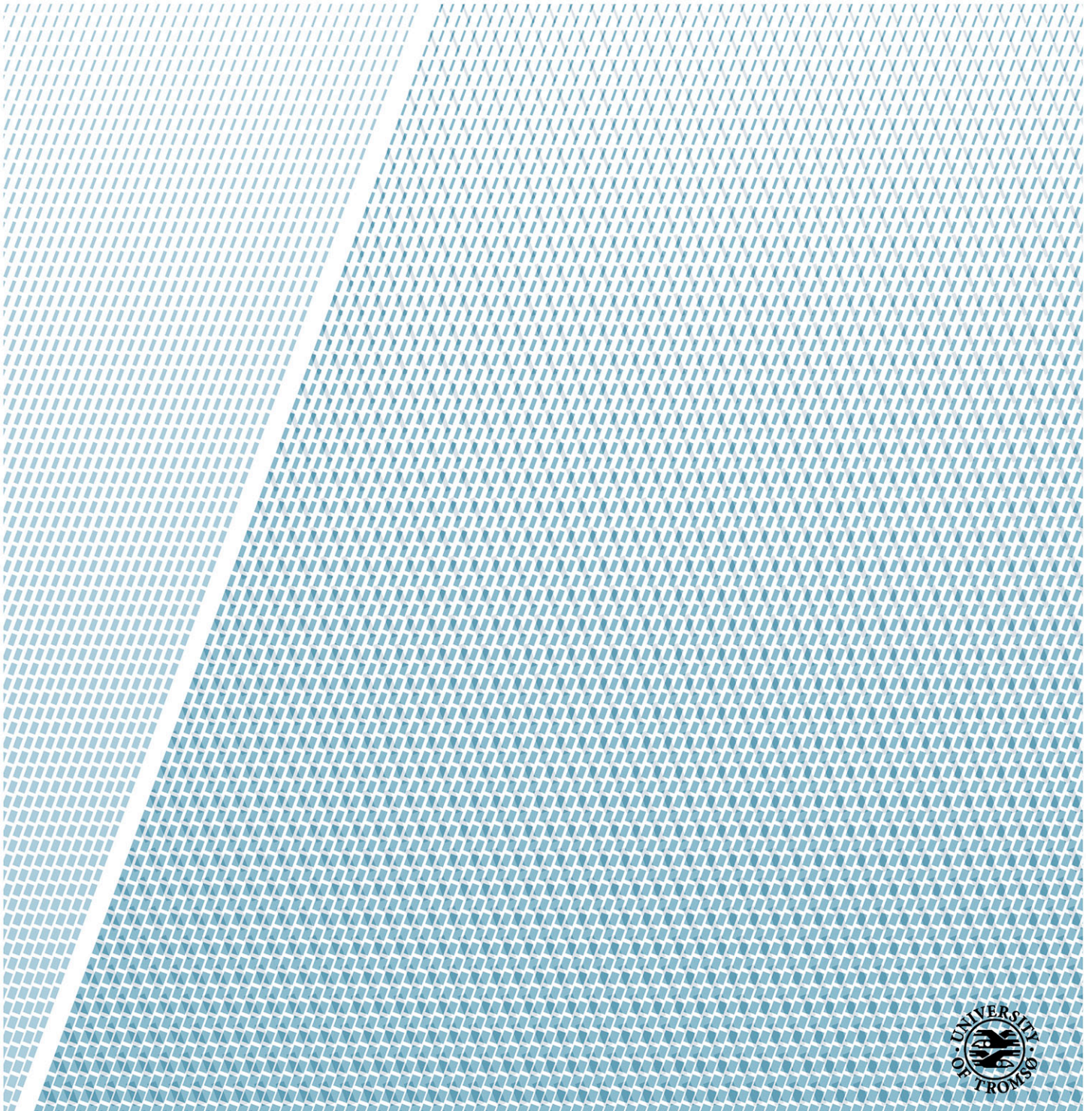


Faculty of Law

The Affect of Privately Contracted Armed Security Personnel on Navigational Rights in the Territorial Sea of Foreign States

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Master thesis in Law of the Sea 1 September 2016



The Affect of Privately Contracted Armed Security Personnel on Navigational Rights in the Territorial Sea of Foreign States

Abstract

In reaction to increasing piracy and armed robbery at sea States have established safety corridors in order to protect merchant ships from attacks. However, vessels cannot be protected everywhere at all times. Therefore, ship owners and operators started to use privately contracted armed security personnel on board their ships, especially in areas with a high risk of attack. Regulation concerning the use of private armed guards still lacks international harmonization.

This thesis addresses the question as to whether the presence of privately contracted armed affects the navigational rights of the vessels carrying them while navigating foreign territorial waters. The two navigational rights which will be dealt with are the right of innocent passage and transit passage. It will be concluded that the presence of private armed guards on board merchant ships does neither affect the right of innocent passage, nor the right of transit passage. Nonetheless, articles 21 and 42 LOSC provide coastal States with the power to adopt laws and regulations regarding arms entering their territorial sea. This has consequences for privately contracted armed security personnel, who may have to stow away their arms and ammunition while navigating through foreign territorial waters.

Keywords: navigation, coastal State, territorial sea, privately contracted armed security personnel, innocent passage, transit passage, prior notification, prior authorization

Table of contents:

List of abbreviations	1
1. Introduction.....	2
1.1 Introducing the topic.....	2
1.2 PCASP – the answer to maritime security risks?.....	4
1.3 The problem and research questions.....	6
1.4 Scope.....	7
1.5 Methodology.....	8
2. The regime of the territorial sea.....	10
2.1 The territorial sea and coastal State jurisdiction.....	10
2.2 Flag State jurisdiction in the territorial sea.....	12
2.3 Restrictions on coastal State jurisdiction in the territorial sea.....	13
2.3.1 Innocent passage.....	13
2.3.2 Prior notification and prior authorization.....	15
2.3.3 Transit passage.....	16
2.3.4 Archipelagic waters.....	19
3. The role of international organizations.....	21
3.1 The International Maritime Organization.....	21
3.2 The International Chamber of Shipping.....	23
4. Does the presence of PCASP on board a merchant ship affect the vessel’s right of innocent passage?.....	25
4.1 Article 19 LOSC.....	25
4.2 Article 21 LOSC.....	29
4.3 Prior notification and authorization.....	31
4.4 Evaluation and conclusion.....	32
5. Does the presence of PCASP on board a merchant ship affect the vessel’s right of transit passage?.....	36
5.1 The transit passage regime in the LOSC.....	36
5.2 Evaluation and conclusion.....	41
6. Conclusion.....	44
7. Bibliography.....	46

List of abbreviations

LOSC	1982 United Nations Convention on the Law of the Sea
PCASP	privately contracted armed security personnel
EEZ	exclusive economic zone
ICJ	International Court of Justice
IMO	International Maritime Organization
ICS	International Chamber of Shipping
ITLOS	International Tribunal for the Law of the Sea

1. Introduction

1.1 Introducing the topic

Piracy and armed robbery at sea are not modern phenomena. In fact, they can be traced back to the classical era when the islands scattering the Aegean Sea provided excellent hiding places for pirates.¹ In the early Middle Ages the Vikings were feared by many; from Western Europe to Eastern Europe and the coasts of North Africa. The turn of the 18th century was the Golden Age of Piracy: Pirates disrupted nearly all important sea-trade routes. In the 1990s, piracy increased again rapidly, especially off the coast of Somalia or in the Strait of Malacca.²

According to the annual report on piracy and armed robbery by the International Maritime Bureau of the International Chamber of Commerce there were 246 actual and attempted attacks in 2015.³ Even though statistics have been varied over the years, in comparison to 1993 there has been an increase of 139% of actual and attempted piracy and armed robbery attacks. In the peak years of 2000 and 2010 the number of actual and attempted attacks was 469 and 445 respectively.⁴

¹ Francesca Pellegrino, 'Historical and Legal Aspects of Piracy and Armed Robbery Against Shipping' (2012) 43/3 Journal of Maritime Law & Commerce 429, 431.

² -, 'History of Piracy' (*Maritime Connector*) <http://maritime-connector.com/wiki/history-of-piracy/> accessed 1 September 2016;

The Way of the Pirates, 'Golden Age of Piracy' < <http://www.thewayofthepirates.com/piracy-history/golden-age-of-piracy/> > accessed 1 September 2016.

³ ICC International Maritime Bureau, 'Piracy and Armed Robbery Against Ships, Report for the Period 1 January – 31 December 2015' (International Maritime Bureau 2016) <<http://www.hellenicshippingnews.com/wp-content/uploads/2016/02/2015-Annual-IMB-Piracy-Report-ABRIDGED.pdf>> accessed 1 September 2016.

⁴ ICC International Maritime Bureau, 'Piracy and Armed Robbery Against Ships, Report for the Period 1 January – 31 December 2015' (ICC International Maritime Bureau 2016) <<http://www.hellenicshippingnews.com/wp-content/uploads/2016/02/2015-Annual-IMB-Piracy-Report-ABRIDGED.pdf>> accessed 1 September 2016;

ICC International Maritime Bureau, 'Piracy and Armed Robbery Against Ships, Report for the Period 1 January – 31 December 2010' (ICC International Maritime Bureau 2011)

<<http://www.simsl.com/Downloads/Piracy/IMBPiracyReport2010.pdf>> accessed 1 September 2016;

ICC International Maritime Bureau, 'Piracy and Armed Robbery Against Ships, Report for the Period 1 January – 31 December 2005' (ICC International Maritime Bureau 2006) <http://www.le-havre.vessels-in-france.net/fichiersdoc/2005_ICC_Piracy_annual_report.pdf> accessed 1 September 2016;

ICC International Maritime Bureau, 'Piracy and Armed Robbery Against Ships, Report for the Period 1 January – 31 December 2004' (ICC International Maritime Bureau 2005)

<http://www.peacepalacelibrary.nl/ebooks/files/ICC_InternationalMaritimeBoard_Annual_Piracy_Report2004.pdf> accessed 1 September 2016.

