Convention I require for IACs the involvement of two or more opposing States. Pirates are not employed or hired by a national government; they cannot be seen as State actors. Therefore piracy on the High Seas is not classified as an IAC.

Art. 3 of the Geneva Convention I defines an NIAC as an ‘armed conflict not of an international character occurring in the territory of a State’.⁸⁴ The conflict has to occur between governmental armed forces and the forces of one or more armed groups, or between such groups. Moreover, two further elements are required. The conflict has to reach a minimum level of intensity and non-state actors involved must be parties to the conflict, meaning they are an armed force sufficiently organised to sustain military operations.⁸⁵

The minimum level of intensity is a vague term, but one has to examine factors such as the number, duration and intensity of individual confrontations, the types of weapons used or the number of casualties.⁸⁶

⁸¹ Lubell, Noam, *Extraterritorial Use of Force against Non-State Actors*, 2010, p. 93 (hereafter Lubell); non-international armed conflicts hereafter: NIAC).

⁸² Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, 12 August 1949, entered into force 21 October 1950 (hereafter: Geneva Convention I); Geneva Convention for the Amelioration of the Condition of Wounded and Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, entered into force 21 October 1950 (hereafter: Geneva Convention II); Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 6 entered into force 21 October 1950, (hereafter: Geneva Convention III); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, entered into force 21 October 1950 (hereafter: Geneva Convention IV); Protocols Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International and Non-International Armed Conflicts, 12 December 1977, entered into force 7 December 1978 (hereafter: Protocol I); Bennett & Strug, p. 402.

⁸³ Parsons, Dana M., ‘Protecting the Booty: Creating a Regulatory Framework to Govern Increased Use of Private Security Companies in the Fight against Pirates’, *Tulane Maritime Law Journal*, 2010, p. 171, (hereafter Parsons).

⁸⁴ See also: The Manual on the Law of Non International Armed Conflict, *International Institute of Humanitarian Law*, San Remo, 2006, Definition of a non-international armed conflict, 1.1.1.

⁸⁵ *ICRC Opinion Paper*, p. 3; Coito, p. 207.

⁸⁶ *Prosecutor v. Dusko Tadic*, Decision of the Defence Motion for Interlocutory Appeal on Jurisdiction, ICTY, 02 October 1995, para 69f.; Coito, p. 209.

With multiple governments involved in counter-piracy missions in the Gulf of Aden, one could assume that the Somali pirate attacks can be classified as a NIAC from one armed group against governmental armed forces. But it is, questionable if these requirements are fulfilled in the context of modern piracy.

First of all, pirates do not attack other armed groups or naval forces, they are groups of private actors whose attacks are solely motivated by financial gains.

Secondly, piracy the definition of art. 101 UNCLOS takes place on the High Seas, not within the territory of a country, such as Somalia.

Regarding the level of intensity, it can be said that pirate attacks occur briefly and do mostly not lead to on-going armed fighting. Looking at the types of weapons, pirates normally use AK-74 assault rifles, pistols and sometimes rocket propelled grenade launchers.⁸⁷ At least the assault rifles and the rocket launchers could be seen as instruments which can cause high number of casualties and heavy damages. Nevertheless, the actual number of casualties occurring from pirate attacks is relatively low compared to other on-going conflicts. Generally, the attacks of pirates declined significantly over the last years.⁸⁸ As a result, the frequent piracy attacks do not reach the required level of intensity.

Finally, the pirate groups would have to be classified as armed forces sufficiently organised to sustain military operations. Even though the groups have some degree of organisation, command structures and leadership, this organisation is not sufficient of itself.⁸⁹ Their attacks are not coordinated in a military operational mode; the raids and hijackings are occur individually and can be compared to acts of bandits or robbers. Also the historic treatment of pirates as criminals rather than prisoners of war supports the argument that they cannot be seen as combatants of an organised armed group.⁹⁰

Taking everything into consideration, one can state that piracy nowadays cannot be regarded as an on-going armed conflict with a certain intensity of violence, which is required for a NIAC in art. 3 Geneva Convention I.

⁸⁷ Koch, Christopher, *Hearing before the House Subcommittee on Coast Guard and Maritime Transportation regarding "International Piracy on the High Seas"*, 04 February 2009, p. 3, available at http://www.worldshipping.org/pdf/wsc_piracy_testimony_feb_2009_2.pdf (last seen: 20 August 2015) ; Mahard, p. 339.

⁸⁸ See p. 13.

⁸⁹ Coito, p. 211; Guilfoyle, Douglas, 'The Laws of War and the Fight against Somali Piracy: Combatants or Criminals?' *Melbourne Journal of International Law*, 2010, p. 141 (hereafter: Guilfoyle).

⁹⁰ Coito, p. 211.

As a conclusion, modern piracy cannot be classified as an international armed conflict or a non-international armed conflict. Therefore, most documents of International Humanitarian Law are not applicable. Especially, the Geneva Conventions and its subsequent protocols are not applicable for the use of PMSCs in vessel protection operations, because the requirement of an armed conflict is not fulfilled.

In general, it can be discussed whether the Geneva Conventions extend to the actions of PSC on land contracted by governments. Nevertheless, PMSCs are employed by shipping companies, not by governments. The Geneva Conventions and its subsequent protocols are therefore not applicable for the typical work of the maritime security sector.

b) The Montreux Document

The Montreux Document of 2008 is the first international approach to codify and regulate the conduct of Private Military and Security Companies. It is a non-binding document, which neither creates nor alters legal obligations, but illuminates existing requirements pertinent to private security operations.⁹¹

The Montreux Document addresses the use of PSCs by States during armed conflicts.⁹² In addition, it recognises the possibility that it might be applied as standard for good practice in comparable situations.⁹³ While the creation of the Montreux Document signals a move to regulate PSC's hired by governments, the use of PSC's by private entities has received little attention.⁹⁴ However in the explanatory comments, the use of PMSCs to protect merchant shipping against piracy is expressly mentioned as a context where the document offers practical guidance.⁹⁵ Additionally, the drafters stated that 'good practices may be of value for entities such as international organisations, NGO's and companies.'⁹⁶ Therefore, the Document can to certain extent function as a reminder for Territorial States, Home States and privately contracted armed security personnel (PCASP) for their existing international legal obligations and provide guidance for the use of PMSCs. But as a non-

⁹¹ Montreux Document, preface, Nr. 3.

⁹² Montreux Document, preface, Nr. 2.

⁹³ Montreux Document, preface, Nr. 5.

⁹⁴ Parsons, p. 174.

⁹⁵ Montreux Document, Explanatory Comments, Questions and answers on the Montreux Document, When does the Montreux Document apply?

⁹⁶ Montreux Document, preface, Nr. 8.

binding document, it has only a limited value and cannot be seen as a legal foundation for the regulation of PMSCs.

The Classification of the Montreux Document as international customary law can be tested. International custom can be defined as a certain pattern of behaviour (*usus*) consistently observed over a period of time, thereby creating an expectation in the wider community that it will be repeated in the future.⁹⁷

In detail, two requirements have to be fulfilled, the state practice and *opinio iuris*.

The Document has currently 52 signatory States, which shows that it is widely accepted in the international community.⁹⁸ But for the *usus*, the rules need ‘a constant and uniform usage practised by the States in question’.⁹⁹ And ‘the conduct of States should in general be consistent with such rules’.¹⁰⁰ There is no information if all the signatory States comply with all the mentioned obligations. Furthermore, the Montreux Document is a relatively new framework which functions more as a reminder than as an obligatory set of rules. Preface Nr. 3 and Nr. 4 of the Document clearly point out that the paper is a non-legally binding instrument and does create new obligations for States under international law. The introduction of Part Two of the Document also States that ‘no State has the legal obligation to implement any particular good practice’. Therefore, the rules of the Montreux Document cannot be seen as custom.

c) Draft International Convention on the Regulation, Oversight and Monitoring Of Private Military and Security Companies

In 2009, a Draft International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies¹⁰¹ was published by a working group of the U.N. Commission on Human Rights.

⁹⁷ Art. 38 (1) (b) of the Statute of the International Court of Justice, adopted on 26 June 1945; Bennett & Strug, p. 14.

⁹⁸ *Swiss Federal Department of Foreign Affairs*, available at <https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies/participating-states.html> (last seen: 30 July 2015).

⁹⁹ ICJ, *Asylum Case* (Colombia v Peru) 1950, ICJ Rep 266, para 276f.

¹⁰⁰ ICJ, *Nicaragua Case* (Nicaragua v US) 1986. ICJ Rep 14, para 186.

¹⁰¹ Draft International Convention on the Regulation, Oversight and Monitoring Of Private Military and Security Companies, drafted on 13 July 2009.

The Convention aims to establish a national and international legal regime to resolve questions of standards under which Private Military and Security Companies should operate and how to oversee their activities. In Article 2 (c) of the Draft, security services are defined as armed guarding or protection of buildings, installations, property and people, police training, material and technical support to police forces, elaboration and implementation of informational security measures and other related activities. Vessels and cargo are owned by shipping companies, other legal entities or private persons and are therefore property. PCASP are hired to protect ships, cargo and their crew. Their employment falls into the category of security services leading to an applicability of the Draft.

But the International Convention on the Regulation, Oversight and Monitoring Of Private Military and Security Companies is only a working draft, not a final set of rules. Its regulations can only be seen as proposals and guidance but are not yet legally binding. Hence, it does not provide legal foundations for the use of PMSCs.

d) Are PMSC employees mercenaries?

International Law provides various rules for the use of mercenaries in conflict situations. PMSC's contractors could possibly fit into the definition of mercenaries.

Art. 1 of the International Convention against the Recruitment, Use, Financing and Training of Mercenaries¹⁰² defines a mercenary as any person who:

1. (a) Is specially recruited locally or abroad in order to fight in an armed conflict;

- (b) Is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;

- (c) Is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;

¹⁰² U.N. International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, adopted on 4 December 1989, entered into force on 20 October 2001 (hereafter: U.N. Mercenary Convention).

(d) Is not a member of the armed forces of a party to the conflict; and

(e) Has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

2. A mercenary is also any person who, in any other situation:

(a) Is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:

(i) Overthrowing a Government or otherwise undermining the constitutional order of a State; or

(ii) Undermining the territorial integrity of a State;

(b) Is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;

(c) Is neither a national nor a resident of the State against which such an act is directed;

(d) Has not been sent by a State on official duty; and

(e) Is not a member of the armed forces of the State on whose territory the act is undertaken.

The prerequisites of art. 1 (1) of the U.N. Mercenary Convention are not fulfilled because of the missing classification of piracy as an armed conflict.

Furthermore, art. 1 (2) of the U.N. Mercenary Convention contains rules applicable for concerted acts of violence aimed at overthrowing a government or otherwise undermining the constitutional order of a State or undermining the territorial integrity of a State. PMSC employees are used to protect ships, the crew and cargo. They do not actively participate in

co-ordinated attacks, especially not against a State or a certain government.¹⁰³ The prerequisites of art. 1 (2) U.N. Mercenary Convention are also not met.

The definition of mercenarism in Art. 47(2) of the 1977 Additional Protocol I to the Geneva Conventions is very similar. Hence, the Protocol is not applicable for the same reasons.

The structure of PMSCs and mercenaries differs widely. Maritime Security Companies are organised as business corporations, whereas mercenaries are rarely structured and mostly operate as individuals.¹⁰⁴ Although both PMSCs and mercenaries are profit driven, PMSCs profit motivation relates to business profit rather than individual profit. Furthermore PMSCs compete openly on the global market, whereas mercenaries shy away from publicity in order to avoid national and international anti-mercenary laws.

In conclusion, PMSC personnel cannot be equated with mercenaries, either from a legal or a more practical point of view. Therefore, the mentioned legal regulations, especially the U.N. Mercenary Convention are inapplicable.

3. Are S.C. resolutions a legal basis for the use of PMSCs?

Over the last decades, the U.N. Security Council has released 14 resolutions concerning the fight against piracy. 12 resolutions targeted the fight on piracy off the coast of Somalia and two dealt with piracy in the Gulf of Guinea.¹⁰⁵

¹⁰³ Pitney, John J. & Levin, John-Clark, *Private Anti-Piracy Navies: How Warships for Hire are Changing Maritime Security*, 2013, Lexington Books, Lanham, p. 96 (hereafter: Pitney & Levin).

¹⁰⁴ For details see: Heemann, Frank A., *Privatising the Military Use of Force: Responsibilities of States and International Organisations under International Law*, *Research Dissertation at the University of Cape Town*, 13 September 2006, p. 25f., available at: http://www.publiclaw.uct.ac.za/usr/public_law/LLMPapers/frankheeman.pdf (last seen: 03 August 2015).