The continuation of such attacks has sparked national, regional, and international action. Initially the chosen tools for combating piracy were naval forces, the establishment of protected corridors, and Vessel Protection Detachments (teams of uniformed military personnel on board commercial vessels).⁵ Lately, however, States as well as the maritime industry have reacted by introducing the carriage of privately contracted armed security personnel ('PCASP') on board commercial vessels in order to protect the vessel, cargo and crew. Especially when vessels navigate through high risk areas.⁶ PCASP is used as additional protection as opposed to being an alternative to other protective measures such as Best Management Practices.⁷

According to the International Maritime Organization ('IMO'), the competence to regulate PCASP is with the flag State. Several States have introduced national legislation regarding various aspects surrounding PCASP as well as Private Maritime Security Companies, for instance regarding their use, authorization, and certification. States to adopt such legislation include, *inter alia*, Italy, the United Kingdom, Japan, and the Philippines.⁸ Notably, the content of regulation varies widely in each State. For example, the use of PCASP may be confined to so-called High Risk Areas. Alternatively, PCASP may only be employed in case Vessel Protection Detachments are not available.⁹ In many instances the use of Private Maritime Security Companies and PCASP are neither permitted nor prohibited.¹⁰

⁵ Jerry Hofhuis, 'Dutch use of Vessel Protection Detachments in the Indian Ocean' (26 September 2012) <<https://internationalsecuritydiscipulus.wordpress.com/2012/09/26/dutch-use-of-vessel-protection-detachments-in-the-indian-ocean/>> accessed 1 September 2016.

⁶ An example of a high risk area are the waters off the coast of Somalia. Exact coordinates can be found at: IMO Circular Letter No 3606, 'Revision to coordinates of the High Risk Area (HRA)' 5.

⁷ International Maritime Organization, 'Interim Guidance on Use of Privately Contracted Armed Security Personnel on Board Ships Agreed by IMO Safety meeting' (20 May 2011) <<http://www.imo.org/en/MediaCentre/PressBriefings/Pages/27-MS-C-89-piracy.aspx#.V8IAU5OLSRs>> accessed 1 September 2016.

⁸ International Chamber of Shipping, 'Comparison of Flag State Laws on Armed Guards and Arms on Board' (*International Chamber of Shipping and European Community Shipowners Associations*, 2015) <<http://www.ics-shipping.org/docs/default-source/Piracy-Docs/comparison-of-flag-state-laws-on-armed-guards-and-arms-on-boardD6805E4B3E6A.pdf?sfvrsn=0>> accessed 1 September 2016.

⁹ Ilja Van Hespren, 'Protecting Merchant Ships from Maritime Piracy by Privately Contracted Armed Security Personnel: A Comparative Analysis of Flag State Legislation and Port and Coastal State Requirements' (2014) 45/3 *Journal of Maritime Law & Commerce* 361, 383.

¹⁰ *Supra* n 8.

1.2 PCASP – the answer to maritime security risks?

There is not yet global consensus regarding whether PCASP on board commercial vessels should be permitted. However, even the Netherlands, which has been extremely reluctant to allow PCASP on board Dutch merchant vessels, is now moving forward to adopt legislation with a view to change this.¹¹

There are numerous reasons for States to permit the use of PCASP on board their commercial vessels. A particularly persuasive argument is connected to Vessel Protection Detachments provided by a State's military forces. States may not have the capacity to provide enough Vessel Protection Detachment forces, therefore adopting a hybrid approach which permits the use of PCASP when Vessel Protection Detachments are not available. This is reflected in Italian, Belgian, and French legislation concerning the use of PCASP.¹²

Another compelling motive to allow the use of PCASP is of a financial nature. It can be argued that security provided by private companies is less expensive compared to equal service provided by governments through Vessel Protection Detachments.¹³ Ship owners and operators, those actually paying for these protective services, have an interest in obtaining the required protection at the lowest possible costs.

Finally, modern piracy and armed robbery occur in huge areas.¹⁴ While safety corridors can protect vessels in certain otherwise highly risky areas, vessels cannot be protected in all areas which may be risky. With PCASP on board a vessel this issue is not likely to arise, provided PCASP embark and disembark well outside areas considered to be a risk.

There are several arguments against the use of PCASP on board commercial vessels. These include the escalation of violence and the fact that causes of piracy are not addressed. Other ambiguous matters are the role of the master of the ship, and issues

¹¹ Jessica N M Schechinger, 'Responsibility for Human Rights Violations Arising from the Use of Privately Contracted Armed Security Personnel against Piracy. Re-Emphasizing the Primary Role and Obligations of Flag States.' (2015) 27 *Nova et Vetera Iuris Genitum* 30, 45.

¹² Eugenio Cusumano and Stefano Ruzza, 'Contractors as a Second Best Option: The Italian Hybrid Approach to Maritime Security' (2015) 46/2 *Ocean Development & International Law* 111, 115.

¹³ It is important to note the difficulty of making a general statement of the costs of PCASP compared to Vessel Protection Detachments, as it may vary between States.

Van Hespén (n 9) 384;

Cusumano and Ruzza (n 12) 118.

¹⁴ See coordinates of Somali high risk area at: IMO Circular Letter No 3606, 'Revision to coordinates of the High Risk Area (HRA)' 5.

as to the ‘[...] certification, deployment, use of force, accountability, and oversight of PCASP [...]’.¹⁵ Notwithstanding the difficulties and uncertainties of these matters, the fact is that PCASP are being used.¹⁶ There are two instances in which PCASP were used and they defended the vessel against an attack.¹⁷ One of the instances involves the vessel *Maersk Alabama* which had been in the news previously when the vessel was hijacked by pirates and the vessel as well as Captain Phillips were taken hostage.¹⁸

PCASP are provided by private maritime security companies. Thus, it is useful to briefly consider these companies. Other than PCASP, these companies may provide a range of other services, such as security intelligence, risk assessment, training crews, or vessel escorts.¹⁹ Moreover, private maritime security companies are to be distinguished from private *military* companies. The latter primarily operate in situations of armed conflict and, accordingly, international humanitarian law is applicable. Private maritime security companies may operate in such situations, but mostly they do not.²⁰

Harmonized international regulations of private maritime security companies are still lacking. In 2012 the IMO’s Maritime Safety Committee adopted interim guidance for private maritime security companies providing PCASP on board ships in the high risk area.²¹ This document contains minimum standards and it is recommended that private maritime security companies do their best to adhere to them. Since there are not yet international standards in place, ‘[...] guidance would improve governance, reduce [the] potential for accidents, and promote competent, safe and lawful conduct at sea.’²²

¹⁵ Schechinger (n 11) 33.

¹⁶ Christopher Spearin, ‘Private Military and Security Companies v International Naval Endeavours v Somali Pirates’ (2012) 10 *Journal of International Criminal Justice* 823, 824.

¹⁷ Amiin Adow and Al Goodman, ‘Pirates Foiled in a Second Attack on Maersk Alabama Cargo Ship’ (19 November 2009, CNN) <<http://edition.cnn.com/2009/WORLD/africa/11/18/maersk.alabama.pirates/>> accessed 1 September 2016;

Michelle Wiese Bockmann and Alan Katz, ‘Shooting to Kill Pirates Risks Blackwater Moment’ (9 May 2012, Bloomberg) <<http://www.bloomberg.com/news/articles/2012-05-08/shooting-to-kill-pirates-risks-blackwater-moment>> accessed 1 September 2016.

¹⁸ Associated Press in Mogadishu and Dubai, ‘Somali pirates beaten off in second attack on Maersk Alabama’ (18 November 2009, *The Guardian*) <<https://www.theguardian.com/world/2009/nov/18/maersk-alabama-pirates-somalia-guards>> accessed 1 September 2016.

¹⁹ Lars Bangert Struwe, ‘Private Security Companies (PSCs) as a Piracy Countermeasure’ (2012) 35/7-8 *Studies in Conflict and Terrorism* 588, 590 <<http://www.tandfonline.com/doi/full/10.1080/1057610X.2012.684660>> accessed 1 September 2016.

²⁰ Schechinger (n 11) 32.

²¹ The high risk encompasses the waters of, *inter alia*, the Gulf of Aden and off the north-eastern coast of Somalia. For more detailed and updated coordinates of the high risk area see IMO Circular 3606, 5; MSC 1/Circ 1443 (25 May 2012).

²² MSC 1/Circ 1443 (25 May 2012) 3.

It can assist policy development at the domestic level and facilitate harmonization on the international level. The recommendations relate to insurance, the recruitment and training of PCASP, the use of force by PCASP, hierarchy of command and control, and the use, storage, and transport of firearms. Furthermore, private maritime security companies are to be aware of and apply the relevant laws and regulations of the flag-, coastal-, and port States.

While these guidelines are certainly a starting point, there is still no common legislation which is mandatory. On the regional level the European Commission published a Joint Communication to the European Parliament and the Council which states the European Commission should propose common ‘[...] requirements governing the use of PCASPs to ensure a common standard for security companies from Member States and on board [European Union]-flagged vessels.’²³ In addition, the European Union should encourage obligatory standards for PCASP at the international level through the IMO.²⁴

1.3 The problem and research questions

The question of whether the presence of PCASP on board commercial vessels is legal, in addition to numerous other questions relating to PCASP and private maritime security companies, are one area to address. However, this thesis will consider whether the presence of PCASP on board a commercial ship has consequences for the navigational rights of the vessel carrying them. Specifically in the territorial sea of other States. Does it change a vessel’s status with respect to innocent passage? Further one may ask whether the coastal State can require flag States to give prior notification or obtain prior authorization before entering the territorial sea. Another affected navigational right of flag States in the territorial sea of other States is the right of transit passage.

The answers to these questions are as crucial as the issues of accountability and the role of the master to name but some. An increasing number of flag States have adopted legislation concerning PCASP on board their commercial vessels.²⁵ It is essential to

²³ Commission, ‘Joint Communication to the European Parliament and the Council’ JOIN (2014) 9 final, 10.

²⁴ *ibid.*

²⁵ *Supra* n 8.

note, however, that this does not mean that the same States, in their capacity as coastal States, may not object to vessels exercising innocent passage or transit passage while carrying PCASP. Both flag States and coastal States are stakeholders in the discussion surrounding PCASP and therefore have an interest in finding solutions for these questions. Beyond flag- and coastal States, ship owners and operators have a vested interest in resolving these issues to ensure the smooth operation of their businesses. Requirements and standards concerning the use of PCASP, as well as affects on navigational rights in the territorial sea, are undoubtedly of interest to them. The carriage of PCASP may restrict their right of innocent passage or transit passage, which, as the freedom of navigation, are cornerstones of international maritime trade.