¹⁰⁵ United Nations Security Council Resolutions S/RES/2125, 18 November 2013; S/Res/2077, 21 November 2012; S/Res/2039, 29 February 2012; S/Res/2020, 22 November 2011; S/Res/2018, 31 October 2011; S/Res/2015, 24 October 2011; S/Res/1976, 11 April 2011; S/Res/1950, 23 November 2010; S/Res/1918, 27 April 2010; S/Res/1897, 30 November 2009; S/Res/1851, 16 December 2008; S/Res/1846, 02 December 2008; S/Res/1838, 7 October 2008; S/RES/1816, 02 June 2008, available at: <http://www.securitycouncilreport.org/un-documents/search.php?IncludeBlogs=10&limit=15&tag=%22Security%20Council%20Resolutions%22+AND+%22Piracy%22&ctype=Piracy&rtype=Security%20Council%20Resolutions&cbtype=piracy> (last seen: 03 August 2015).

The resolutions suggest different methods to fight piracy and armed robbery on the sea, based on Chapter VII of the Charter of the United Nations.¹⁰⁶

The latest Resolution 2125¹⁰⁷ from 2013 calls upon States to use all available means in the repression and disruption of piratical activity off the coast of Somalia. In addition, it sets out the relevant provisions of the UNCLOS (arts. 100, 101, 105) to be used as legal grounds for combating piracy.

Interestingly, the Resolution also notes the use of privately contracted armed security personnel.¹⁰⁸ It encourages flag States and port States to regulate such activities in accordance with applicable international law and permits charters to favour arrangements that make use of such measures, through a consultative process.¹⁰⁹

Resolution 2125 is legally binding because it is issued under Chapter VII about Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression, of the Charter.¹¹⁰ But the content of the Resolution 2125 concerning PCASP only suggests States to regulate the PMSC sector. It does not contain specific rules or guidance about the use of private contractors. The only thing that can be noted out of the Resolution is the general acknowledgement of the Security Council of PCASP on the high seas. Additionally, the necessity of the Council to regulate this field demonstrates that worries about the use of PCASP exist due to a lack of existing control mechanisms.

To sum up, the Security Council Resolutions do not offer legal foundations for the sector of private maritime security.

4. Interim conclusion

By looking at the different sources from international humanitarian law, one can summarise that an explicit regulation of PMSCs does not exist. There are rules concerning similar matters such as general private security companies and non-binding documents, such as the Montreux

¹⁰⁶ Charter of the United Nations, adopted on 26 June 1945 and entered into force on 24 October 1945 (hereafter: Charter of the United Nations).

¹⁰⁷ United Nations Security Council Resolution 2125, S/RES/2125, adopted on 18 November 2013 (hereafter: Resolution 2125).

¹⁰⁸ Resolution 2125, p. 3.

¹⁰⁹ Resolution 2125, p. 9, nr. 26.

¹¹⁰ Bennett & Strug, p. 20.

Document, but the maritime sector has not been covered yet. Hence, one has to take a look into other international laws and instruments to find rules about the use of PMSCs.

IV. PMSCs in the scope of UNCLOS

1. The question of locale

a) The United Nations Convention on the Law of the Seas

This chapter aims to find out if the UNCLOS contains rules about the ship owners' use of privately contracted armed security personnel (PCASP) and which rules could be applied for the conduct of armed guards. For this purpose, the significance of the UNCLOS will be presented, and the different rules for ships when travelling through territorial waters, international straits, on the high seas and in ports will be outlined. Afterwards, the issues of the carriage of weapons and the use of force under UNCLOS will be scrutinized.

In 1982, the drafters of UNCLOS wanted to create an effective international regime over the seabed and the ocean floor beyond a clearly defined national jurisdiction.¹¹¹ The Convention codified existing rules of the sea and was adopted on 12 December 1982. At present, the treaty has 167 signatory parties.¹¹² However, certain States have signed but not ratified the Convention; the United States for example has signed the treaty but not ratified it and is therefore not bound by it. With respect to the high risk areas it is noteworthy that in the Gulf of Aden Somalia, the Seychelles, Kenya, the United Republic of Tanzania, Djibouti and Yemen have all signed and ratified the Convention; concerning the Gulf of Guinea, all States with coastlines are members of UNCLOS, the same counts for the Asian high risk areas¹¹³

¹¹¹ See Preamble of UNCLOS.

¹¹² *United Nations*, Chronological lists of ratifications of, accessions and successions to the Convention and the related Agreements, 07 January 2015, available at: http://www.un.org/depts/los/reference_files/chronological_lists_of_ratifications.htm (last seen: 05 August 2015).

¹¹³ Such as India, Indonesia, Malaysia, Philippines, Singapore and Sri Lanka and Vietnam, see list in fn.106.

b) The law of the coastal State, international straits and the meaning of innocent passage

Vessels with armed security guards on board may encounter problems when navigating through numerous territorial seas because the sovereignty of a coastal State extends beyond its land territory and internal waters according to art. 2 UNCLOS.

aa) Meaning of innocent passage

Generally, art. 17 UNCLOS grants the right of innocent passage by saying that ships of all States, whether coastal or land-locked, enjoy the right of innocent passage through the territorial sea of another State. Art. 19 UNCLOS sets preconditions for an innocent passage.

Art. 19 (1) UNCLOS states that a passage is innocent as long as it is not prejudicial to the peace, good order or security of the coastal State. Art. 19 (2) UNCLOS lists the following activities as prejudicial to the peace, good order or security which could be infringed by the use of PMSCs:

- (a) any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations;
- (b) any exercise or practice with weapons of any kind;
(...)
- (f) the launching, landing or taking on board of any military device;
(...)

The use of armed guards could be seen as a threat to the sovereignty, territorial integrity or political independence of the coastal State.¹¹⁴ But it has to be mentioned that the numbers of PCASP per ship are low, which can be estimated with around 4 per ship,¹¹⁵ though their employment cannot be seen as a possible threat because they are not armed with heavy weapons which can affect the sovereignty, territorial integrity or political independence of a State. Furthermore, they are equipped to defend the ship, rather than to board other vessels or to carry out amphibious operations.

The pure use of armed guards on board of a ship could already be regarded as a practice with weapons of any kind, which is contradictory to art. 19 (2) (b) UNCLOS. But already the wording of the paragraph using “...exercise or practice with weapons...” is an

¹¹⁴ Parsons, p. 166, 169.

¹¹⁵ Cook, Interview, Comment to Slide 1; Spearin, p. 828.

argument that only actions related to the use of weapons, for example the firing of bullets, are included by the drafters. If the drafters would have wanted to prohibit the employment of armed persons on board, they could have used detailed terms such as “hiring” “employing” or “using” armed personnel instead of “exercise” or “practice”. The mere carriage of weapons, locked or stowed, cannot be seen as an “exercise or practice.”¹¹⁶

However, the armed guards could exercise or practice with their weapons in the territorial waters by actually firing their weapons. PCASP tend to practice hijacking scenarios and target shooting during their operations, because they need to be permanently ready and prepared to encounter sudden attacks. However, as long as they do it on the high seas and not in the territorial waters of a State, their manoeuvres and drills are not contradictory to the UNCLOS. Similarly, using a weapon in a self-defence situation against piracy or armed robbery attacks would also not classify as an “exercise or practice” because it would be a real self-defence situation, not a manoeuvre. Hence, there is no risk of a violation of art. 19 (2) (b) UNCLOS and a violation can clearly be avoided by practising outside the territorial waters.

A further forbidden activity is the launching, landing or taking on board of any military device, as art. 19 (2) (f) UNCLOS. PCASP must eventually embark, disembark, and load or offload weapons at a floating armoury or supply boats. Should these activities take place, especially via floating armoury or other vessel in a State’s territorial sea and without that coastal State’s permission, it may be considered as taking aboard a military device and thus a violation of innocent passage. Nevertheless, not all weapons, ammunition, and equipment can be seen as military devices. The term military can be defined as “relating to or characteristic of soldiers or armed forces”.¹¹⁷ Hence, the devices such as weapons and equipment must be of a kind which normally soldiers or armed forces use. Maritime Guards are armed for private security services, not for military operations. One has to distinguish between the different weapons and pieces of equipment commonly used by PCASP, not all of them will fit in the category of military devices. Bulletproof vests and semi-automatic rifles are not solely attributable to the military sector, automatic assault rifles, machine guns or grenades would be counted as military devices. A distinction must be assessed on a case-by-case basis. Therefore, the prerequisites for the launching, landing or taking on board of any

¹¹⁶ Koenig, Doris & Salomon, Tim René, ‘Private Sicherheitsdienste auf Handelsschiffen – Rechtliche Implikationen’, *Pirat Arbeitspapiere zur Maritimen Sicherheit*, March 2011, Nr. 2, p. 12 (hereafter: Koenig & Salomon).

¹¹⁷ Oxford Advanced Learner's Dictionary, 8th edition, 2010.

military device are not necessarily fulfilled if the ship with PCASP on-board merely traverses the territorial waters.

bb) The law of the coastal State concerning innocent passage through its waters

The use of armed guards on-board could contravene the laws and regulations of coastal States. For instance, a coastal State could totally prohibit the employment of PMSC personnel within its jurisdiction during the passage through its territorial waters or impose restrictions on the carriage of firearms.

Nonetheless, art. 21 UNCLOS restrains the possibility for States to adopt laws and regulations relating to innocent passage by their unlimited choice. Art. 21 (1) UNCLOS provides a positive legal basis for the adoption of laws and regulations for coastal States. The provisions of art. 21 (1) (a) and (h) UNCLOS could be applicable as to regulations concerning the use of maritime security guards. However, none of these paragraphs deals with the employment of armed guards.

Art. 21 (1) (a) UNCLOS concerns ‘the safety of navigation and the regulation of maritime traffic’. The rationale for this provision is exclusively the regulation of naval navigation and traffic.¹¹⁸ Regulations about the use of PMSCs do not fit into this category, their personnel does not affect naval navigation or traffic.

Furthermore, the use of PMSC contractors does not fall under ‘the prevention of infringement of the customs, fiscal, immigration or sanitary laws and regulations of the coastal State,’ as set out in article 21 (1) (h) UNCLOS. The pure use of armed guards during the transit of a ship through territorial waters does not affect any matters of customs, fiscal policies, immigration or sanitary protection. These fields are mainly influenced when vessels moor in a port, the crew disembarks and goods are unloaded. A small team of armed guards on-board a vessel during transit will not infringe any of the provisions mentioned above. Regulations about the use of PCASP therefore do not fit into the provision of article 21 (1) (a) and (h) UNCLOS.

As a result, one can say that coastal States generally do not have the possibility to restrict the use of PMSC personnel during transit under UNCLOS. Several UNCLOS rules allow the implementation of rules concerning the right to innocent passage, but only when certain requirements are fulfilled. The use of armed maritime guards cannot be regarded as one of the fields in which regulations are possible.

¹¹⁸ Koenig & Salomon, p. 13; Nordquist, Myron H., *United Nations Convention on the law of the Sea 1982 Commentary*, Volume II, 1993, p. 200 (hereafter: Nordquist).

cc) Criminal jurisdiction on board a foreign ship

Coastal States are empowered to exercise criminal jurisdiction on board a foreign ship passing through the territorial sea under certain requirements.¹¹⁹ This includes the arrest of any person and the conduct of any investigation in connection with any crime committed on board the ship during its passage. Generally, a State cannot exercise jurisdiction over ships passing through its waters, because the right to innocent passage has to be guaranteed and can only be limited under the prerequisites of art. 21 UNCLOS. The use of armed security guards would need to fulfil the requirements of art. 27 (1) UNCLOS to enable criminal jurisdiction. The employment of armed PCASP, if prohibited under national law of the coastal State, could be seen as a crime with consequences which extend to the coastal State or a crime of a kind to disturb the peace of the country or the good order of the territorial sea.¹²⁰

The pure employment cannot have any consequences for the coastal State. Normally, no consequences occur for the coastal State when ships with armed contractors on-board are solely traversing through territorial waters and do not call into a port.

Nevertheless, one could claim that the use of PMSC personnel, if prohibited under the domestic law, could be a crime which disturbs the peace of the country or the good order of the territorial sea. Armed guards on-board merchant vessels could carelessly or intentionally damage other vessels with their weapons and thereby at least disturb the good order of the territorial sea. Armed guards definitely increase the risk of such incidents. Nevertheless, it is doubtful if the requirement of art. 27 (1) (b) UNCLOS can be fulfilled if weapons are only carried along the transit through the territorial waters. It is uncontested that the coastal State can exercise criminal jurisdiction in case of a use of these weapons against other vessels.¹²¹

This would clearly demonstrate a disturbance of the good order of the territorial sea. But the mere possession of firearms on-board will usually do not lead to any disturbance.¹²²

Hence, the coastal State is not authorised by art. 27 UNCLOS to infringe the use of PMSC personnel on-board of merchant ships during the passage of its territorial waters.

¹¹⁹ Art. 27 UNCLOS.

¹²⁰ Art. 27 (1) (a), (b) UNCLOS.

¹²¹ Koenig & Salomon, p. 14.

¹²² Koenig & Salomon, p. 14.

dd) The passage through international straits

Another important set of rules in the UNCLOS concerns the passage through international straits. Under art. 37 UNCLOS, a strait is defined as a waterway which is ‘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’. Although art. 38 UNCLOS gives the right of transit passage to all ships and aircrafts through straits, the passage can be restricted by the regulations of art. 39 UNCLOS. According to art. 39 (1) (b) UNCLOS, ships shall 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. As already argued, armed guards on ships do not present a threat to sovereignty, territorial integrity or political independence of States. Hence, ships with PCASP on-board should enjoy the right of transit passage through international Straits according to UNCLOS rules.

The littoral States of the Straits, Indonesia, Malaysia and Singapore have each asserted claims of sovereignty over the Malacca and Singapore Straits. Hence, the question arises over whether these waters might be construed as the territorial waters of those three States instead of simply an international strait. As a result, the rules about innocent passage through the territorial sea, art. 17ff. UNCLOS would be applicable. But even if these Straits would be regarded as territorial waters, the use of PMSC would still not contravene UNCLOS rules as shown above.¹²³

ee) Interim conclusion

Vessels with armed security guards need to respect the rights and the sovereignty of the coastal States when navigating through numerous territorial seas and straits. But as long as they do not practise with weapons or take on board military devices, they enjoy the freedom of innocent passage through territorial seas and straits. Employed security teams should therefore be advised to limit their activities to surveillance and reconnaissance of the surrounding waters during the passage through coastal waters.

c) The law of the flag State

The high seas are open to all States under art. 87 UNCLOS, and no State may claim sovereignty over the high seas under art. 89 UNCLOS. Therefore it could be assumed that the

¹²³ See above, p. 26.

high seas are an unregulated, lawless area. But there are distinctive rules for the high seas in art 86ff. UNCLOS, and art. 88 UNCLOS reserves the high seas for peaceful purposes.

The law of the flag State determines that a ship shall sail under the flag of one State only and that it should be subject to its exclusive jurisdiction on the high seas.¹²⁴ Art. 94 (1) UNCLOS regulates that the State has the duty to effectively exercise its jurisdiction and control in administrative, technical and social matters over ships flying its flag. The nationality of ships also indicates which State is responsible in international law for the vessel in cases where an act of the vessel is attributable to the State, and which State is entitled to exercise diplomatic protection on behalf of the vessel.¹²⁵

Basically, the law of the flag state determines which legal regime PCASP have to follow.¹²⁶ The regulations of PMSCs, the carrying of firearms on-board the vessel and general criminal matters are under the jurisdiction and control of the flag State.¹²⁷ Thus, one has to look at the domestic law to find the legal framework for the use of PMSCs and all the issues concerning them. Most States throughout the world enable the use of security personnel on-board under certain criteria.¹²⁸ Interestingly, traditional sea powers such as China, the Netherlands and Portugal do not provide a legal basis for the use of armed guards, often relying solely on the protection by State navies.¹²⁹

However, a ship may fly a flag of a State different than that of the ship owners', as a result nowadays ships commonly fly a "flag of convenience", meaning that the owners may choose to fly a flag of a State with laws and regulations of his favour, usually speaking about reduced operational costs. Shipping companies can take advantage of this approach to avoid strict laws regulating the use of PCASP, by choosing a flag State with relatively lax security

¹²⁴ Art. 92 (1) UNCLOS

¹²⁵ Churchill, Robin R. & Vaughan, Alan, *The Law of the Sea*, 3rd edition, 1999, Manchester University Press, Manchester, p. 209 (hereafter: Churchill & Lowe).

¹²⁶ Koenig & Salomon, p. 11; Mahard, p. 335

¹²⁷ Hohenstein, p. 12.

¹²⁸ See: *International Chamber of Shipping and European Community Shipowners Associations*, Comparison of flag State laws on armed guards and arms on board, March 2015, available at: <http://www.ics-shipping.org/docs/default-source/Piracy-Docs/comparison-of-flag-state-laws-on-armed-guards-and-arms-on-board3030D998A844.pdf> (last seen: 29 September 2015).

¹²⁹ *International Chamber of Shipping and European Community Shipowners Associations*, Comparison of flag State laws on armed guards and arms on board, March 2015; Spearin, p. 836.

regulations.¹³⁰ It is estimated that 60 per cent of ships fly flags different from the nationality of their owners.¹³¹ There are some countries which are commonly used as “flag of convenience States”, including Cyprus, Liberia, Malta, Marshall Islands, Panama or Sri Lanka.¹³² A flag of convenience could theoretically authorise unqualified foreigners to act as PCASP on ships, and then shield them from prosecution if they commit crimes. These States know that the international community is unwilling to impose military or economic sanctions on them, to prevent such abuses; therefore they have insufficient incentive to enforce better regulation on PMSC regulated issues.¹³³

In essence, flag States choose individually to support and enable the use of armed maritime guards. They need to implement domestic policies and laws to regulate the field of PMSCs and the possession of weapons on-board. Preferably, they would impose basic standards for the employment and regulate the use of force by armed guards.

d) The law of the port State

When a ship enters a port, it becomes subject to the laws of the port State.¹³⁴ The laws and regulations of the port State decide if a ship may be anchored in a harbour or if violations of certain rules will be prosecuted.¹³⁵ States show different attitudes towards the use of maritime guards. PMSC escorts are based in several countries; in 2013 they mainly operated from Djibouti, Sri Lanka, Oman or the United Arab Emirates.¹³⁶ In contrast, governments such as from Nigeria, Togo or Benin and others around the Gulf of Guinea forbid the use of foreign PMSCs from operating within their jurisdiction.¹³⁷ Other nations welcome them only if a certain amount of money was paid, which then again increases the financial burden for shipping companies.¹³⁸

Usually, maritime nations accept the general principle of international comity. This principle means that matters of a vessel’s internal management and discipline are not subject

¹³⁰ Brown, p. 8.

¹³¹ Spearin, p. 833.

¹³² Pitney & Levin, p. 96.

¹³³ Pitney & Levin, p. 97.

¹³⁴ Churchill & Lowe, p. 61.

¹³⁵ Koenig & Salomon, p. 17.

¹³⁶ Pitney & Levin, p. 110.

¹³⁷ Pitney & Levin, p. 110.

¹³⁸ Koenig & Salomon, p. 15.

to local concerns or law.¹³⁹ This principle is not based on the UNCLOS or other laws, but the general State practice of this rule is remarkably consistent.¹⁴⁰

In regard to armed guards, the principle would keep port authorities away from controlling vessels and would prevent them of realising that security personnel with firearms would be on-board.

Nevertheless, when there is a disturbance, then it may be expected that the port State will intervene. The U.S. Supreme Court was confronted with a case concerning the principle of international comity in 1887. In the *Wildenhus* case¹⁴¹, a crew member on a Belgian vessel was killed on-board as a result of a conflict with other crew members while the ship was in the U.S. port of Jersey City, New Jersey. The Belgian consul applied for a writ of habeas corpus, after the alleged assailant Wildenhus was arrested, on the ground that a treaty granting exclusive charge to consuls for the internal order of the merchant vessels of their nation except where a disorder was of such a nature as to disturb tranquillity and public order on shore or in the port. The consul appealed the judgment after the circuit court refusal to release Wildenhus. The Supreme Court upheld the denial of the writ, stating:

From experience, however, it was found long ago that it would be beneficial to commerce if local government would abstain from interfering with the internal discipline of the ship, and the general regulation of the rights and duties of the officers and crew towards the vessel, or among themselves. And so by comity it came to be generally understood among civilised nations that all matters of discipline, and all things done on board, which affected only the vessel, or those belonging to her, and did not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged as the laws of that nation, or the interests of its commerce should require. But, if crimes are committed on board of a character to disturb the peace and dignity of the country to which the vessel has been brought, the offenders have never, by comity or usage, been entitled to any exemption from the

¹³⁹ Churchill & Lowe, p. 65f.; Hohenstein, p. 12f.

¹⁴⁰ Churchill & Lowe, p. 66.

¹⁴¹ U.S. Supreme Court, *Consul of his Majesty the King of Belgians v. Keeper of the Common Jail of Hudson County, New Jersey*, 120 U.S. 1, 1887 (hereafter: *Wildenhus* case).

operation of the local laws for their punishment, if the local tribunals see fit to assert their authority.¹⁴²

The decision of the U.S. Supreme Court is obviously not binding in international law, but the dictum can be used for determining an international rule of law as a national judicial decision.¹⁴³ Based on this decision, one can conclude that if PMSC employees were protecting a vessel in port and became engaged in a fire fight to defend the vessel, their conduct would be subject to the jurisdiction of the domestic law.¹⁴⁴

Furthermore it could be concluded that the use of arms in port of a State outside the ship or from the ship on external targets falls under the sovereignty of the port State. Moreover, one could say that a State has a vast and legitimate interest to decrease the risk of weapons on board commercial vessels and to be able to control that risk. Combined with the permanent threat of international terrorism, States could tend to exercise local jurisdiction over foreign ships. On the other hand, port States in Africa, such as Somalia or Liberia suffer from poor legislation and control over their Ports. PCASP will not often fear the enforcement of strict laws in these areas.

As a result, PCASP should in most areas be advised to lock away their weapons and ammunition when anchoring in port and to rely on the protection by local police or security forces, especially when strict gun laws exist in the port State. Still, in most cases, local authorities won't even notice the employment of PMSC personnel and during a shore leave they will possibly be difficult to distinguish from ordinary crew members. Moreover, the principle of international comity will restrain local authorities from specifically looking for them or seizing ships. Therefore, vessels using armed teams can enter different ports, even if it is illegal under domestic law.

e) Result

To sum up, for the employment of armed guards it is important to distinguish between the different UNCLOS rules for each maritime zone. The law of the flag State may differ from regulations of coastal or port States. On the one hand, it can be summarised that the UNCLOS

¹⁴² *Wildenhus* case, paragraph 12.

¹⁴³ Art. 38 (1) (d) of the Statute of the International Court of Justice; Shaw, Malcom N., *International Law*, Sixth edition, 2008, p. 112.

¹⁴⁴ Hohenstein, p. 14; Mineau, p. 75.

does not include specific rules for the use of PMSC personnel on-board of commercial vessels.¹⁴⁵ The Convention on the Law of the Seas addresses the problem of piracy in various articles and leaves piracy as a problem on a State level, with each sovereign State having the task to solve the problem. But on the other hand, it can be stated that the use of PMSCs is not addressed at all, meaning that their employment is not clearly prohibited. Still, the use of maritime PCASP remains complicated und jurisdictional questions maintain unresolved.¹⁴⁶ Sometimes port States in particular have strict rules on the employment of armed guards, so that one has to consider the different legal framework in each and every State.

2. Carriage of weapons and the use of force under the UNCLOS

In the previous chapter, general questions about existing legal foundations in the UNCLOS for the use of PMSCs were scrutinized. Next, existing rules for more specialised problems will be analysed, such as the carriage of weapons or the use of force by armed guards during pirate attacks.

a) International regulation for the carriage of weapons

A fundamental question of maritime security is the carriage of weapons on ships.

Normally, vessels are seldom armed with anything other than fire axes and hoses.¹⁴⁷ Often ship masters carry a small weapon for protection, which is generally located in the vessels safe.¹⁴⁸

Looking at international agreements and especially the UNCLOS as to firearms, there are currently no regulations addressing the carriage of such weapons on vessels.¹⁴⁹ The carriage and use of firearms on the high seas is exclusively a matter which falls under the flag state of the vessel. In the territorial waters or the ports of other nations, one has to consider the laws of these nations, which vary widely. A number of countries, however, forbid the bearing of weapons on board or request to unload and lock them in a safe before entering a port of

¹⁴⁵ Mahard, p. 345.