1.4 Scope

First, this thesis will be confined to commercial vessels, excluding military vessels and other governmental vessels. The latter types of vessels have a different legal status and may even be subject to immunity. Further, military vessels and other government vessels can be excluded due to the fact that they do not carry PCASP, because PCASP exclusively are used for the protection of merchant ships.

Second, the thesis will solely deal with PCASP and hence, Vessel Protection Detachments, which are governmental military forces, will not be dealt with. Vessel Protection Detachments form part of a State's military to which a different set of rules applies.

Third, there are several other questions as to the use of PCASP, the regulation of private maritime security companies which employ PCASP, issues of state responsibility, human rights and more. In addition, there are problems as to PCASP and the use of force, specifically issues such as attributibility and the right of self-defense. It is not the purpose of this work to seek to answer questions relating to the use of force by PCASP. Moreover, the research questions ask whether the mere *presence* of PCASP on board affects vessels' navigational rights. This automatically excludes the *use* of force from the discussion.

These matters also extend beyond the territorial sea. The aim of this work, however, is to analyze navigational rights of flag States and coastal State jurisdiction in the territorial sea. Coastal State powers on navigational rights of foreign vessels in the

territorial sea are distinct from those in the EEZ and the high seas. This justifies the exclusive focus on the territorial sea and the corresponding navigational rights.

Finally, it is necessary to define the term PCASP for the purpose of this work. PCASP refers exclusively to privately contracted guards, hence excluding any governmental or military personnel. PCASP operate independently from the State, especially due to the fact that with there are multiple States involved: the flag State of the vessel, the State of nationality of the guard, and the State in which the private maritime security company is situated. Furthermore, PCASP are presumed to be on board merchant ships, as opposed to a separate escort vessel, as well as carrying lethal weapons such as firearms.

1.5 Methodology

In order to answer the research questions posed in section 1.3, it is necessary to introduce the regime of the territorial sea. The history, nature, and fundamental characteristics of the territorial sea as a maritime zone must be presented first in chapter 2, as this contributes towards the understanding of the navigational rights possessed by foreign vessels which exist in the territorial sea. Next, one must gain an understanding of coastal State jurisdiction, followed by an examination of the navigational right of foreign vessels in the territorial sea. The relevant navigational rights are innocent passage, transit passage, as well as the navigational regime applicable to archipelagic waters.

International organizations have an important role in combating piracy and armed robbery at sea. They have contributed greatly so far in advancing cooperation between States in order to combat piracy as well as attempting to set common standards for PCASP and private maritime security companies. Therefore, the IMO and the International Chamber of Shipping ('ICS') will be examined briefly in chapter 3.

Chapters 4 and 5 will deal with the research questions. In discussing and answering the research question, first attention must be paid to the applicable law. This thesis will examine the law in times of peace. The central legal document governing the oceans is therefore the 1982 United Nations Convention on the Law of the Sea ('LOSC').²⁶

²⁶ United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3 (LOSC).

However, beyond codified law, the work of international organizations as well as declarations and State practice should be considered. There may be general trends which can be identified. Arguments in favor and in opposition of PCASP affecting navigational rights in the sea must be presented and evaluated. Finally, chapter 6 will provide a conclusion.

2. The regime of the territorial sea

2.1 The territorial sea and coastal State jurisdiction

In the development of the law of the sea there have been two opposing doctrines concerning navigation. On the one hand, the freedom of the high seas advanced by Hugo Grotius at the beginning of the 17th century, and on the other hand, the notion of the closed sea. While during the 17th and 18th century the primary concern of coastal States was to secure their coast, the industrial revolution prompted the interest of fisheries. In this period State practice relating to territorial waters developed, *albeit* to a limited extent and not uniformly so as to create customary law.²⁷ In the 19th century it had become increasingly acceptable for European States to assert some degree of jurisdiction or control over their adjacent waters. This entailed the regulation of, *inter alia*, trade, and criminal and civil matters on board foreign and domestic vessels.²⁸

A significant milestone was the adoption of the Convention on the Territorial Sea and the Contiguous Zone in 1958 ('1958 Convention').²⁹ It codified several important issues of the territorial sea regime as it exists today, such as the existence of a right to innocent passage for foreign ships. The 1958 Convention was not entirely successful. Even after the adoption of the 1958 Convention certain matters were still the object of severe disagreement. One of the pivotal issues which were resolved at UNCLOS III that had been neglected in the 1958 Convention was the 12nm territorial sea. This allowed negotiations to move on to related matters such as international straits.³⁰

The LOSC provides that the sovereignty of a coastal State extends beyond its land territory and internal waters. This sovereignty covers the airspace above the water, water column, and the sea-bed and sub-soil. The nature of the territorial sea is that it is inherent, meaning it exists independently, without having to be proclaimed by the

²⁷ Donald R Rothwell and Tim Stephens, *The International Law of the Sea* (2nd edition, Hart Publishing 2016) 3, 60-62.

²⁸ In certain instances even the assertion of sovereignty.

Rothwell and Stephens, *The International Law of the Sea* (n 27) 62.

²⁹ Convention on the Territorial Sea and Contiguous Zone (adopted 29 April 1958, entered into force 10 September 1964) 516 UNTS 205 (1958 Convention).

³⁰ Rothwell and Stephens, *The International Law of the Sea* 69-71; LOSC (n 26) art 3.

coastal State.³¹ The territorial sea is measured from baselines established according to the relevant provisions in the LOSC.³² Within the baselines lie internal waters. Today, the territorial sea forms part of the territory of the coastal State. The sovereignty of the coastal State over its territorial sea is similar in nature to sovereignty over land. A difference being that a coastal State's sovereignty over the territorial sea is restricted by international law to a greater extent than the sovereignty over its land territory.³³

The development of the territorial sea constitutes an assertion of sovereignty by coastal States, restraining the freedom of navigation on the high seas as envisioned by Hugo Grotius at the beginning of the 17th century. Nonetheless, a prominent feature of the territorial sea today is the preservation of basic navigational rights for foreign flagged vessels. This was especially important to gain consent from the great maritime States who wanted their merchant ships and military vessels to be able to navigate freely. The outcome in the LOSC is a carefully crafted balance of different interests, rights, and duties.

The regime of the territorial sea '[...] reflects, to a great extent, the reconciliation of two different interactive *desiderata* from coastal sovereignty and the freedom of navigation respectively, which always coexist in a seesaw game.'³⁴ Later sections will consider specific navigational rights of foreign vessels in the territorial, namely innocent passage and transit passage.

First, however, it is useful to briefly address the applicable rules on criminal and civil jurisdiction of coastal States over foreign vessels in the territorial sea. Article 27(1) LOSC provides that criminal jurisdiction of coastal States 'should not be exercised on board a foreign ship passing through the territorial sea to arrest any person or to conduct any investigation in connection with any crime committed on board the ship during passage [...]'. Notwithstanding, the provision makes four exceptions, for example: when the consequences of the crime extends to the coastal State, or the crime disturbs the peace of the country or good order of the territorial sea.³⁵ Notably, article

³¹LOSC (n 26) art 2.

³² *ibid* arts 3, 4;

The relevant articles in the LOSC on baselines are arts 5-11 and 14.

³³Haijiang Yang, *Jurisdiction of the Coastal State over Foreign Merchant Ships in Internal Waters and the Territorial Sea* (Hamburg Studies on Maritime Affairs Volume 4, Springer Berlin 2006) 124.

³⁴ Yang (n 33) 115.

³⁵ LOSC (n 26) art 27(1a,b).

27 LOSC only applies to crimes committed before the vessel enters the territorial sea and to vessels which do not enter or come from a domestic port or internal waters.³⁶

With regard to civil jurisdiction article 28 LOSC stipulates that coastal States ‘[...] *should not* stop or divert a foreign ship passing through the territorial sea [...]’ in order to exercise civil jurisdiction regarding an individual on board the vessel.³⁷ This provision adopts the wording ‘*should not*’, indicating that it is recommended but not mandatory.³⁸ Unless the vessel is proceeding from internal waters, coastal States may only exercise their enforcement jurisdiction for ‘[...] obligations or liabilities assumed or incurred by the ship itself in the course or for the purposes of its voyage through the waters of the coastal State’.³⁹

A State which may have alternative jurisdiction in the territorial sea is the flag State of the vessel. The next section will briefly present the most important aspects of flag State jurisdiction relevant for this thesis.

2.2 Flag State jurisdiction in the territorial sea

Unless otherwise provided in international treaties, flag States have exclusive jurisdiction over their vessels on the high seas.⁴⁰ Additionally, flag States have certain duties as provided for in article 94 LOSC. Flag States are to effectively exercise their jurisdiction and control in administrative, technical, and social matters. They have to ensure the safety of their vessels at sea. While this exclusive jurisdiction and the flag State’s duties also generally apply in the EEZ, here the sovereign rights of the coastal State pose significant restrictions.⁴¹ Where the coastal State has sovereign rights, the latter prevail over flag State jurisdiction.

In contrast to the high seas and the EEZ, in the territorial sea the coastal State generally has jurisdiction by virtue of its sovereignty. Nonetheless, there are restrictions upon the sovereignty of the coastal State in its territorial sea, especially concerning

³⁶ *ibid* art 27(5).

³⁷ *ibid* art 28(1).

³⁸ Yoshifumi Tanaka, ‘Navigational Rights and Freedoms’ in Donald R Rothwell, Alex G Oude Elferink, Karen N Scott, Tim Stephens (eds), *Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 545.

³⁹ LOSC (n 26) art 28(2,3).

⁴⁰ *ibid* art 92(1);

Articles 108 – 111 LOSC constitute exceptions to the exclusive jurisdiction of the flag State on the high seas.

⁴¹ LOSC (n 26) arts 58(2,3), 56(1).

navigation by foreign vessels. As preciously alluded to, in certain circumstances foreign vessels have rights of innocent passage or transit passage. These two regimes and the regime of archipelagic waters will be presented in the following sections.