¹⁴⁶ Mineau, p. 77.

¹⁴⁷ Diaz, Leticia & Dubner, Barry H., On the Problem of Utilizing Unilateral Action to Prevent Acts of Piracy and Terrorism: A Proactive Approach to the Evolution of International Law, *Syracuse Journal of International Law and Commerce*, Vol. 32, Issue 1, 2004, p. 3.

¹⁴⁸ Hohenstein, p. 5.

¹⁴⁹ Mineau, p. 72.

call.¹⁵⁰ In regard to anchoring in ports, the principle of comity may let coastal States hesitate to enforce domestic legislation for the carriage of weapons as long as the possession relates solely to the internal management of the ship and there is no incident.¹⁵¹ Nevertheless, this principle is not legally binding and this “tradition” might not be applicable to weapons used by PMSC personnel. However, the weapons that may lawfully be carried and used by the guards will vary widely from State to State. Different domestic jurisdictions require that either the weapons or the personnel carrying them, or both, be licensed under the law of the coastal State through which the ship is transiting. More often, there are import or export restrictions relating to the disembarkation of weapons in port.¹⁵² Furthermore, different approaches are in force to ensure that weapons are safely stored and delivered when a ship is in port, including gun-rental schemes whereby PMSC personnel can rent State owned firearms for a daily fee.¹⁵³ As of 2012, the Seychelles would send police aboard to lock vessels’ armouries during their time in port and authorities in Mauritius take firearms off civilian ships and hold them in safekeeping until departure.¹⁵⁴ Ships transiting through the Suez Canal with weapons have to submit documentation in advance specifying the kind of weapons and the security personnel aboard.¹⁵⁵

Therefore, maritime security providers try to evade coastal regulations on weapons in different ways. Firearms are sometimes simply dumped at sea before entering territorial waters and then purchased at a low price elsewhere.¹⁵⁶ Occasionally, floating armouries are used which do not enter ports but stay on the high seas to supply contractors with firearms.¹⁵⁷ There are about 17-20 at sea today in three key points: Southern Red Sea, off the port of Fujairah and Sri Lanka.¹⁵⁸ For instance, the PMSC Protection Vessels International used this method to prevent issues with coastal regulations. An event in 2010 showed that this practice

¹⁵⁰ Ronzitti, p. 44.

¹⁵¹ Hohenstein, p. 5.

¹⁵² Priddy & Casey-Maslen. p. 849.

¹⁵³ Priddy & Casey-Maslen. p. 849.

¹⁵⁴ Pitney & Levin, p. 109.

¹⁵⁵ Pitney & Levin, p. 109.

¹⁵⁶ Koenig & Salomon, p. 18.

¹⁵⁷ Priddy & Casey-Maslen. p. 849.

¹⁵⁸ Cook, *Interview*, Question 7.

might be highly risky when four employees of Protection Vessels International were arrested by Eritrean authorities for storing military weapons and equipment on a remote island.¹⁵⁹

As a solution, relevant PMSC should be advised to have an understanding of port State and coastal State laws and requirements with respect to the possession, carriage, and movement of firearms, ammunition and other security related equipment, such as silencers, bulletproof vests, specialised communication equipment and infrared night-vision binoculars.

b) Seizure of a pirate ship by PMSCs and the ‘letter of marque’

aa) Seizure by warships

UNCLOS deals with piracy in art. 105. Art. 105 functions as an authorisation to seize a pirate ship or aircraft on the high seas and to arrest the persons and seize the property on board. Art. 111 deals with the right of hot pursuit of a foreign ship. But these norms clearly indicate that only States may seize a pirate ship; private entities are expressis verbis not included. Art. 107 UNCLOS defines the ships and aircraft which are entitled to seize on account of piracy and art. 111 (5) UNCLOS lists the same for the right of hot pursuit. Only warships or military aircraft, or other ships or aircraft clearly marked and identifiable as being in government service and authorised to that effect are included.¹⁶⁰ The definition of a warship can be found in art. 20 UNCLOS, as a ship belonging to the armed forces of a State bearing the external marks distinguishing such ships of its nationality, under the command of an officer duly commissioned by the government of the State and whose name appears in the appropriate service list or its equivalent and manned by a crew which is under regular armed forces discipline.

Commercial vessels with on-board armed guards clearly do not fit into the category of warships.¹⁶¹ Usually, they are run by private entities, not by States, are not under the command of a military officer and its crews are not under the discipline of regular armed forces. Neither can private security escort vessels be regarded as warships due to their private employment, unless contractors are incorporated in the armed forces of a State.¹⁶² However in

¹⁵⁹ Hill, Amelia & Smith, David, ‘British men held in Eritrea freed’, *The Guardian*, 12 June 2011, available at <http://www.theguardian.com/world/2011/jun/12/british-men-held-in-eritrea-freed> (last seen: 24 August 2015).

¹⁶⁰ Spearin, p. 827.

¹⁶¹ Mineau, p. 73.

¹⁶² Mineau, p. 73.

legal terms, it is possible to convert a merchant vessel into a warship under the Hague Convention (VII) of 1907.¹⁶³ According to art. 1 of the Hague Convention (VII) of 1907, the vessel must be placed under the direct authority, immediate control, and responsibility of the Power whose flag it flies. But in practice, one will barely find a commercial vessel under the command of an officer duly commissioned by the government of a State with a crew under military discipline.

bb) Commercial ships and the ‘letter of marquee’

As a further option, a commercial vessel could be marked and identifiable as being on government service and authorised to seize pirates as set out in art. 107 UNCLOS. The reason for ships on government service on being included was that some States do not possess any warship and the amendment made it possible to have the seizure carried out by a vessel on a State service.¹⁶⁴ The ownership of the ship by the State is not required nor is the presence of a commissioned officer demanded. The question arises if a PMSC could outfit a vessel for pirate hunting provided that it is commissioned to do so by a State and receives and authorisation to hunt pirates? This method was used in a similar form in former times and can be called the issuing of ‘letters of marquee’.¹⁶⁵ The first letter of marquee against pirates was already issued in the 15th century by the English King Henry VII.¹⁶⁶ This method practically fits out and commissions a private vessel by the highest governmental authorities to hunt down pirates and recover their treasure.¹⁶⁷

In this process, several legal problems may occur. Normally, the exercise of these functions is carried out solely by governmental authorities, such as the hot pursuit, the right to visit a ship, seizure of goods and the detention of persons. The right of visit, for instance, is a State function and it is difficult to conceive that third States are ready to have their ships stopped and visited by a ship manned by PMSC personnel.¹⁶⁸ Moreover, the use of privateers

¹⁶³ Convention (VII) relating to the Conversion of Merchant Ships into War-Ships, The Hague, 18 October 1907.

¹⁶⁴ Ronzitti, p. 43.

¹⁶⁵ For example Congressman Ron Paul, see Ron Paul’s plan to fend off pirates in *Politico* 15 April 2009, available under: <http://www.politico.com/news/stories/0409/21245.html> (last seen: 25 August 2015).

¹⁶⁶ Richard, Theodore T., Reconsidering the Letter of Marquee: Utilizing Private Security Providers against piracy, *Public Contract Law Journal*, 2010, Vol. 39, No. 3, p. 427 (hereafter; Richards).

¹⁶⁷ Richards, p. 412.

¹⁶⁸ Ronzitti, p. 42.

in the maritime zone was officially abolished by the Paris Declaration respecting Maritime Law of 1856 because States bore in the mind the negative consequences of this approach.¹⁶⁹ And since the 19th century, State practice does not show any use of privateers, so that ‘letters of marquee’ could also be regarded as banned under international customary law.¹⁷⁰

Additionally, privateers could exceed their commission and governments could lose the control over private actors.¹⁷¹ The control mechanisms would be insufficient, gathering evidence from armed fights on the high seas is often difficult. Especially with regard to the misconduct of PMC employees in Iraq, there seems to be a high risk to issuing these ‘letters of marquee.’

To sum up, the monopoly over seizing pirates on the high seas is held by State navies, not by private ships.¹⁷² One does not find a legal foundation for PMSC personnel to hunt pirates in the UNCLOS; neither do other sources of international law provide any authorisation. Arming vessels and hiring contractors for pirate hunting is in principle legally possible if the ship is on government service, authorised to chase pirates, and the hiring government bears international responsibility.¹⁷³ Nevertheless, no practice of this kind exists to support such a finding.¹⁷⁴ To the contrary, a hot pursuit of another ship and the detention of its crewmembers by PCASP without a State authorisation could itself constitute piracy under art. 101 UNCLOS.¹⁷⁵ Therefore, PMSC should refrain from any offensive activities to pursue and arrest pirates.

c) Seizure during self-defence and the detention of pirates?

aa) The question of self-defence by PMSC employees

PMSC personnel, unless explicitly operating on behalf of a State, are citizens with the same rights, duties and responsibilities as any other citizen. Their actions are primarily dependent on applicable national law, which could come from the flag State, the law of nationality of the

¹⁶⁹ Declaration Respecting Maritime Law. Paris, 16 April 1856; Spearin, p. 833.

¹⁷⁰ Koenig & Salomon, p. 21.

¹⁷¹ Koenig & Salomon, p. 22.

¹⁷² Koenig & Salomon, p. 20; Mahard, p. 345.

¹⁷³ Ronzitti, p. 42.

¹⁷⁴ Ronzitti, p. 42.

¹⁷⁵ Koenig & Salomon, p. 19; Spearin, p. 827.

PCASP involved or in territorial waters the the coastal State. It might be possible that more than one State has jurisdiction over their actions. Generally, the right of maritime security guards to use of force is restricted to lawful acts either in self-defence or in the defence of others.¹⁷⁶ UNCLOS does not contain any rules for the use of force by crewmembers or security guards. And concerns rise about whether PCASPs are even allowed to engage in fire fights on the high seas and whether they could therefore be sued by pirates or expose themselves to criminal liability.¹⁷⁷

However, one finds the concept of self-defence by merchant vessels against pirates already mentioned by the International Law Commission¹⁷⁸ in their commentary to draft art. 45 on the Law of the Sea in 1956.¹⁷⁹ In the ILC commentary it was stated that art. 45 does not apply in the case of a merchant ship which has repulsed an attack by a pirate ship and, in exercising its right of self-defence, overpowers the pirate ship and subsequently hands it over to a warship or to the authority of a coastal State. In this comment, the International Law Commission duly points out the existence of a right to self-defence on the high seas against pirates by private persons. It refers to the right of self-defence of human beings, a right which is recognised by all legal orders of the members of the international community.¹⁸⁰ This right of self-defence has to be strictly distinguished from the right of self-defence of States as embodied in art. 51 of the United Nations Charter, which concerns cases of armed attacks against a Member of the United Nations and not against a merchant vessel.

Although it is indisputable that the use of force by PMSC personnel is authorised and recognised by the international community, so long as it is used lawfully in self-defence or defence of others or in more limited circumstances in the defence of the vessel and its cargo, the intricacies of the type and degree of force that can be used remain unclear. Moreover, one cannot deduce defined rules for the use of force from the right to self-defence, mentioned in art. 45 of the ILC commentary. Many questions remain unsolved: May PMSC personnel lawfully fire warning shots or shots into an engine block? Are PMSC contractors allowed to use anticipatory self-defence if a pirate is about to fire a RPG at a ship with cargo of

¹⁷⁶ Priddy & Casey-Maslen. p. 845.

¹⁷⁷ Ghiradani, Paolo, 'Legal concerns', *Lloyd's List*, 20 December, 2010, available under: <http://www.marsecreview.com/2010/12/legal-concerns/> (last seen: 27 August 2015).

¹⁷⁸ Hereafter: ILC

¹⁷⁹ International Law Commission, *Yearbook of the International Law Commission*, 1956, Vol. II (hereafter ILC commentary).

¹⁸⁰ Ronzitti, p. 43.

petroleum? Which type of firearms may be used for a proportionate self-defence? Answers to these questions will depend on domestic legislation and case-law.

However, it is suggested that the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials could provide adequate guide to legality.¹⁸¹ These Standards were adopted by the UN Congress on the Prevention of Crime and the Treatment of Offenders in 1990 and represent authoritative statements of international law that set out the principles on the use of force by the police.

Principle nine of the Basic Principles states that lethal force may only be used intentionally when strictly unavoidable in order to protect life. Regarding warning shots, the International Tribunal for the Law of the Sea seems to suggest that a warning shot does not constitute a use of force. In the *Saiga* case, the court described the practice to stop a ship at sea.¹⁸² The M/V *Saiga* was an oil tanker flying the flag of Saint Vincent and the Grenadines. The tanker crossed the maritime boundary between Guinea and Guinea Bissau and entered illegally the exclusive economic zone of Guinea. Saint Vincent and the Grenadines claimed that Guinea used excessive and unreasonable force in stopping and arresting the *Saiga*. The Court decided that the use of force must be avoided as far as possible and, where force is unavoidable, it must not go beyond what is reasonable and necessary in the circumstances.¹⁸³ Considerations of humanity must apply in the law of the sea, as they do in other areas of international law. Afterwards, the judgement says that to stop a ship, first of all, internationally recognised auditory or visual signals should be given; where this does not succeed, a variety of shots may be fired, including the firing of shots across the bows of the ship.¹⁸⁴ If this fails, as a last resort, the pursuing vessel may use force.¹⁸⁵

bb) The question of the detention of pirates

Another important question arises if PMSC personnel actually repulse an attack and capture one of the attackers. As the ILC Commentary to art. 45 already indicates, a detained pirate has

¹⁸¹ Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, 27 August to 7 September 1990.

¹⁸² International Tribunal for The Law of the Sea, The M/V *Saiga* (No. 2) Case, Saint Vincent And The Grenadines v. Guinea, 1 July 1999, para. 153ff. (hereafter: *Saiga* case).

¹⁸³ *Saiga* case, para. 155.

¹⁸⁴ *Saiga* case, para. 156.

¹⁸⁵ *Saiga* case, para. 156.

to be handed over to a warship or to the authorities of the coastal State. During his detention on board, he must be provided with adequate food and water.¹⁸⁶ For PMSC contractors, there is the potential concern that by detaining prisoners, they are in fact kidnapping them. But most national laws cover the detention of a suspected criminal under the basis of a form of citizen arrest until they can be handed over to the authorities.¹⁸⁷ Furthermore, some domestic legislation include a master's power to detain a person on board.¹⁸⁸ Therefore, it can be stated that PMSC guards generally have the right to detain pirates after an attack until they can hand them over to the military or other security authorities.

cc) Interim conclusion

Although domestic law may have different degrees of force that may lawfully be used in self-defence or rules about the detention of a criminal, it is highly important that PMSC employees clearly understand their legal rights, duties and responsibilities. A unification of all the different regulations across national jurisdictions and better transparency in this area would be beneficial for better control over the use and conduct of PMSCs.¹⁸⁹

d) The obligation to rescue at sea

Another important issue regarding the use of PMSCs is the duty to render assistance which international law imposes on the master of a vessel to rescue anyone in danger of being lost at sea. The International Convention for the Safety of Life at Sea of 1974, the International Convention on Salvage of 1989 and especially Art. 98 UNCLOS all deal with the rescue at sea. According to art. 98 UNCLOS, this duty is not absolute but rather qualified on the basis that the rendering of assistance would not pose a serious danger to the ship, the crew or the passengers. For example, if a ship with armed security guards on board gets informed about a nearby attack of another ship, it would have to render assistance as long as it is reasonable.¹⁹⁰ Assistance would not be reasonable in the case of a non-armed ship, because it is barely able

¹⁸⁶ Priddy-Maslen, p. 852.

¹⁸⁷ For example in South Africa: The South African Criminal Procedures Act Of 1977, Act 51, Section 42; in Germany: art. 127 (1) Strafprozessordnung, in the U.K.: section 24 A of the U.K. 1984 Police and Criminal Evidence Act; in the U.S. California Penal Code section 837; in China art. 82 of the Criminal Procedure law; in Australia section 3Z of the Crimes Act of 1914.

¹⁸⁸ For example in the U.K. section 105 of the U.K.'s 1995 Merchant Shipping Act.

¹⁸⁹ Priddy & Casey-Maslen, p. 848.

¹⁹⁰ Koenig & Salomon, p. 20.

to help and would risk of being attacked as well. A ship with PCASP on board or with armed escort boats could repulse the attack. Therefore, the master could be obligated to help, leading to a negative side effect of using PMSCs for shipping companies because the ships would need to interrupt the original transit to render assistance. But it has to be noted that the obligation rests with the master of the ship, not its crew or PMSC personnel.¹⁹¹

8. Result

International Law does not contain rules concerning the use of private maritime security guards. A look into different sources, from the international humanitarian law, S.C. resolutions, the Law of the Sea and international custom did not show any profound legal foundations for the employment of private maritime security companies. Even though the number of PMSCs around the globe has risen, international conventions have not adopted the issue yet. The different attitudes of States, even from same regions, shows that the international community struggles to find a comprehensive, effective solution in terms of international binding regulations for this relatively new problem. One main reason for this ambiguity rests in the fact that existing international treaties regarding conflicts are structured around diplomacy and that the State itself as a sovereign is seen as the cornerstone of international law, rather than the international community.¹⁹² Regarding the Law of the Sea, one has to say that the maritime world remains partly unregulated. The principle of the Freedom of the Seas embodies the concept that nations and private enterprises should freely use the world's oceans without infringement by other nations.¹⁹³

On the one hand, this unregulated field creates a legal gap for armed contractors. Poor coastal and port State legislations in third world countries potentially create legal grey areas for practices of maritime security providers. As a consequence, the risk exists of unaddressed human rights and other criminal violations. On the other hand, shipping masters also face difficulties for the employment of maritime guards and escort vessels due to many different regulations in coastal and port States. The carriage of firearms through territorial waters or into ports in particular continues to be a key issue throughout the different national legislations. As a result, the entry into ports can be denied, privately contracted armed security

¹⁹¹ Priddy-Maslen, p. 852.

¹⁹² Hohensetin, p. 9.

¹⁹³ Parsons, p. 174f.

personnel (PCASP) can be sanctioned and prosecuted and as a result weapons and equipment can be confiscated. It remains challenging for shipping masters and companies to cope with all these problems and this can certainly lead to cost-intensive delays. The current legal situation in international law can be described as a complex field which is opaque for the shipping industry and security providers. The problem of piracy and armed robbery on the open water has risen over the last decades in different areas of the world. Governments and State navies are not ready to keep the oceans safe from the threat of piracy,. Hence, private actors stepped into this gap to protect the merchant vessels by taking over traditional governmental functions. The carriage of weapons and the use of force on the high seas in particular are tasks which are normally exercised by state organs due to the state monopoly on the use of force. The lack of detailed and uniform rules concerning the private security providers, lead to a huge legal grey area.

Shipping masters and security companies seem no other choice than accepting these problematic legal conditions. One has to observe future State practice and possible responses by the international community to see if fundamental binding regulations will be implemented.

V. Possible Regulations and existing soft law standards

In the following chapter, we want to point out how States could regulate the maritime security sector and which legal issues should be regulated. Certain key points and mechanisms will be suggested and we want to analyse how different international organisations already created guidance and mechanisms to standardise the use of Private Maritime Security Companies (PMSCs). Different mechanisms created by the UN and one of its agencies, the International Maritime Organisation (IMO) will be presented. Approaches by other international organisations, mainly from the shipping and the security sector will be set out and the effect of the existing standards and mechanisms will be analysed. Finally, rules by regional bodies and their position towards private maritime security will be outlined.

1. A State's duty to regulate and to protect human rights

As a result of the legal problems regarding the use of maritime security guards, States need to be obliged to establish enforceable laws and mechanisms for the use of PMSCs to ensure an effective protection of human rights. Especially problems concerning the state monopoly on the use of force cannot be left unregulated due to the risk of serious human rights violations by private actors. Possible escalations of violence which could result from the use of firearms and carriage of armed personnel on board ships and maintain a permanent threat if armed guards traverse unregulated in international waters.

The international community considered the importance of human rights violations by private entities in two different UN publications. Attempts towards a legal foundation for the regulation of private military and security companies was made by the UN Working Group on the use of mercenaries in its 2010 report.¹⁹⁴ The Working Group published a draft Convention on Private Military and Security Companies, which has not been finalised and adopted yet.¹⁹⁵ The draft proposes in art. 4 para. 1 that States should have in place a legislative and administrative framework to regulate PMSC's actions.

A similar idea can be found in the UN Framework and the Guiding Principles on Business and Human Rights. The Framework calls on the State's duty to protect against human rights abuses committed by third parties. States are prompted to have a duty to protect against human rights abuses by non-State actors, including businesses, affecting persons within their territory or jurisdiction.¹⁹⁶ The UN 'Protect, Respect and Remedy' Framework for Business and Human Rights was drafted in 2008 and supported by the Human Rights Council.¹⁹⁷ It clearly includes the work of PMSCs during their maritime employment. Based on this Framework, the UN Special Representative on Business and Human Rights also

¹⁹⁴ Report of the UN Working Group on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, Human Rights Council Resolution A/HRC/15/25, 2 July 2010.

¹⁹⁵ Draft of a possible Convention on Private Military and Security Companies for consideration and action by the Human Rights Council (hereafter: Draft Convention).

¹⁹⁶ Human Rights Council Resolution A/HRC/8/5, 7 April 2008, para 8.

¹⁹⁷ UN 'Protect, Respect and Remedy' Framework for Business and Human Rights, Human Rights Council Resolution A/HRC/8/5, 7 April 2008.

published the Guiding Principles on Business and Human Rights¹⁹⁸ to provide practical recommendations for the UN Framework's implementation. The Guiding Principles emphasise existing standards applicable to all States and all businesses as well. The Principles have therefore implications both for flag States and the States of registration and operation of PMSC's providing services.¹⁹⁹ The Guiding Principles represent a consensus of the international community, creating a global business-human rights standard.

As a consequence, States need to implement effective laws to prevent possible human right violations. Hereby, the following five aspects need to be regulated in particular:

- The use of force
- The carriage of firearms
- General training and conduct of armed guards
- Reporting instruments
- Employment and certification procedures

2. Key legal aspects and existing soft law standards

a) The use of force

Laws regarding the use of force are one of the elementary rules which are essential in the regulation of private security providers. Armed personnel need clear regulations when and how they are allowed to react to attacks. Regulations concerning the use of force exist in all jurisdictions of the world in several penal codes or acts, but there are no binding international regulations for private actors. As a result, armed personnel are at a risk to ignore known domestic rules while travelling through international waters or into other jurisdictions.

¹⁹⁸ Guiding Principles on Business and Human Rights, Human Rights Council Resolution A/HRC/17/31, 16 June 2011.

¹⁹⁹ Priddy-Maslen & Caley, p. 855.

Generally, non-violent means have to be considered before it is resorted to the use of force and firearms. Security operators shall only be allowed to defend themselves or other people against what they believe to be an imminent unlawful threat of death or serious body injury, in respect of the exercise of the essential right of self-defence. The use of force shall be proportionate in order to minimise damage or injury.

The international community and the private sector developed different guidance regarding the use of force over the last years.

aa) 100 Series rules for the use of force

In May 2013, different maritime and security groups developed the 100 Series Rules as an independent set of maritime rules for the use of force (RUF).²⁰⁰ Along the group of the drafters were organisations such as the International Chamber of Shipping, the UN Interregional Crime and Justice Research Institute, BIMCO, the Republic of the Marshall Islands and Lloyd's Register.²⁰¹ The 100 Series rules complement current industry RUF guidance on the drafting of RUF, international standards and are in accordance with national and international law.²⁰²

The purpose of the RUF is twofold. Firstly, to provide PCASP, Master and crew with guidance on lawful graduated response measures and 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.²⁰³ Secondly, to reduce risk to the Master, crew, PMSC, ship owner, charterer, insurer and underwriters of civil liability claims and/or potential criminal or other charges.²⁰⁴ The rules do not, however, provide any form of defence, indemnity or immunity against civil or criminal liability when force has been used unlawfully.²⁰⁵

²⁰⁰ The 100 Series Rules, 1st Edition, adopted on 3 May 2015 (hereafter 100 Series Rules), available at https://100seriesrules.com/uploads/20130503-100_Series_Rules_for_the_Use_of_Force.pdf (last seen: 26 October 2015).

²⁰¹ See list of supporting entities: https://100seriesrules.com/uploads/Supporting_Entities-Updated.pdf (last seen: 26 October 2015).

²⁰² 100 Series Rules, Scope, Nr. 4 and Nr. 5; see also 100 Series Rules Website, available at: <https://100seriesrules.com/> (last seen: 26 October 2015).

²⁰³ 100 Series Rules, Purpose, Nr. 2.

²⁰⁴ 100 Series Rules, Purpose, Nr. 2.