2.3 Restrictions on coastal State jurisdiction in the territorial sea

2.3.1 Innocent passage

Innocent passage allows foreign vessels to navigate through the territorial sea of other States, to proceed to and from internal waters, or to call at a port facility.⁴² The customary right to innocent passage is reciprocal and applies to all foreign ships, including war ships.⁴³ It must be continuous and expeditious; stopping and anchoring is permitted so long as it is incidental to ordinary navigation or necessitated by *force majeure* or distress.⁴⁴

The right of innocent passage ‘[...] is regarded as the main restriction imposed by international law upon the sovereignty of the coastal State over its territorial sea [...].’⁴⁵ The coastal State has limited means to regulate innocent passage. According to article 21 LOSC, the coastal State can adopt laws and regulations on a number of issues, for instance the safety of navigation, fishing, the preservation of the environment, and the prevention of infringement of customs, fiscal, immigration or sanitary laws and regulations of the coastal State.⁴⁶ In addition, coastal States can establish sea lanes and traffic separation schemes which vessels in innocent passage have to observe. However, among other factors, coastal States have to take into account the recommendations of the competent international organization, for example the IMO, as well as routes which have been used customarily.⁴⁷

Notwithstanding the ability to regulate innocent passage of foreign ships to a certain extent, coastal States must be careful not to hamper innocent passage. This means the coastal State may not divert or stop a vessel exercising innocent passage, unless it is according to provisions in the LOSC, for example in accordance with LOSC

⁴² LOSC (n 26) art 18(1).

⁴³ Rothwell and Stephens, *The International Law of the Sea* (n 27) 230;

LOSC (n 26) art 17.

⁴⁴ LOSC (n 26) art 18(2).

⁴⁵ Yang (n 33) 115.

⁴⁶ LOSC (n2 6) art 21(1a,e,f,h).

⁴⁷ *ibid* art 22(1,3a,b).

provisions 21 and 22. According to article 24(1) LOSC, ‘not hampering innocent passage’ means that coastal States cannot ‘[...] impose requirements on foreign ships which have the practical effect of denying or impairing the right of innocent passage or discriminate in form or fact against ships of any State or against ships carrying cargoes to, from or on behalf of any State.’⁴⁸

The right of innocent passage is accompanied by provisions as to what passage is *non-innocent*. The restrictions upon coastal State powers do not apply to non-innocent vessels. On the contrary, subject to the vessel not enjoying sovereign immunity, the full sovereignty of the coastal State applies to them.

As long as passage is not prejudicial to the peace, good order or security of the coastal State in the territorial sea passage is to be considered innocent. Furthermore, passage must not be contrary to the LOSC or other rules of international law.⁴⁹ The question then arises as to what kind of passage is considered as prejudicial to the peace, good order and security of the coastal State in the territorial sea. Article 19(2) provides guidance on the matter. Activities considered as prejudicial are, *inter alia*: the threat or use of force; any exercise or practice of weapons of any kind; the loading or unloading of any commodity, currency, or person contrary to the customs, fiscal, immigration, or sanitary laws and regulations of the coastal State; or any other activity not having a direct bearing on passage.⁵⁰

Here it is important to note that the wording ‘activities’ indicates that omissions are not included.⁵¹ Even though it is not uniformly accepted, the list of activities contained in article 19(2) LOSC is said to be non-exhaustive due to its last paragraph, which reads ‘any other activity not having a direct bearing on passage’.⁵² The right of innocent passage is an extremely important matter for coastal States. Article 19(2) LOSC has the potential to be interpreted broadly resulting in possibly excessive limitations on the right of innocent passage.⁵³

⁴⁸ LOSC (n 26) art 24(1).

⁴⁹ *ibid* art 19(1).

⁵⁰ *ibid* art 19(2a,b,g,l).

⁵¹ Rothwell and Stephens, *The International Law of the Sea* (n 27) 232.

⁵² The USA and USSR for example released a Joint Statement that they considered it to be an exhaustive list: USA-USSR Joint Statement on a Uniform Interpretation of Rules of International Law Governing Innocent Passage (adopted 23 September, 1989, Wyoming, USA).

⁵³ Rothwell and Stephens, *The International Law of the Sea* (n 27) 232-233.

In case the passage of a foreign vessel is regarded to be non-innocent, article 25 LOSC provides the relevant coastal State with the legal basis to prevent passage by ‘taking the necessary steps’.⁵⁴ The phrasing is non-specific and seems to afford the coastal State a wide margin of appreciation regarding its meaning. Indeed, the article does not expressly state which measure to take. Notwithstanding, coastal States may resort to

‘[...] an exchange of communications requesting a delinquent ship to refrain from certain acts, a request that the ship leave the territorial sea immediately, the positioning of vessels to prevent the ship from continuing its passage, the intervention of state authorities such as a Coast Guard or Maritime Police in order to board the vessel to direct it away from the territorial sea, or subject to threat posed to the coastal state by the delinquent ship the use of armed force.’⁵⁵

Additionally, ITLOS case-law suggests that the use of force by the coastal State is to be avoided and that necessity and proportionality, depending on the particular circumstances of the case, are to be applied.⁵⁶ Article 25 further accords coastal States the right to non-discriminately suspend innocent passage in areas of the territorial sea when this is necessary for the protection of its security, including weapons exercises.

While today the right of innocent passage is generally regarded to be customary international law, the exact content is still not entirely clear. For example, there is a State practice of denying innocent passage to vessels which carry nuclear waste.⁵⁷ Some States require vessels with ultra-hazardous wastes to notify the coastal State before entering the territorial sea. In other instances coastal States assert these vessels even need to obtain prior authorization before entering their territorial sea. These two doctrines of prior notification and authorization are discussed in the next section.

2.3.2 Prior notification and prior authorization

The concepts of prior notification and prior authorization entail foreign vessels to notify or ask the coastal State for permission before entering the territorial sea respectively. Prior notification and authorization do not form part of customary

⁵⁴ LOSC (n 26) art 25(1).

⁵⁵ Rothwell and Stephens, *The International Law of the Sea* (n 27) 233.

⁵⁶ *M/V Saiga (NO 2) (Saint Vincent and the Grenadines v Guinea)* (1999) 120 ILR 143, 155-156.

⁵⁷ Rothwell and Stephens, *The International Law of the Sea* (n 27) 239.

international law and when applied, are highly controversial. They should not be confused with port entry requirements which coastal States may legitimately adopt.

As previously mentioned, some coastal States require notification from foreign vessels before they enter the coastal State's territorial sea, especially if the vessel carries extremely dangerous goods.⁵⁸ However, the LOSC expressly provides for innocent passage of nuclear-powered vessels and for vessels carrying nuclear or other dangerous or noxious substances. As long as vessels carry the relevant documents and observe special precautionary measures established for such vessels by international agreements they enjoy the right of innocent passage.⁵⁹ Nevertheless, there have been instances in which vessels carrying nuclear materials were asked not to enter a State's territorial sea were required to ask for prior authorization by coastal States. At the very least coastal States protested against these vessels entering their territorial seas.⁶⁰ Even though this practice contradicts article 23 LOSC, in the case of nuclear or ultra-hazardous materials there are undoubtedly serious environmental concerns.

There may be legitimate security concerns regarding PCASP which may or may not justify coastal States to ask for prior notification or authorization. The question in later chapters will be whether coastal States are permitted to require vessels carrying PCASP to notify or ask for authorization before entering their territorial sea.

2.3.3 Transit passage

The right of transit passage provides vessels with the right to transit through straits used for international navigation. Similar to innocent passage, all ships, meaning warships and commercial vessels, have the right to exercise transit passage as long as certain conditions are fulfilled.⁶¹ Ships can only enjoy the right of transit passage in straits which are used for international navigation and which connect two areas of high

⁵⁸ Robin R Churchill, 'The Impact of State Practice on the Jurisdictional Framework contained in the LOS Convention' in Alex G Oude Elferink (ed), *Stability and Change in the Law of the Sea: The Role of the LOS Convention* (Martinus Nijhoff Publishers 2005) 115.

⁵⁹ LOSC (n 26) art 23.

⁶⁰ Jon M Van Dyke, 'Sea Shipment of Japanese Plutonium under International Law' (1993) 24 *Ocean Development and International Law* 399;

Duncan E J Currie and Jon M Van Dyke, 'The Shipment of Ultrahazardous Nuclear Materials in International Law' (1999) 8 *RECIEL* 113.

⁶¹ LOSC (n 26) art 38(1).

seas and/or EEZ.⁶² This means vessels transit through the territorial sea of one or more States. Hence, a strait in which transit passage applies cannot be broader than 24 nm. Further, there is no right of transit passage in case there exists a route of ‘[...] similar convenience with respect to navigational and hydrographical characteristics [...]’.⁶³

There are a number of other exceptions concerning the exercise of the right of transit passage. First, even though transit passage does generally not apply to internal waters, it may still apply in case internal waters are created by the drawing of straight baselines according to article 7 LOSC.⁶⁴ Then straight baselines enclose parts of the sea which were previously considered part of the territorial sea. Due to the fact that this is an outward extension of the coastal State’s sovereignty, transit passage and innocent passage still apply in these newly enclosed waters. Second, transit passage does not exist when the ‘[...] strait is formed by an island of a State bordering that strait and its mainland [...]’ as long as there is a route of similar convenience through the EEZ or high seas.⁶⁵ To the latter situation as well with a dead end straits, non-suspendible innocent passage applies.⁶⁶

It is important to recognize that the right of transit passage for foreign ships does not otherwise alter the legal status of the waters to which it applies; nor does it affect the exercise of sovereignty or jurisdiction within these waters of bordering States so long as it is exercised in accordance with the applicable provisions contained in Part III LOSC and rules of international law.⁶⁷

Bordering States retain the power to regulate certain aspects of transit passage through the strait. Subject to a number of requirements, they can regulate with respect to the safety of navigation and maritime traffic; the prevention, reduction, and control of pollution; fishing; and the loading or unloading of any commodity, currency or person which is in contravention of their customs, fiscal, immigration or sanitary laws and regulations.⁶⁸ In adopting laws and regulations, bordering States may not discriminate or go beyond what are generally accepted international regulations.⁶⁹ In addition,

⁶² *ibid* art 37, 38(2).

⁶³ *ibid* art 36.

⁶⁴ *ibid* art 35(a).

⁶⁵ *ibid* art 38(1)

⁶⁶ *ibid* art 45.

⁶⁷ *ibid* art 34.

⁶⁸ *ibid* arts 42(1a-d).

⁶⁹ *ibid* arts 41(3), 42(2).

bordering States must *not hamper or suspend* transit passage through the strait. Nor can they adopt laws or regulations with respect to transit passage which have the ‘[...] practical effect of denying, hampering or impairing the right of transit passage [...]’.⁷⁰

Vessels which exercise transit passage have certain duties. The exercise of transit passage must be continuous and expeditious.⁷¹ Ships must, *inter alia*, refrain from any threat or use of force; refrain from any activities other than those incidental to their normal modes of transit; comply with generally accepted international regulations, procedures, and practices against pollution and for safety at sea.⁷² Further, ships exercising transit passage must comply with the laws and regulations which were adopted by the bordering State in accordance with Part III LOSC.⁷³

Finally, article 45 LOSC prescribes that where transit passage does not apply to a strait used for international navigation because it does not fulfill the geographic criterion, the regime of innocent passage applies. Through these straits innocent passage is not suspensible.

It is noteworthy to mention that the outward extension of the territorial sea up to 12 nm is a development which increased the importance of transit passage. Before the extension of the territorial sea many of today’s straits had high seas corridors where foreign vessels were able to exercise the freedom of navigation. For example, with a territorial sea limit of 3nm on each side, the Straits of Gibraltar, Malacca, and Hormuz would all have high seas or EEZ corridors.⁷⁴

The right of transit passage is of paramount importance for the freedom of navigation and international commerce. It affords vessels an even stronger right of transit than the regime of innocent passage, *inter alia* due to the fact transit passage is not suspensible

⁷⁰ *ibid* arts 44, 42(2)

⁷¹ *ibid* art 38(2)

⁷² *ibid* art 39

⁷³ *ibid* art 42(4,5).

⁷⁴ On their narrowest point in width is 7.5 nm (Strait of Gibraltar), 8.4 nm (Strait of Malacca), and 21 nm (Strait of Hormuz).

Adam Weinrit (ed), *International Recent Issues About ECDIS, E-Navigation and Safety at Sea, Marine Navigation and Safety of Sea Transport* (CRC Press, 2011) 170;

Mohd Hazmi bin Mohd Rusli, Maizatun binti Mustafa, and Wan Izatul Asma binti Wan Talaat, ‘Replacing the transit passage regime with freedom of navigation in the Strait of Malacca: A case study with special reference to the Korea Strait’ (2013) 78 *Ocean and Coastal Management* 25, 30;

Nilufer Oral, ‘Transit Passage Rights in the Strait of Hormuz and Iran’s Threats to Block the Passage of Oil Tankers’ (2012) 16/16 *AJIL* < <https://www.asil.org/insights/volume/16/issue/16/transit-passage-rights-strait-hormuz-and-iran%E2%80%99s-threats-block-passage>> accessed 1 September 2016.

and coastal States have less power to regulate passage. Since highly important straits such as the Strait of Malacca are in areas with a high risk of piracy attacks it is important to examine whether the carriage of PCASP through such straits impacts a vessel's right to transit passage.

2.3.4 Archipelagic waters

The creation of a navigational regime for archipelagic waters occurred parallel to the debate on transit passage. The outcome of the discussion was Part IV of the LOSC. The sovereignty of an archipelagic State extends to its archipelagic waters, which lie within its archipelagic baselines.⁷⁵ Sovereignty of the archipelagic State is, however, subject to other provisions in Part IV LOSC.⁷⁶

In the territorial sea and archipelagic waters of an archipelagic State, the regime of innocent passage generally applies.⁷⁷ A distinctive feature of archipelagic waters is the regime of archipelagic sea lanes passage. Essentially archipelagic sea lanes passage is rather similar to the regime of transit passage. The archipelagic State can designate sea lanes which are suitable for continuous and expeditious passage through its archipelagic waters and territorial sea.⁷⁸ The sea lanes established by the archipelagic State are to include all normal passage routes used for international navigation.⁷⁹ The purpose of archipelagic sea lanes passage is for foreign vessels to navigate in their 'normal mode' between two parts of EEZ and/or high seas. The duties of vessels exercising archipelagic sea lanes passage as well as duties of archipelagic States and their laws and regulations relating to archipelagic sea lanes passage are the equivalent of those concerning transit passage; articles 39, 40, 42, and 44 apply *mutatis mutandis*.⁸⁰

The significance of archipelagic waters lies with the fact that specifically Indonesian archipelagic waters are of high importance for international maritime traffic. For example, a vessel would have to travel through Indonesian waters in order to transit

⁷⁵ Archipelagic baselines have to be established in accordance with article 47 LOSC.

⁷⁶ LOSC (n 26) art 49(1,3).

⁷⁷ Archipelagic waters are those landward of archipelagic baselines; LOSC (n 26) art 52(1).

⁷⁸ *ibid* art 53(1).

⁷⁹ *ibid* art 53(3,4).

⁸⁰ *ibid* art 54.

through the Strait of Malacca. Having to navigating around archipelagic waters would constitute a huge restriction on the freedom of navigation.

In archipelagic waters vessels have either a right of innocent passage or archipelagic sea lanes passage, the latter of which is generally similar to transit passage. Therefore, the discussions in chapters 4 and 5 on the affect of PCASP on a vessel's right to innocent passage and transit passage respectively, is also relevant to navigation through archipelagic waters.

Chapter 2 has provided an overview of the basic characteristics of the territorial sea. Moreover, the restrictions of coastal State powers by the regimes of innocent passage and transit passage, which also apply in archipelagic waters, were presented. Before discussing the research questions it is necessary to briefly examine some relevant international organizations and their output which may influence the regulation of PCASP.

3. The role of international organizations

International organizations may have significant influence on regulation and standard setting established by individual States. For example, the LOSC provides that for certain regulation States need the approval of the IMO.⁸¹ In addition, many IMO Conventions are widely ratified, a number of which apply to 98% of the world merchant shipping tonnage.⁸²

In the context of piracy and the presence of PCASP on board merchant ships the IMO as well as the International Chamber of Shipping ('ICS') are relevant. The United Nations Security Council has adopted a number of Resolutions on piracy off the Somali coast and the Gulf of Guinea. Several of the resolutions⁸³ mention PCASP, but do not help answering the research questions. Therefore, the United Nations Security Council will not be dealt with.

This chapter will briefly examine two relevant international organizations, their role regarding the presence of PCASP on board merchant ships, and whether they have issued any recommendations relevant for answering the research questions discussed in subsequent chapters.

3.1 The International Maritime Organization

The IMO is a specialized agency of the United Nations and is the

'[...] global standard-setting authority for the safety, *security* and environmental performance of international shipping. Its main role is to create a regulatory framework for the shipping industry that is fair and effective, universally adopted and universally implemented.'⁸⁴

⁸¹ For instance LOSC arts 22(3a), 41(4).

⁸² International Maritime Organization, 'About IMO' <<http://www.imo.org/en/About/Pages/FAQs.aspx>> accessed 1 September 2016.

⁸³ The most recent is: UNSC Res 2246 (10 November 2015) UN Doc S/RES/2246 (2015)

⁸⁴ International Maritime Organization 'Introduction to IMO' <<http://www.imo.org/en/About/Pages/Default.aspx>> accessed 1 September 2016.

Structurally the IMO has several committees which work on different issues.⁸⁵ The relevant committee for PCASP and piracy in general is the Maritime Safety Committee.

The Maritime Safety Committee's position on PCASP has changed over time. First, in 1993, the use of PCASP was expressly discouraged. Then, about 15 years later, the Maritime Safety Committee reduced its stance, recommending flag States to discourage the use of PCASP.⁸⁶ Finally, in 2015 the Maritime Safety Committee used language that was even weaker. While pointing out the presence of PCASP may lead to increasing violence, the Maritime Safety Committee nevertheless stated that

‘[t]he carriage of such personnel and their weapons is subject to flag State legislation and policies and is a matter for flag States to determine in consultation with ship owners, companies, and ship operators, if and under which conditions this will be allowed.’⁸⁷

Thus, the Maritime Safety Committee adopted the stance to neither endorse nor condemn the use of PCASP. Notwithstanding, it also saw the need for the IMO to ‘[...] develop appropriate guidance, bearing in mind the need for extreme caution in matters relating to liability, jurisdiction, sovereignty, ships in transit and rights of innocent passage, among other issues.’⁸⁸ Through the Maritime Safety Committee the IMO has developed and adopted interim guidance on the use of PCASP in high risk areas concerning, for instance, guidance for ship owners, operators, Masters, flag States, and private maritime security companies.⁸⁹

In addition to the adoption of interim recommendations for port and coastal States regarding the use of PCASP, in particular their embarkation and disembarkation, the Maritime Safety Committee has distributed a questionnaire in order to gain information on coastal and port State requirements relating to PCASP on board foreign

⁸⁵ International Maritime Organization ‘Structure of IMO’ <<http://www.imo.org/en/About/Pages/Structure.aspx>> accessed 1 September 2016.

⁸⁶ International Maritime Organization, ‘Private Armed Security’ <<http://www.imo.org/en/OurWork/Security/PiracyArmedRobbery/Pages/Private-Armed-Security.aspx>> accessed 1 September 2016; MSC/Circ.623 (June 18, 1993) Annex para 40; MSC.1/Circ.1333 5 (June 26, 2009) Annex para 5.

⁸⁷ MSC.1/Circ.1333/Rev.1 (12 June 2015) Annex, para 7.

⁸⁸ *Supra* n 86.

⁸⁹ See MSC.1/Circ.1405/Rev.2 (May 2012); MSC.1/Circ.1406/Rev.3 (June 2015); MSC.1/Circ.1443 (25 May 2012); *Supra* n 86.

ships.⁹⁰ Markedly, this questionnaire also contains a section asking to provide information on requirements for the use of PCASP in territorial waters. It is important to note that not all IMO member States have answered the questionnaire yet. Moreover, in some instances questions are not answered properly. The questionnaire is directly relevant for questions concerning the effect of PCASP on navigational rights such as innocent passage and transit passage and will be revisited in chapter 4.