²⁰⁵ 100 Series Rules, Fundamental Principles, Nr. 11.

Basically, the 100 Series rules provide a graduated four step guideline for responding to an eventual attack on the open water. Rule 100 states that armed guards shall advise the Master or the Officer of the Watch in the event of any actual, perceived or threatened attack by third parties if they intend to invoke these RUF.

Another important rule is that warnings or as a next step warning shots should be used before using lethal force.²⁰⁶ Lethal force shall only be used as a last resort in self-defence when under attack or when an attack is imminent and has to be reasonable and necessary.²⁰⁷

The 100 Series Rules are a detailed model set and an example of best practice for maritime rules of force. They not only contain elementary rules of force, but also explain comprehensively the purpose, scope and fundamental principles as well as key definitions for the use of the rules. They do not bind flag States as to their use, but instead provide a choice for their potential incorporation into national guidance as determined by respective governments and authorities.

bb) The International Code of Conduct for Private Security Service Providers

In November 2010, the International Code of Conduct for Private Security Service Providers²⁰⁸ was released. The ICoC is a set of non-binding standards for security companies to respect human rights and the rules of humanitarian law.²⁰⁹ It is a multi-stakeholder initiative developed as a complement to the Montreux Document. The initiative was launched by a multi-stakeholder initiative in 2009 with the assistance of the Government of Switzerland and in consultation with the Governments of the United Kingdom and the United States, as well as other stakeholders and relevant experts.²¹⁰ The Code aims to clarify international standards for the private security industry operating in complex environments and to improve

²⁰⁶ 100 Series Rules, Rule 101 and 102.

²⁰⁷ 100 Series Rules, Rule 103.

²⁰⁸ The International Code of Conduct for Private Security Service Providers, adopted on 9 November 2010, available under: http://www.icoca.ch/en/the_icoc (last seen: 30 September 2015), hereafter ICoC.

²⁰⁹ Pitney & Levin, p. 99.

²¹⁰ Website of the ICoC Association, available under: <http://www.icoca.ch/en/history> (last seen 30 September 2015)

oversight and accountability of such companies.²¹¹ By September 2013, 708 companies had formally committed to operate in accordance with the Code of Conduct.²¹²

The ICoC, although mainly dealing with private security companies operating on-land, is also applicable to the maritime sector. Art. 13 states that the Code refers to ‘actions of Signatory Companies while performing Security Services in Complex Environments’. The ICoC defines Complex Environments in section B as ‘any areas experiencing or recovering from unrest or instability, whether due to natural disasters or armed conflicts, where the rule of law has been substantially undermined, and in which the capacity of the state authority to handle the situation is diminished, limited, or non-existent. The reference to ‘any areas’ instead of to ‘any territory’ suggests that the definition was intended to be broader than acts within the exclusive territorial jurisdiction of a State.²¹³ Regarding the requirement of a complex environment, one can say that countries such as the Congo, Liberia or Somalia are certainly unstable and still suffering from the aftermaths of civil wars. Additionally, the maritime security services are expressly mentioned in art. 7 of the ICoC and many of its signatories are engaged in maritime security.²¹⁴

In signing the ICOC, companies commit to supporting the rule of law, respecting the human rights of all persons and protecting the interests of all persons.²¹⁵ Art. 30 of the ICoC encourages PSC personnel to take all reasonable steps to avoid the use of force, and only use it if proportionate and reasonable. Art. 33 of the Code also deals with the detention of persons, a matter which is not addressed in other presented standards. Security companies are advised to will only, guard, transport, or question detainees if the Company has been specifically contracted to do so by a state and its Personnel are trained in the applicable national and international law. The prohibition of torture or other cruel, inhuman or degrading treatment or punishment during detention is also emphasized.²¹⁶

By taking a closer look at the ICoC, one has to mention that it does not bring any innovations in international law; it rather recalls provisions from international and national

²¹¹ Priddy & Casey-Maslen, p. 853.

²¹² Website of the ICoC Association, available under: <http://www.icoca.ch/en/history> (last seen 30 September 2015).

²¹³ Priddy & Casey-Maslen, p. 853.

²¹⁴ Priddy & Casey-Maslen, p. 853

²¹⁵ Art. 3 ICoC.

²¹⁶ Art. 33, para. 2 ICoC.

laws and serves like the Montreux document as a guideline. It merely tries to encourage voluntary compliance.²¹⁷ It applies to a broad number of different security firms – from the protection civilians in war zones, to risk management, to training forces.²¹⁸ The ICoC itself does not really include PMSCs with its defensive competence and focuses more on humanitarian aspects. The shipping industry needs provisions specified for maritime threats.

cc) The draft Convention on PMSCs on the use of force

Art. 18 (3) of the draft Convention on Private Military and Security Companies states that the use of force need to be in proportion to the seriousness of the offence and that damage and injury has to be minimised. Furthermore, security guards need to respect and preserve human life and it has to be ensured that assistance and medical aid are rendered to any injured or affected persons at the earliest possible moment.

b) The carriage of firearms

Security providers need to have an understanding of flag State, port State and coastal State laws and requirements with respect to the possession, carriage, and movement of firearms, ammunition and other security related equipment. On the one hand it is the full responsibility of the security companies to know and to follow these laws.

On the other hand, States should provide clearly the relevant information to anyone who is eventually entering territorial waters or ports. Comprehensive information regarding the import, export and movement of firearms and ammunition within the country, the exact type of permitted arms and penalties in case of breaches need to exist and need to be published in a transparent way. This is not only important for international security companies, but also for private persons who want to bring guns into a country.

c) Training and conduct of armed guards towards the shipping master

A certain level of quality in the training and the employment of security personnel would help to achieve a standard in which human rights violations are less likely to occur and safety requirements are met. Hence, security personnel should especially be trained in the handling of weapons, attack scenarios, maritime safety and first aid. Additionally, operators need to

²¹⁷ Pitney & Levin, p. 100.

²¹⁸ Pitney & Levin, p. 100.

know relevant rules of engagement and legal aspects of their work. The capture and the dealing with pirates are an important aspect which the maritime guards need to be trained in. Permanent seminars, trainings and on board manoeuvres are essential to comply with these requirements.

The position of the guards towards the shipping master and other ship personnel must be clear and the chain of command must be clarified in advance of the operation.

aa) ISO/PAS 28007

As a result of the increased employment of privately contracted armed security personnel (PCASP), the International Organisation for Standardisation (ISO) released a standard document in 2012 to help instil confidence and ensure the safety, efficiency and reliability concerning the use of maritime security providers. The ISO is an independent, non-governmental membership organization and the world's largest developer of voluntary International Standards with 162 member countries constituting the national standards bodies around the world.²¹⁹ The guiding document is called publicly available specification 28007 (ISO/PAS 28007).²²⁰ It was developed at the request of the IMO's Maritime Safety Committee and supported by major international corporations, intelligence and law enforcement agencies such as INTERPOL, and the European Commission.²²¹ The document deals with security aspects such as planning, resources, training and awareness, communication and documentation and generally follows the provision of the IMO guidance.²²² It outlines practical requirements for elements like scene and casualty management, incident reporting and investigation, health and safety, and customer complaints and also includes recommendations for performance evaluation such as monitoring, audits, management and continual improvement.²²³

²¹⁹ ISO website, About ISO, available at: <http://www.iso.org/iso/home/about.htm> (last seen: 5 October 2015).

²²⁰ ISO/PAS 28007:2012, Ships and marine technology, Guidelines for Private Maritime Security Companies providing privately contracted armed security personnel on board ships (and pro forma contract), adopted on 15 December 2012.

²²¹ ISO website, Fighting piracy - ISO guidelines for armed maritime guards, available at: <http://www.iso.org/iso/news.htm?refid=Ref1717> (last seen: 5 October 2015).

²²² ISO website, Fighting piracy - ISO guidelines for armed maritime guards, available at: <http://www.iso.org/iso/news.htm?refid=Ref1717> (last seen: 5 October 2015).

²²³ ISO website, Fighting piracy - ISO guidelines for armed maritime guards, available at: <http://www.iso.org/iso/news.htm?refid=Ref1717> (last seen: 5 October 2015).

It has to be mentioned that two key issues are missing in the ISO/PAS 28007; namely the responsibility of maritime security companies to respect human rights and to carry out human rights due diligence processes. The standard needs clearly to be improved in the field of international human rights law.

bb) MarSecPro Standard

In 2011, another international organisation, the International Association of Maritime Security Professionals (IAMSP) published guidance regarding the conduct of maritime security guards. The non-profit, volunteer organisation IAMSP was founded in 2010 as the result of a perceived need by a number of private entities to raise the level of professional conduct within the maritime security industry. The most notable document is the Maritime Security Professionals Voluntary Professional Code of Practice, also known as the MarSecPro Standard.²²⁴ MarSecPro aims to establish and promote high quality education and personal development at all levels throughout the maritime security industry.²²⁵ The Code defines the professional standards expected of maritime security professionals and provides an internationally recognized Certification scheme. The IAMSP also published other guidance, e.g. for the vetting of training or the use of force.

Nevertheless, the IAMSP guidance is merely a set of recommendations based on international law and business practices. It is not binding and it will be a matter of each armed contractor exercising his personal judgement in meeting the requirements of the mentioned standards.²²⁶

cc) ASIS

The American Security Industry Society (ASIS), an international society of security professionals counting over 38,000 members, has also developed a set of standards and guidelines for security companies.²²⁷ ASIS has developed PSC.1, a standard based on the Montreux Document and the ICOC for private security companies operating on land overseas. In 2013, ASIS released PSC.4, a guideline for implementing PSC.1 in the maritime

²²⁴ International Association of Maritime Security Professionals MarSecPro Standard, Maritime Security Professionals Voluntary Professional Code of Practice, adopted in May 2011 (hereafter: MarSecPro Standard).

²²⁵ MarSecPro, art. 2.0.

²²⁶ Pitney & Levin, p. 103.

²²⁷ See ASIS website, available under: <https://www.asisonline.org/About-ASIS/Pages/default.aspx> (last seen: 27 October 2015).

environment in accordance with the ISO 28000:2007 standard.²²⁸ The aim of PSC.4 is to provide quality assurance in all security related activities and functions while demonstrating accountability to law and respect for human rights. Hence, this guidance follows the already outlined ISO standards and its acceptance by security companies is only voluntarily.

d) Reporting instruments

A detailed reporting mechanism could help to collect information about pirate attacks and the conduct of PCASP. Security companies should make sure that the PCASP team leader maintains a log recording every incident in which firearms are deployed, to be acknowledged by the master. Such incidents should be documented in detail in the form of a piracy report. Security teams should ensure that a formal written report of each incident involving the use of force is made by the PCASP team leader and acknowledged by the master. This report has to include the time and location of the incident, details of events leading up to the incident, written statements by those involved in the incident from the PCASP team and injuries and/or material damage sustained. The report has to be forwarded to the ship owner or operator and relevant photo or video material needs to be added.

These suggestions are also implemented in the ISO PAS 28007 Standards and in para. 63 of the International Code of Conduct for Private Security Service Providers.

e) Employment and licensing procedures

Before ship owners or operators employ a PMSC, they must have the opportunity to analyse and to rate the security company. Therefore, the security company structure and place of registration, the company ownership, its financial position and the extent of insurance cover must be published. Further important information is the operational competence and the senior management experience, general and specific to the task of the company.

Certification and licensing procedures are the most effective way to provide reliable quality management indicators and to maintain a high standard of security companies. A coherent international licensing system whereby flag States could certify maritime security guards

²²⁸ See ASIS website concerning PSC.4, available under <https://www.asisonline.org/Standards-Guidelines/Standards/published/Pages/Quality-Assurance-and-Security-Management-for-Private-Security-Companies-Operating-at-Sea-Guidance.aspx?cart=5f62805a406a44b8b9103d02a27a16c0> (last seen: 27 October 2015).

would be a possible action. The certification would need to include standards for personnel qualification, training and penalties for non-compliance.

aa) **GUARDCON**

Due to changing national laws regarding to the use of PMSCs and the possession of firearms on-board of ships, the shipping organisation BIMCO decided in 2011 to help to clarify the situation for shipping masters.²²⁹ In March 2012 BIMCO's Documentary Committee published a 'standard contract for the employment of security guards on vessels', called GUARDCON.²³⁰ The contract provides shippers and PMSCs with a framework for the understanding of their respective rights and obligations. GUARDCON sets out basic requirements of PMSCs providing on-board guards, mainly in the areas of firearms licensing, insurance and liability.²³¹ The nature of the Contract GUARDCON is intended to be a multi-functional agreement which can be used for single transits or as a framework agreement for multiple transits.²³² GUARDCON is only a standard contract; it does not impose any enforceable provisions. It helps to outline standards, by taking "all reasonable skill and care" as the benchmark for providing the agreed security services.²³³ Therefore it has only a very limited impact on the regulation of the PMSC industry.

bb) **SAMI Accreditation**

A highly influential maritime security organisation was founded in 2011, the Security Association for the Maritime Industry (SAMI). SAMI has a broad number of international members with over 120 maritime security providers, consultants, trainers and maritime security equipment, technology and hardware manufacturers.²³⁴ Its aim is to develop guidance, documentation, education, training and innovative technological solutions for the maritime security sector.²³⁵ SAMI certifies PMSCs through a three-step process. At first, it

²²⁹ Pitney & Levin, p. 101.