3.2 The International Chamber of Shipping

The ICS was established in the beginning of the 20th century and is the primary international trade association for the shipping industry, representing ship owners and operators. Its membership is comprised of shipping companies which operate over 80% of the world's merchant tonnage. The organization deals with technical, legal, employment affairs, and policy issues which are of interest to international shipping. The ICS develops best practices and guidance, and promotes the interests of ship owners and operators in matters which concern shipping policy and ship operations.⁹¹ The goal is to have a '[...] regulatory environment which supports safe shipping operations protection of the environment and adherence to internationally adopted standards and procedures.'⁹²

The ICS consists of numerous national ship owners' organizations. These members appoint representatives to form part of committees which work on selected topics. These committees develop the policy which the ICS represents at international organizations such as the IMO. The national ship owners' organizations in turn advise companies on the national level on international developments.⁹³

The organization also provides a number of free resources. Relevant in the context of PCASP is a table comparing flag State laws on PCASP and weapons on board

⁹⁰ Available at the IMO website: <<http://www.imo.org/en/OurWork/Security/PiracyArmedRobbery/Pages/Private-Armed-Security.aspx>> accessed 1 September 2016.

⁹¹ International Chamber of Shipping 'About ICS' <<http://www.ics-shipping.org/about-ics/about-ics>> accessed 1 September 2016.

⁹² International Chamber of Shipping 'Statement of Purpose' <<http://www.ics-shipping.org/about-ics/statement-of-purpose>> accessed 1 September 2016.

⁹³ International Chamber of Shipping 'How it Works' <<http://www.ics-shipping.org/docs/default-source/about-ics/the-international-chamber-of-shipping-ics-representing-the-global-shipping-industry.pdf?sfvrsn=18>> accessed 1 September 2016.

commercial vessels.⁹⁴ The list provides an overview of whether flag States have adopted legislation regulating private armed guards and weapons on board merchant ships. While this does not directly correlate with the research question of navigational rights in the territorial sea of other States, the table does provide some relevant information.

This type of table has obviously value for ship owners and operators in order to have an overview on flag State legislation on the issue. In addition, the list assists in assessing the position or regulation of coastal States on the affect of PCASP on board merchant vessels on navigational rights in their territorial waters, *albeit* in a limited manner.

Other types of ICS documents which are relevant include the ‘BMP4 Best Management Practices for Protection against Somali Piracy’.⁹⁵ According to this document the ICS’s stance on the use of armed private maritime security contractors is that it is entirely in the discretion of the ship owner or operator whether or not to use them. The use of PCASP is thus not generally endorsed or recommended. It is made clear, however, that PCASP are only to be used as an additional layer of protection and not as an alternative to other measures.⁹⁶ The document refers to the IMO Circular for ship owners and Masters and for flag States relating to the use of private maritime security contractors in high risk areas.

⁹⁴ The paper disclaims that the information in this table is for general guidance only and is not a substitute for proper verification with the Flag States concerned.

Supra n 8.

⁹⁵ International Chamber of Shipping ‘BMP4 Best Management Practices for Protection against Somali Piracy’ (August 2011) < <http://www.ics-shipping.org/docs/default-source/resources/safety-security-and-operations/best-management-practices-4.pdf?sfvrsn=12>> accessed 1 September 2016.

⁹⁶ *ibid* 39-40.

4. Does the presence of PCASP on board a merchant ship affect the vessel's right of innocent passage?

The territorial sea and the concept of innocent passage have already been introduced in chapter 2. Now the task at hand is to provide a detailed analysis of whether or not the presence of PCASP on board a commercial vessel affects the vessel's right of innocent passage.

The Chapter begins with an analysis of Part II section 3 LOSC on innocent passage, specifically articles 19 and 21. After examining both articles in turn, there will be an evaluation of the arguments, followed by conclusions that can be deduced from the analysis of this chapter.

4.1 Article 19 LOSC

In order to determine whether the presence of PCASP on board a vessel affects its innocence, scrutiny of whether the presence of PCASP renders passage non-innocent according to article 19 LOSC is needed.

According to article 19(2a) LOSC 'any *threat or use of force* against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner on violation of the principles of international law embodied in the Charter of the United Nations' renders a foreign vessel's passage non-innocent.

First, it is crucial to note again that the right of innocent passage only exists between States in times of peace. In case two States are at war with each other the innocent passage regime will not be applicable. Therefore, a merchant ship exercising innocent passage should generally not be perceived as threatening, even though it may carry PCASP. It has to be acknowledged, however, that a vessel carrying PCASP entering the territorial sea of a State with which the flag States has fragile relations, or is even on the brink of war, the coastal State may have legitimate concerns.

Second, it is unclear whether or not paragraph 2a can apply to a merchant vessel carrying PCASP. Several of the paragraphs in article 19(2) LOSC, including paragraph 2a, appear to be more relevant to warships exercising innocent passage. As previously mentioned, PCASP and the threat or use of force generate questions concerning attributability, self-defense, and more. It is not, however, the purpose of this work to

enter into the discussion of the use of force and non-State actors in international law, but leaves the *threat* of force.

Whether vessels have stowed away weapons and equipment if coastal State laws prescribe vessels to do so is of importance here. Depending on the circumstances, a coastal State may perceive non-compliance with the relevant laws as threatening. Whether or not the relevant territorial sea is situated in a high risk area, or extremely close to one, can be considered as part of the ‘circumstances of the case’.⁹⁷

Nonetheless, in times of peace, especially with weapons and equipment are stored away, it is unreasonable to conceive the presence of PCASP on board merchant ships as a threat of force against the coastal State.

Next, paragraph 2b renders a vessel which undertakes weapons exercises or practices in non-innocent passage. The mere presence of PCASP on board a commercial vessel cannot reasonably be considered as a weapons exercise or practice; when PCASP use their weapons in defending an armed robbery attack, this cannot be considered an *exercise* anymore. Nevertheless, this paragraph may cover embarkation and disembarkation of PCASP and their weapons and equipment (also see the section on paragraph 2g and sub-chapter 4.2 further below).

Paragraphs 2c and 2d on the collection of information which prejudices the defense or security of the coastal State, and on propaganda aimed at affecting the defense or security of the coastal State, can be disregarded in this analysis because they do not relate to PCASP to a relevant extent.

Next, paragraphs 2e and 2f, which deal with the launching, landing, or taking on board of any aircraft or any military device, need not be discussed in the context at hand. This provision could potentially apply to a situation where PCASP were to launch or land equipment which can be considered military devices while in the territorial sea. The latter can be avoided by undertaking such activities outside the territorial sea. These provisions, however, do not apply to PCASP being carried through the territorial sea on board a merchant ship.

Article 19(2g) renders vessels which load or unload any commodity, currency or person contrary to customs, fiscal, immigration or sanitary laws and regulations of the

⁹⁷ Coastal States can have requirements in their customs laws for stowage of weapons and equipment while a vessel is in the territorial sea. This issues will be dealt with in greater detail in chapter 4.2.

coastal State non-innocent. Vessels carrying PCASP will also carry weapons and equipment to be used by these guards. Notwithstanding, as long as weapons and guards are not *loaded* or *unloaded* (embarked or disembarked) during innocent passage, there is no breach of article 19(2g). The issue of entering a territorial sea with weapons and equipment for the use by PCASP will be revisited and discussed in the next sub-chapter.

Subsequently, paragraphs 2h-2k are not applicable to PCASP. Paragraph (2l), however, is of more interest. Article 19(2l) stipulates ‘any other activity not having direct bearing on passage’ to be considered prejudicial to the peace, good order and security of the coastal State, rendering a vessel in non-innocent passage. This provision thus makes the list of activities in article 19(2) LOSC non-exhaustive.⁹⁸

Paragraph 2l illustrates an issue which applies to all of article 19(2) LOSC. Namely, as already mentioned in chapter 2.3.1, that the provision refers solely to *activities*. This constitutes a diversion from the 1958 Convention where no reference to ‘activities’ was made.⁹⁹ Notably, the 1958 Convention did not actually address the meaning of what is ‘[...] prejudicial to the peace, good order or security of the coastal State.’¹⁰⁰ The only specification as to this kind of passage which is considered to be non-innocent concerns fishing vessels which do not obey coastal State laws and regulations on fishing.¹⁰¹ Thus, the 1958 Convention is not helpful in determining the scope of article 19 LOSC as to what constitutes non-innocent passage.

The decisive question is whether the presence of PCASP on board commercial vessels can be considered as an activity, especially in the instance where there is an absence of the PCASP using force or the like. According to the ordinary meaning of the word ‘activity’ a vessel has to actually do something in order to lose its innocence.¹⁰² Whether the presence of PCASP falls within this scope is highly questionable. The other instances mentioned in article 19(2) LOSC are either expressly phrased as activities, such as launching, landing, fishing, loading, or exercise; or they are

⁹⁸ K Hakapää and E J Molenaar, ‘Innocent Passage – Past and Present’ (1999) 23/2 Marine Policy 131, 132.

⁹⁹ 1958 Convention (n 29) Part I Section III.

¹⁰⁰ *ibid* art 14(4);

Hakapää and Molenaar (n 98) 132.

¹⁰¹ 1958 Convention (n 29) art 14(5).

¹⁰² Oxford Dictionaries ‘Activity’ <<http://www.oxforddictionaries.com/definition/english-thesaurus/activity>> accessed 1 September 2016.

described as an act which does a certain thing, for example an act aimed at interfering, the act of polluting, or an act aimed at collecting information.

Another possible interpretation to widen the scope of what passage can be considered as non-innocent has been brought forward by Tanaka. He asserts the question as to whether '[...] paragraph 2 is meant to be an illustrative list of paragraph 1 [...] or whether the coastal State may evaluate innocence solely on the basis of paragraph 1, without having recourse to paragraph 2.'¹⁰³ Notably, paragraph 1 of article 19 does not contain a reference to 'activities'. Thus, one could argue that under article 19(1) LOSC innocence can be evaluated beyond the '[...] *manner* of the passage of the ship.'¹⁰⁴ Furthermore, Tanaka asserts if the list in paragraph 2 were indeed illustrative of paragraph 1, the latter is rendered redundant. In other words, one can claim that if the intention had been that a breach of paragraph 2 was to be the sole reason for loss of innocence, then paragraph 1 should not have been included at all. Tanaka provides the example of the Japanese government applying this interpretation in order to classify the passage of foreign warships carrying nuclear waste as non-innocent, thus establishing non-innocence on the basis of paragraph 1.¹⁰⁵

In the context of PCASP the independent standing of paragraph 1 means the elimination of the criterion 'activity'. The relevant law then states that '[p]assage is innocent as long as it is not prejudicial to the peace, good order and security of the coastal State.'¹⁰⁶ In addition, passage has to be in accordance with the LOSC and other rules of international law. Arguing the presence of PCASP is prejudicial to the peace, good order and security of the coastal State is easier for coastal States. Specifically the terms 'good order' and 'security' are open for interpretation.

In conclusion, this interpretation opens the door for potential abuse by coastal States. Increased restrictions on the right of innocent passage stand in stark contrast to the freedom of navigation and the very purpose of having the right of innocent passage. Hence, whether or not the presence of PCASP renders a vessel in non-innocent passage depends on which interpretation is adopted regarding the standing of paragraph 1 article 19 LOSC.

¹⁰³ Tanaka, *Navigational Rights and Freedoms* (n 38) 542.

¹⁰⁴ *ibid.*

¹⁰⁵ *ibid.*

¹⁰⁶ LOSC (n 26) art 19(1).

4.2 Article 21 LOSC

As mentioned in chapter two, article 21 LOSC provides the legal basis for coastal States to regulate innocent passage. One of the issues that may arise in the context of PCASP entering the territorial sea on board a foreign merchant ship is the fact that they carry arms. According to article 21(1h) LOSC coastal States can adopt laws and regulations in order to prevent the infringement of, *inter alia*, customs laws in its territorial sea. This is in line with the notion that territorial sea is considered to be part of the coastal State's territory over which the coastal State has sovereignty. Hence, coastal States can regulate the conditions for weapons and equipment carried by PCASP entering their territorial sea.

For the purposes of this section an important question is whether a violation of laws and regulations adopted under article 21 LOSC renders the passage non-innocent. Paragraphs 1 and 4 of article 21 LOSC state that foreign vessels exercising innocent passage must adhere to the laws and regulations enacted by the coastal State. However, these laws and regulations must '[...] not apply to the design, construction, manning or equipment of foreign ships unless they are giving effect to generally accepted international rules and standards' and are duly publicized.¹⁰⁷

Strikingly, article 21 LOSC does not specify whether a violation of these laws and regulations renders passage *ipso facto* non-innocent. Neither does article 14 of the 1958 Convention: except vessels violating fishing laws, the only passage of vessels which is prejudicial to the peace, good order and security of the coastal can be considered as non-innocent.¹⁰⁸ Therefore, ships violating the laws and regulations adopted in accordance with article 21(1) LOSC may only be deemed as non-innocent if the violation also falls within the scope of article 19 LOSC.

The next step is to examine what consequences are prompted by violating coastal State laws and regulations. Neither article 21 and 25 LOSC, nor article 14 of the 1958 Convention provide guidance on the matter. Notwithstanding, authors state consequences may include '[...] requesting a delinquent ship to stop certain conduct, requesting a ship to leave the territorial sea, and the intervention of State authorities to board and exclude the ship from its territorial sea.'¹⁰⁹ Nonetheless, coastal States must

¹⁰⁷ LOSC (n 26) art 21(2,3).

¹⁰⁸ 1958 Convention (n 29) art 14(4,5)

¹⁰⁹ Yoshifumi Tanaka, *The International Law of the Sea* (2nd edition Cambridge University Press 2015) 95.

find the balance between these measures as not to *hamper* innocent passage. It has been argued that '[p]rima facie, [...] ships exercising the right of innocent passage are not to be denied the right of passage, and whilst undertaking passage are not to be subjected to interference.'¹¹⁰ However, there must be a degree of discretion for the coastal State to investigate a vessel in case the coastal State has reasonable grounds to believe the vessel violates laws adopted in accordance with article 21 LOSC.

Interestingly, articles 19 and 21 LOSC concern similar matters. The difference is, however, that while article 19 deals with the issue of what renders passage non-innocent, article 21 LOSC expressly provides for matters which coastal States are allowed to regulate during innocent passage.

Another possibility of enforcing laws and regulations adopted under article 21 LOSC is to make use of articles 27 and 28 LOSC on criminal and civil jurisdiction respectively. A violation of laws and regulations concerning weapons carried by PCASP would constitute a crime, thus rendering article 27 LOSC applicable.

Article 27 LOSC provides coastal States with jurisdiction over certain crimes on board foreign ships, for instance when '[...] the consequences of the crime extend to the coastal State' or the crime '[...] is of the kind to disturb [...] the good order of the territorial sea' of the coastal State.¹¹¹ Therefore, in the case of a breach of coastal State laws concerning weapons by a foreign vessel, the coastal State may resort to the use of article 27 in order to enforce its laws. Notably, article 27 LOSC provides the coastal State with criminal jurisdiction, *albeit* only in certain situations. Namely *on board* the foreign ship and not the vessel itself. Therefore, any measures based on article 27 LOSC must be against persons on board the ship, not the vessel.

Last, another tool of the coastal States is to temporarily suspend the innocent passage of a vessel, *albeit* pursuant to the criteria in article 25(3). The criteria are the following: suspension must be without discrimination; suspension must be temporary and in specified areas; suspension must be essential for the protection of the coastal State's security; finally, suspension must be duly published.¹¹² The term 'security' is rather imprecise, and is therefore open to interpretation by coastal States. Article 25(3) LOSC

¹¹⁰ Rothwell and Stephens, *The International Law of the Sea* (n 27) 235.

¹¹¹ LOSC (n 26) art 27(1a,b).

¹¹² LOSC (n 26) art 25(3).

thus does not constitute a legal basis for generally denying innocent passage to vessels carrying PCASP.

4.3 Prior notification and authorization

It is generally accepted that coastal States cannot require vessels to give prior notification or ask for prior authorization before entering the coastal State's territorial sea. Whether prior notification or authorization can be required by the coastal State depends on the answer to the question in chapter 4.2: Whether the presence of PCASP renders a vessel non-innocent or not.

If one concludes the presence of PCASP does render the vessel non-innocent, coastal States may ask vessels to give prior notification or authorization to navigate through their territorial sea. However, foreign vessels entering the territorial sea are presumed to be in innocent passage.¹¹³ In other words, the burden to prove otherwise lies with the coastal State. Therefore, a vessel carrying PCASP would only lose its innocence after already exercising its right of innocent passage. In line with what has been presented in previous sections, the coastal State would have to have a reasonable suspicion¹¹⁴ that PCASP were on board in order to 'take the necessary steps'.¹¹⁵

Alternatively, concluding the presence of PCASP does *not* render a vessel non-innocent, coastal States cannot generally require prior notification or authorization from ships regarding the presence of these guards on their vessel. Notwithstanding, coastal States may require prior notification or authorization regarding weapons or ammunition used by PCASP. This falls within the scope of article 21 LOSC as discussed in the section 4.2.

¹¹³ Neil Craik, 'Presumed Innocent: Navigation Rights and Risk-Based Activities in the Passamaquoddy Bay' (2008) 58 *University of New Brunswick Law Journal* 167, 186.

¹¹⁴ For example, a coast guard vessel (or equivalent) sees PCASP on board the vessel.

¹¹⁵ The meaning of 'necessary steps' was enumerated upon in section 2.3.1. LOSC (n 26) art 25(2).

4.4 Evaluation and conclusion

The previous section indicated that States can reason either way; there are arguments to be made for and against the loss of innocence for vessels carrying PCASP. This section evaluates the argumentation of both perspectives. Moreover, the aforementioned IMO questionnaire is examined in order to deduce the view supported by States. Finally, it is also necessary to consider the implications of concluding one way or the other.

The argument that the presence of PCASP on board merchant ships renders a vessel's passage non-innocent, means the recall of arguments presented in the previous sections. First, one can argue the loss of innocence on the basis of article 19 LOSC. One possibility is the assertion that the presence of PCASP on board a commercial vessel can be considered as an '[...] activity not having a direct bearing on passage' as stated in article 19(21) LOSC. This argument is not prudent; if one compares the fact of having PCASP on board with the wording of the activities expressly rendering passage non-innocent, it is striking that they each specify an activity or act. Examples include the threat or use of force, the act of interfering, launching or landing, loading and unloading.¹¹⁶ The presence of PCASP not using their weapons or equipment does not fit this pattern.

Whether or not PCASP has a direct bearing on passage could depend on the security status of the water the vessel traverses. If the vessel navigates through a territorial sea which is known for armed robbery attacks, PCASP can have a direct bearing on passage. Conversely, the same does not apply to territorial waters which are known to be safe. In such areas PCASP may be unnecessary and do not have any purpose for the particular passage.

Next, one can argue the set criterion which defines an activity in order to render its passage non-innocent is eliminated based on the interpretation that article 19(1) LOSC has a standing of its own. As previously mentioned, this then means the list in paragraph 2 of article 19 LOSC is not illustrative of paragraph 1. The innocence of a vessel may also be evaluated by reference to the broader terms of paragraph 1, namely passage which prejudices the peace, good order or security of the coastal State.

¹¹⁶ LOSC (n 26) art 19(2a, e,f,k).

It has formerly been mentioned that the Japanese government applies this broader interpretation and application of article 19 LOSC in the context of foreign warships carrying nuclear weapons. However PCASP, as well as their weapons and equipment, still stand in stark contrast to nuclear weapons. The latter are probably the most dangerous weapons in existence with enormous consequences, while in comparison the former is of relatively small significance.

Proponents of the above view the presence of PCASP as not affecting a vessel's status of innocent passage and their reasoning begins with a plain reading of article 19 LOSC. This means to adopt the position that paragraph 2 of article 19 LOSC is illustrative of paragraph 1. Therefore, only vessels undertaking any of the *activities* listed in paragraph 2 can render the vessel in non-innocent passage. While paragraph 21 opens the door for 'any other activity not having direct bearing on passage' for a vessel to lose innocence, it still has to be an *activity*. Thus, as long as PCASP are not actually *doing* anything on board, as for example using their weapons¹¹⁷, the vessel will be innocent.