²³⁰ BIMCO, *GUARDCON explanatory notes*, p. 2, available under:

https://www.bimco.org/~media/Chartering/Document_Samples/Sundry_Other_Forms/Explanatory_Notes_GUARDCON.ashx (last seen: 30 September 2015) (hereafter: BIMCO, *GUARDCON explanatory notes*).

²³¹ Pitney & Levin, p. 101, 119.

²³² BIMCO, *GUARDCON explanatory notes*, p. 2,.

²³³ BIMCO, *GUARDCON explanatory notes*, p. 4.

²³⁴ SAMI website, About SAMI, available under: <http://www.seasecurity.org/about/> (last seen: 5 October 2015).

²³⁵ Pitney & Levin, p. 103.

analyses the PMSCs records.²³⁶ Secondly, SAMI conducts an on-site audit that tests the “implementation, readiness, conduct of operations, personnel management and logistics” of the PMSC.²³⁷ Hereby, SAMI decided to use the ISO/PAS 28007 guidance as its key standards for accreditation.²³⁸ Finally, the PMSC’s operational capabilities will be tested during an operational site visit. The certification process started with a number of auditing companies, such as Lloyd’s Register Quality Assurance, MSS Global or RTI Forensics, and some of the big maritime security companies have already been certified.²³⁹

The certification procedure is clearly a welcoming step in regulating the PMSC industry. The certification confirms that various legal, compliance and quality issues have been adequately addressed and lead to a positive recognition of members in the maritime industry. Nevertheless, these standards are only voluntary. Major PMSCs will likely follow them to demonstrate their qualities and capabilities. But not necessarily all armed companies operating on the high seas will conduct themselves according to these high standards.²⁴⁰ Therefore, it has to be observed how many PMSCs will go through all the steps of the certification process and if the standard has a lasting impact on the conduct of PMSCs.

cc) The International Code of Conduct Association

From the beginning, the ICoC process foresaw the establishment of an independent mechanism for governance and oversight. This led to the foundation of the ICoC Association²⁴¹ in 2013 as a Swiss non-profit association. The purpose of the ICoCA is to govern and oversee the implementation of the ICoC, and to promote the responsible provision of private security services. Its main functions are to provide and support certification, monitoring and complaints resolution. The ICoCA’s board of directors meeting voted on 29

²³⁶ Mahard, p. 365.

²³⁷ Yvonne, M. Dutton in Basedow, Juergen & Magnus, Ulrich & Wolfrum, Ruediger, *The Hamburg Lectures on Maritime Affairs 2011-2013*, Hamburg Studies on Maritime Affairs 28, 2015, p. 293 (hereafter: Dutton in Basedow & Magnus & Wolfrum).

²³⁸ Pitney & Levin, p. 105.

²³⁹ Pitney & Levin, p. 106.

²⁴⁰ Dutton in Basedow & Magnus & Wolfrum, p. 293.

²⁴¹ Hereafter ICoCA.

July 2015 to accept the proposed Certification Procedures, so that all member companies will be required to become certified to an ICoCA-recognised standard.²⁴²

dd) ISO/PAS 28007

PMSCs can also get a certification when complying with ISO/PAS 28007 by accredited inspectors, known as Certification Bodies.²⁴³ Before a Certification Body can be appointed to carry out ISO/PAS 28007 inspections, it must itself attain national accreditation.²⁴⁴ The ISO standard is not necessarily expected to eliminate other national accreditation requirements, but it might reduce the extent to which the shipping industry has to conduct its own forms of due diligence.

ISO/PAS 28007 gives a comprehensive international standard for the use of PMSCs. But one has to keep in mind that it is a non-binding instrument. Therefore, it is highly important that regulatory measures are enforced through the establishment of stringent national accreditation processes and that ship owner's insist on employing PMSCs which are ISO/PAS 28007 accredited, instead of relying on their own vetting processes.

3. The IMO Circulars

The International Maritime Organisation is a specialised agency of the United Nations and is the global standard-setting authority for the safety, security and environmental performance of international shipping.²⁴⁵ Its main role is to create a regulatory framework for the shipping industry. It has 171 member States and three associated members.²⁴⁶

²⁴² *ICoCA Board Meeting*, Minutes, 27 July 2015, available under:

<http://icoca.ch/sites/default/files/resources/Minutes%2027%20July%202015%20Board%20Meeting.pdf> (last seen: 1 October 2015).

²⁴³ Pitney & Levin, p. 105f.

²⁴⁴ Kmelisch, Mark, 'Are Merchant Shippers Hiring Pirates To Kill Pirates? The Regulation Of Private Maritime Security Companies Operating In The Gulf Of Aden', *Mondaq*, 17 December 2013, available at:

<http://www.mondaq.com/southafrica/x/281592/Marine+Shipping/Are+Merchant+Shippers+Hiring+Pirates+To+Kill+Pirates+The+Regulation+Of+Private+Maritime+Security+Companies+Operating+In+The+Gulf+Of+Aden> (last seen: 5 October 2013).

²⁴⁵ Mahard, p. 345.

²⁴⁶ *IMO Website*, Member States, IGOs and NGOs, available at:

<http://www.imo.org/en/About/Membership/Pages/Default.aspx> (last seen: 3 October 2015).

Officially, the IMO does not take a position on the carriage of arms on board ships. It states that it is the responsibility of the individual flag State and coastal State to determine if the use of armed security guards is appropriate and legal, if so under what conditions.²⁴⁷

Due to the increased number of private armed security guards on the high seas, the IMO started in 2011 to publish various Circulars to give guidance on the topic. The ultimate goal of its interim guidance was to harmonise domestic policies for PMSCs across nations.

In these four Circulars, all the mentioned key aspects towards a regulation of private maritime security companies are included. Therefore it is pointed out as a special document.

Basically, the IMO drafted Interim Guidance targeting three different groups:

aa) IMO Circular 1405

IMO Circular 1405 was issued for Ship owners, Ship Operators, and Shipmasters²⁴⁸, Circular 1405, as well as Circulars 1406 and 1443, deal with the employment and the conduct of PMSC guards. Circular 1405 contains rules concerning the use of force and encourages PCASP to use force only in self-defence that is strictly necessary and reasonable in response to a piratical attack.²⁴⁹ Furthermore, the IMO encourages ship owners in Circular 1405 to use a risk assessment and proper due diligence procedures before hiring armed guards.²⁵⁰ The Circular also provides ship owners with criteria for selecting and vetting security personnel and encourages ship owners to ensure that the personnel is adequately trained.²⁵¹ Additionally, the Circular at annex art. 5.16 suggests a reporting procedure. The master is advised to maintain a log of every circumstance in which firearms are discharged, whether accidental or deliberate.

²⁴⁷ *IMO Website*, Maritime Security and Piracy, available at:

<http://www.imo.org/en/OurWork/Security/Pages/MaritimeSecurity.aspx> (last seen: 3 October 2015).

²⁴⁸ IMO, MSC.1-Circ. 1405-Rev2, Revised interim guidance to ship owners, ship operators and shipmasters on the use of privately contracted armed security personnel on board ships in the High Risk Area, adopted on 25 May 2012.

²⁴⁹ IMO Circular 1405, at Annex art. 5.14 and 5.15.

²⁵⁰ IMO Circular 1405, at annex art. 3; art. 4.1.

²⁵¹ IMO Circular 1405, at annex art. 4.4; 4.6. and 4.7.

bb) IMO Circular 1406

IMO Circular 1406 gives Interim Recommendations for flag States.²⁵² The IMO encourages them to adopt a policy on whether or not the use of PCASP will be authorized and, if so, under which conditions.²⁵³ It requests that flag States identify minimum requirements for PCASP as well as a process for authorizing their use.²⁵⁴ Finally, the Circular proposes the implementation of reporting and record-keeping requirements.²⁵⁵

cc) IMO Circular 1408

IMO Circular 1408 regards recommendations for port and coastal States²⁵⁶. It includes recommendations concerning aspects related to the embarkation, disembarkation and carriage of PCASP and of firearms and security-related equipment for use by PCASP.²⁵⁷ Member Governments, and, in particular, those of the coastal States bordering the Indian Ocean, Arabian Sea, Gulf of Aden and Red Sea, are asked to create policies and related procedures, which facilitate the movement of PCASP and of their firearms and security-related equipment. The shipping industry and to the PCASP service providers shall be informed about these policies and regulations.²⁵⁸ An important mentioned concern of the IMO is thereby that governments should not establish policies and procedures which hinder or may hinder the continuation of maritime trade or interfere with the navigation of ships and that they should ensure that all are consistent with international law.²⁵⁹

²⁵²IMO, MSC.1-Circ. 1406-Rev.3, Revised Interim Recommendations for Flag States regarding the use of Privately Contracted Armed Security Personnel on board ships in the High Risk Area, adopted on 12 June 2015.

²⁵³ IMO Circular 1406, at annex art. 5.

²⁵⁴ IMO Circular 1406, at annex art. 5.2.; Mahard, p. 348.

²⁵⁵ ²⁵⁵ IMO Circular 1406, at annex art. 5.2.7.

²⁵⁶ IMO, MSC.1-Circ.1408-Rev1 Revised interim recommendations for Port and Coastal States regarding the use of Privately Contracted Armed Security Personnel on board ships in the High Risk Area, adopted on 25 May 2012.

²⁵⁷ IMO Circular 1408, at annex art. 1.

²⁵⁸ IMO Circular 1408, at annex art. 5.

²⁵⁹ IMO Circular 1408, at annex art. 6.

dd) IMO Circular 1443

IMO Circular 1443 directly addresses PMSCs.²⁶⁰ The Circular recognises that flag States have the sole discretion to permit PCASPs to operate aboard its vessels as per art. 92 UNCLOS.²⁶¹ The Circular at annex art. 3.1 suggests that PMSCs should establish procedures to provide maritime security services to ship owners and ship operators and to comply with all relevant legal requirements.

Besides guidance for the use of force, Circular 1443 also deals with certification, insurance cover, management and other deployment considerations.²⁶²

Furthermore, risk assessments and compliance mechanisms such as, documentation, certification, authorisation and reporting procedures for the use of PMSCs are proposed.²⁶³

ee) Analysis of IMO Circulars

As shown above, the IMO provides a comprehensive guiding framework to those who are affected by PMSCs. All the Circulars have in common that they are non-legally binding and can therefore only be seen as recommendations. States are only urged to bring them to the attention of all national agencies concerned with anti-piracy activities, ship owners, ship operators, shipping companies, shipmasters and crews. IMO's member governments are further urged to take any necessary action to implement, as appropriate, the revised interim recommendations given in the annexes. The documents do not define self-defence or when force is strictly necessary and reasonable. Furthermore, they do not deal with accountability mechanisms and detailed ship owner's obligations. Hence, we have to sum up that the IMO's guidelines demonstrate an elaborate framework for the use of PMSCs, but for a proper regulation, more practical and enforceable standards are required.²⁶⁴

²⁶⁰ IMO, MSC.1-Circ. 1443, Interim guidance to Private Maritime Security Companies providing Privately Contracted Armed Security Personnel on board ships in the High Risk Area, adopted on 25 May 2012.

²⁶¹ IMO Circular 1443, at annex art. 1.2.

²⁶² IMO Circular 1443, at annex art. 2; 3.4ff.; 4; 5.

²⁶³ IMO Circular 1406, at Annex art. 5.1; IMO circular 1443, at annex art. 3.1.

²⁶⁴ Mahard, p. 349.

3. Interim conclusion

The last sections gave a brief overview over several attempts of international organisations and entities to create legal and ethical guidance for the use of private armed maritime security guards on board of ships.

On the one hand, it can be summarised that a comprehensive patchwork of regulations, as well as private sector codes of conducts and mechanisms, already exists. In many areas, the standards and regulations overlap. Some concentrate more on rules for the use of force or humanitarian issues, others concern the practical employment of armed contractors or implement accreditation processes. Some of the regulations are addressing States, others shipmasters and owners or directly security companies. The set of regulations could lead to the sort of long-term stability of the PMSC industry which it never enjoyed before the African piracy epidemic.²⁶⁵ But on the other hand, all of the mentioned sets of rules have in common that they are not legally binding and thus can be described as soft law in contrast to the binding traditional law, often referred to as “hard law”. The regulations of the UN, the IMO and the other organisations give merely flexible incentives, recommendations, best management practices and guidance. They often only recall already existing national and international law but do not impose any enforceable rules on States or private actors. As a result, States need to incorporate detailed legal and administrative frameworks into their domestic law. Even if often a general framework already exists, more specific regulations and guidance is urgently needed, especially for the use of force and firearms.²⁶⁶

In addition, one needs to rely on the shipping and the security industry to accept the proposed regulations and mechanisms and hope that they will be fully implemented. Hereby, it is often criticised that self-binding regulations often depend too much on the responsibility of the operating companies themselves, and the idea that a fear of a loss in reputation due to a breach of the soft law standards would keep companies from breaching them.²⁶⁷ Furthermore, there is a risk that not all of the PMSCs will undergo prestigious certification processes like the SAMI membership. As a consequence, shipmasters could willingly hire unlicensed guards to cut operational costs.²⁶⁸

²⁶⁵ Pitney & Levin, p. 106.

²⁶⁶ Priddy & Casey Maslen, p. 842f.

²⁶⁷ Spearin, p. 832f.

²⁶⁸ Pitney & Levin, p. 106.

Nevertheless, without any binding international regulations or detailed national law, the maritime and the security sector are left to regulate themselves. Hence, it remains to be seen how States incorporate rules concerning the use of PMSCs and how many private security companies undergo certification processes like the SAMI accreditation.

In order to ensure the compliance with these regulations, States should impose rules about jurisdictional questions and international reporting requirements. Furthermore, rules concerning accountability of PMSC personnel need to be established. Criminal, civil or administrative sanctions on offenders need to be set out and sufficient remedies to victims of violations of mentioned rules have to be provided.

The establishment of an international, non-profit organisation to govern and approve PMSCs would be facilitation for the work of local authorities, shipping owners and security providers and could minimise the risk of human rights violations through a certain degree of control.

4. Regional regulations

The following section aims to find regional regulations for the use of private armed maritime guards and to show the position of different regional bodies towards them.

a) ReCAAP

The Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP) is the first regional government-to-government agreement to promote and enhance cooperation against piracy and armed robbery in Asia.²⁶⁹ The agreement was finalised on 11 November 2004 and entered into force on 4 September 2006. To date, 20 States have become Contracting Parties to ReCAAP, mostly Asian countries but also Australia, Denmark, the Netherlands, Norway, the U.K. and the US.²⁷⁰

In the ReCAAP, the use of PMSCs is not mentioned. Article 16 states that ‘each Contracting Party shall encourage ships, ship owners, or ship operators, where appropriate, to take protective measures against piracy and armed robbery against ships, taking into account the relevant international standards and practices, in particular, recommendations adopted by the International Maritime Organization.’ Hereby, the contracting parties merely accept and

²⁶⁹ Geiss & Petrig, p. 45ff.; Hohenstein, p. 17.

²⁷⁰ ReCAAP Website, available under <http://www.recaap.org/AboutReCAAPISC.aspx> (last seen: 26 October 2015).

reaffirm the guidance of the IMO with its respective Circulars. But they did not create specific regional rules for the use of PMSCs in their waters.

b) African regulations

Also African countries have taken serious steps towards the combat against piracy and armed robbery at sea. Therefore the Djibouti Code of Conduct²⁷¹ and the Code of Conduct concerning the repression of piracy, armed robbery against ships, and illicit maritime activity in West and Central Africa were established. They aim to promote greater regional cooperation between signatories and to enhance their effectiveness in the prevention, interdiction, prosecution, and punishment of persons engaging in piracy and armed robbery against ships.²⁷² Nevertheless, both codes do not deal with the issue of private maritime security at all.

c) Law of the European Union

One does not find distinct regulations of the private maritime security industry in the law of the European Union (EU). The position of the EU towards PMSCs can only be taken from documents of the European Economic and Social Committee (EESC). In 2013, the EESC called on member States to allow the use of private armed guards ‘subject to a strict legal framework which makes the training of guards, inter alia, the responsibility of the member State of their establishment and lays down the terms of the master’s responsibility, particularly in the event of shots being fired.’²⁷³ The EESC published in 2014 another opinion paper about maritime security which dealt with the use of PMSCs as well.²⁷⁴ In point 1.14 it was claimed that ‘internationally agreed standards for maritime security companies

²⁷¹ Djibouti Code of Conduct, signed on 29 January 2009; Code of Conduct concerning the repression of piracy, armed robbery against ships, and illicit maritime activity in West and Central Africa, signed on the 25 June 2013.

²⁷² Geiss & Petrig, p. 48.

²⁷³ Record of the Proceedings of the European Economic and Social Committee on Maritime piracy: strengthening the EU response, 486th plenary session, Brussels, 16 and 17 January 2013, agenda item 10, Point 1.7.

²⁷⁴ European Economic and Social Committee, Opinion of the Section for External Relations on the EU Maritime Security Strategy, 28 July 2014.

should be introduced. The ISOPAS 28007 standard will ensure a level playing field for private armed guard companies globally'. And in point 4.1, the document reaffirms that 'the EESC fully supports the on-board protective measures introduced by shipping companies, as well as the internationally agreed standards regarding private armed guards on ships'.

d) Result

As a result, one can say that at least Asian and European regional bodies generally accept the use of private armed security personnel on board of commercial vessels. Furthermore, they call on member States to implement specific rules for the use of PMSCs and the use of force and the carriage of weapons respectively. Hereby, they refer to the guidance of the IMO and in consequence above mentioned IMO Circulars.²⁷⁵ This referral is only logical because of the membership of the ReCAAP and EU States in the IMO. Hence, it can be said that it lies upon each sovereign State to create a legal framework for the employment of PMSCs within their jurisdiction.

VI. Conclusion

1. Summary of the investigation

The purpose of this study was to find the international legal foundations and requirements for the use of PMSCs when operating on the high seas.

Present documents of international humanitarian law were scrutinized in chapter III. Hereby, the applicability of the Geneva Conventions was denied due to the absence of an international armed conflict for the issue of piracy. Furthermore, the Montreux Document, the Draft International Convention on the Regulation, Oversight and Monitoring of Private Military and Security Companies and various SC Resolutions concerning piracy were presented and it was concluded that no document imposed legally binding regulations for the use of maritime security guards. In this context, the question whether privately contracted armed security guards could be seen as mercenaries under the UN Mercenary Convention was investigated but not answered in the affirmative.

²⁷⁵ See p. 44ff.

Chapter IV dealt with the application of the United Nations Convention on the Law of the Seas. Thereby, a closer look was taken into existing rules about the use of force in self-defence and the problem of the carriage of weapons through different maritime zones was analysed. First of all, no specific rules were found in the UNCLOS for the use of PMSCs. Secondly, it was pointed out that laws and regulations may change in each maritime zone. PMSC operators therefore need to consider that change during their missions. The law of the flag State may differ from regulations of coastal or port States. The use of maritime PCASP is therefore complex und jurisdictional questions remain unresolved due to many different regulations in coastal and port States. Especially the carriage of firearms through territorial waters or into ports continues to be a key issue throughout the different national legislations. Furthermore, the use of individual self-defence is not regulated by binding rules in international law and is dependent on national legislations of the flag State of the traversing vessel.

Despite of the lack of binding international regulations, the field of maritime security is targeted by a vast number of international soft law standards and mechanisms, developed by international organisations, the shipping industry and the security sector. Clear regulations by regional bodies such as the EU or other State unions are not yet available.

Taking everything into consideration, I come to the conclusion that a legal gap exists for the use of private maritime security companies operating on the high seas. The described practical problems for State navies and coast guards²⁷⁶ in the fight against pirates lead to the fact that the private security sector takes over naval functions. And governments, navies and the shipping industry seem to accept this shift towards a private solution.

But we do not find detailed enforceable regulations in international law concerning this shift. The fight against piracy and armed robbery at sea remains legally an issue at State level. The use of force, the protection of nationals and the detention of individuals are traditionally State functions, not of private individuals. Not every State has implemented comprehensive rules for the use of PMSCs yet. Moreover, security companies can easily operate outside of territorial waters and shipping companies can fly under a flag of convenience of a State with lax regulations towards maritime armed guards to evade strict domestic legislations concerning PMSCs.

²⁷⁶ See Chapter II. 2.

The commercial shipping industry is still in the early stages of incorporating PMSC regulations because of the relatively new phenomena of PMSCs and the respective regulatory problems. But self-regulating mechanisms of the shipping and security industry will not replace the power of sovereign States to regulate the security sector or to investigate and prosecute violations of their laws. Incidents on the High Seas differ fundamentally from incidents on land. Violent confrontations between armed contractors and pirates could stay undetected and law enforcement is generally far more difficult far away from the coastline compared to territorial investigations. One has to observe future State practice and possible responses by the international community to see if fundamental binding regulations will be implemented.

2. Final conclusion

The absence of a standardised and enforceable regulatory framework governing PMSCs and PCASP in the maritime domain has left a considerable part of armed maritime security regulation in the domain of flag States. Flag State laws and regulations on the employment and management of PCASP vary substantially and range from permissive and clear rules to total prohibition of deployment of PCASP on board commercial vessels. Nevertheless, clear and understandable regulation in every State is a key issue in preventing excessive force by armed contractors. States should have legislation in the following fields in regard to private maritime security providers:

- The use of force
- The carriage of firearms
- General training and conduct of armed guards
- Reporting instruments
- Employment and certification procedures

If they do not fulfil the obligations laid out by the flag State, PMSCs should be prohibited from travelling on board the vessel.

Thereby, accreditation processes are essential to implement quality standards throughout the maritime security sector. They not only ensure that PMSCs can adequately perform the tasks they are contracted to perform, but additionally ensure that flag States are able to exercise effective control and eventually hold PMSCs accountable. Only flag States would be able to suspend a PMSCs operating license or prohibit a particular PMSC from

operating on that flag State's ships in case its employees act unlawful. Oversight mechanisms such as master and owner reports would clearly help to prevent misconduct. Notwithstanding the implementation of substantial regulatory measures by the majority of flag States, it is suggested that shipping registries ensure regulatory measures are enforced through the establishment of stringent national or international accreditation processes.²⁷⁷ Standardisation processes already exist, such as ISO/PAS 28007 and the SAMI accreditation, but these processes need to be mandatory for each security provider. In addition, PMSC personnel who have committed any international violations in the past should be excluded from certification.

Legal gaps left by the regulation of flag States can be filled by regulations of coastal States or port States. They should require authorisation before a PMSC is operating within the State's waters.²⁷⁸ This approach would pose difficulties for States that suffer from unstable or corrupt governments such as Somalia or Yemen, but the development of regulations would help to ensure that PMSC no longer fall through the cracks of international law.²⁷⁹

As a result we have to state that international law does not contain specific rules or requirements for the employment of privately contracted armed guards in the fight against piracy. States, as well as the shipping companies and the security sector itself are the key players in regulating the use of PMSC.

In practice, there are no real alternative methods to the use of PMSCs. The escort of merchant vessels by security boats, dispatching security teams from land bases²⁸⁰, an arming of the crew²⁸¹ or dispatching single navy soldiers²⁸² on ships do not really present a more effective solution for the protection of merchant vessels. But so far, there are not many reports about misconduct of armed personnel on the open waters, so that we are not on the point of comparing the situation with experiences from the Iraq and Afghanistan war related to private security companies.

Hence, one has to observe the development of the maritime security situation as well as the efforts of the shipping and security industry to impose standards. States need to be

²⁷⁷ Mahard, p. 365.

²⁷⁸ Parsons, p. 179.

²⁷⁹ Parsons, p. 179.

²⁸⁰ Franciconi & Ronzitti, 47.

²⁸¹ Koenig & Salomon, p. 10.

²⁸² Franciconi & Ronzitti, p. 44f.

urged by international organisations and regional bodies such as the European or African Union to adopt national legislation concerning the use of PMSCs.