Again, it is important to note that a violation of laws and regulations adopted under article 21(1-3) LOSC does not automatically lead to the loss of innocence. To the contrary, only when the violation falls within the scope of the article 19(2) LOSC the vessel loses its innocence. Therefore, coastal States can adopt requirements concerning the weapons, ammunition, and equipment of PCASP while the vessel navigates through the territorial sea. Theoretically it cannot, however, prohibit PCASP themselves to enter its territorial sea.¹¹⁸

In the IMO questionnaire¹¹⁹ Jordan and Mauritius took the opportunity to reiterate that navigation in the territorial sea is regulated by the innocent passage regime.¹²⁰ Here,

¹¹⁷ PCASP using their weapons may fall under the use of force in article 19(2a) LOSC anyways.

¹¹⁸ This issue will be discussed more below.

¹¹⁹ See chapter 3.

¹²⁰ The context of the answers provided was what the State considers to be a security incident in its territorial sea(s). Both Jordan and Mauritius reiterated paragraphs one and two of article 19 LOSC, adding that incidents falling in the categories constitute security incidents. Additionally, 'acts of violence, terrorism, maritime violence, armed robbery hijacking etc.' constitute security incidents. While this is not directly related to the questions as to whether PCASP affect the status of innocent passage, this would have been an excellent opportunity to expressly mention it.

Royal Jordanian Naval Force Response To MSC-FAL. 1/CIR.2 Of 22 Sep 2011, 6 <<http://www.imo.org/en/OurWork/Security/PiracyArmedRobbery/Documents/PCASP/Jordan.pdf>> accessed 1 September 2016. See also Response by Mauritius to hMSC-FAL. 1/CIR.2 Of 22 Sep 2011 <<http://www.imo.org/en/OurWork/Security/PiracyArmedRobbery/Documents/PCASP/Mauritius.pdf>> accessed 1 September 2016.

both States had an excellent opportunity to provide a statement in support of the view of PCASP not affecting a vessel's innocence. However, they did not; in fact, the questionnaire provided all 171 Member States and 3 Associated Members of the IMO with the opportunity to do so.¹²¹ So far, only 21 Members have provided answers which have been published on the website of the IMO.¹²²

For the States who have completed the questionnaire, no explicit statement as to whether or not vessels carrying PCASP are in innocent passage can be found. In answering whether there are any requirements for vessels carrying PCASP, or firearms or equipment for the use by PCASP, France¹²³ began its answer by stating that transit through French territorial waters was governed by the right of innocent passage. In addition, armed individuals cannot be visible and weapons cannot be visible or handled on the exterior of the vessel. If these requirements were not met, '[...] on arrival the ship must hand over any weapons and ammunition kept on board [...]' ¹²⁴

This answer does not provide any new insight. As previously demonstrated, coastal States can regulate weapons, ammunition, and other equipment under article 21 LOSC. In fact the answers of those States who have returned the questionnaire demonstrate that a large number of States have stowage requirements¹²⁵ for transiting through the territorial sea, while others have notification or authorization procedure for firearms and ammunition.¹²⁶ Liberia has a strict arms embargo and therefore prohibits any firearms or ammunition.¹²⁷ Finally, some States declare they do not have any procedures in place, for PCASP as well as their firearms and equipment.¹²⁸

Due to the fact that a number of States provide for the stowage of weapons during passage, the question then arises whether this effectively prohibits the use of PCASP. Without their weapons, PCASP may be rendered useless in case of an attack. Alternatively, the fact that firearms are stowed out of sight does not mean PCASP

¹²¹International Maritime Organization, 'Member States' <<http://www.imo.org/en/About/Membership/Pages/MemberStates.aspx>> accessed 1 September 2016.

¹²² *Supra* n 86.

¹²³ Response by France to MSC-FAL. 1/CIR.2 Of 22 Sep 2011 <[http://www.imo.org/en/OurWork/Security/PiracyArmedRobbery/Documents/PCASP/France_\(E\).pdf](http://www.imo.org/en/OurWork/Security/PiracyArmedRobbery/Documents/PCASP/France_(E).pdf)> accessed 1 September 2016.

¹²⁴ *ibid*, 4.

¹²⁵ For example Australia, France, Jordan, Spain, and the United Kingdom.

¹²⁶ For example Denmark, Madagascar, Romania, and Somalia.

¹²⁷ Response by Liberia to MSC-FAL. 1/CIR.2 Of 22 Sep 2011, 1, 3-4 <<http://www.imo.org/en/OurWork/Security/PiracyArmedRobbery/Documents/PCASP/Liberia.pdf>> accessed 1 September 2016.

¹²⁸ For example Brazil, China (outside Hong Kong waters), Iran, Israel, and Panama.

cannot access them in case they need to defend themselves. The fact that they will not be able to immediately shoot may have a positive effect, since they will be forced to take more time to evaluate the potential threat, or using the non-lethal methods.

The main findings to be taken from the IMO questionnaire so far seems to be that States: either believe there is no conflict; they are not willing to make a public statement on the issue; or they have not yet decided what their position is going to be.

It is important to note that some of the most relevant States in the present discussion have not yet answered the questionnaire. Oman and Somalia, both situated in the IMO high risk area, have handed not in their response. Other important States, such as Indonesia, Malaysia, or Singapore, have not done so either. Thus, the importance and relevance of the IMO questionnaire will increase once these States provide answers.

To conclude, foreign vessels carrying PCASP enjoy the right of innocent passage. Carrying PCASP does not constitute grounds for loss of innocence under article 19(2) LOSC. Moreover, coastal State laws and regulations concerning weapons in the territorial sea can be adopted under article 21 LOSC. Notwithstanding, violation of such laws does not render a vessel non-innocent. To the contrary, coastal States are to apply a gradual response or base their measures on article 27 LOSC.

Coastal States may not require prior notification or authorization for vessels exercising innocent passage. However, prior notification or authorization can be stipulated in laws and regulations adopted under article 21 LOSC concerning the carriage of weapons in the territorial sea while in innocent passage.

5. Does the presence of PCASP on board a merchant ship affect the vessel's right of transit passage?

This chapter seeks to answer whether commercial vessels carrying PCASP enjoy the right of transit passage through straits used for international navigation. The concept of transit passage and its contents have already been presented in chapter 2.3.3.

5.1 The transit passage regime in the LOSC

In order to answer the question whether the presence of PCASP affects a vessel's right of transit passage, the first step is to examine the possible grounds for loss of transit passage as well as requirements which may need to be fulfilled in order to exercise it. Regarding the latter, transit passage must be exercised 'for the purpose of continuous and expeditious transit' but lacks the requirement of innocence as provided for in the innocent passage regime. In other words, once it is established that transit passage applies in a certain strait and as long as foreign vessels navigate continuously and expeditiously, vessels can exercise the right to transit passage.

As already mentioned, the LOSC prescribes that bordering States cannot suspend or hamper transit passage. Therefore, the right of transit passage cannot be lost. Moreover, innocent passage can be suspended when necessary for the protection of the coastal State's security. In contrast, '[...] even if a strait State has concerns regarding its national security because of the potential for transiting traffic to be caught up in internal disturbances, it may not suspend the right of transit passage'.¹²⁹

The transit passage regime thus balances the interests of flag States and bordering States, similar to the innocent passage regime. On the one hand, flag States have certain duties and must comply with laws and regulations adopted by the bordering State.¹³⁰ On the other hand, bordering States cannot hamper or suspend transit passage

¹²⁹ Donald R Rothwell, 'International Straits' in Donald R Rothwell, Alex G Oude Elferink, Karen N Scott, Tim Stephens (eds) *The Oxford Handbook of the Law of the Sea* (Oxford University Press 2015) 121.

¹³⁰ More detailed presentation can be found in chapter 2.3.3.
LOSC (n 26) art 39, 41(7), 41(3).

and have extremely restricted power to regulate vessels exercising transit passage.¹³¹ Hence, a vessel's right of transit passage cannot be lost or suspended.

Second, one must investigate whether ships violate any duties by carrying PCASP during transit passage. According to article 39 LOSC vessels exercising transit passage must, *inter alia*, 'refrain from any threat or use of force against the sovereignty, territorial integrity or political independence of the bordering State [...]'.¹³² This is the same phrasing as in the corresponding article concerning innocent passage and thus raising the same issues, namely whether the presence of PCASP may be regarded as a threat or use of force.¹³³ The question has already generally been answered in the negative relating to innocent passage, and must be once again.

Article 39(1c) LOSC prescribes that vessels must 'refrain from any activities other than those incidental to their *normal modes* of continuous and expeditious transit, unless rendered necessary by *force majeure* or by distress'.¹³⁴ The issue thus arises as to what is considered to be incidental to a vessel's 'normal modes' of transit.

The term 'normal mode' usually refers to military vessels. For example, the normal mode of submarines is considered to be beneath the surface.¹³⁵ That is why the innocent passage regime expressly provides for submarines to navigate on the surface.¹³⁶

The question then arises whether the term 'normal mode' in article 39(1c) exclusively refers to how the vessel navigates through the strait, meaning either on or beneath the surface. Then the article would only apply to submarines and other underwater vehicles and not to merchant ships. Alternatively, the term 'normal mode' could refer to the manner in which the vessel traverses through the strait and the behavior of the personnel on board. In that instance the presence of PCASP may be significant.

In the *Corfu Channel case* the ICJ, among other issues, examined the manner of a warship during transit. In 1946, two British warships were damaged by mines while

¹³¹ A more detailed presentation can be found in chapter 2.3.3.

LOSC (n 26) arts 41, 42, 44.

¹³² *ibid* art 39(1b).

¹³³ *ibid* art 19(2a).

¹³⁴ *ibid* art 39(1c)

¹³⁵ Satya N Nandan and Shabtai Rosenne (eds), *United Nations Convention on the Law of the Sea 1982: A Commentary* (The Hague, Nijhoff, 1985-2002) vol II, 342.

¹³⁶ LOSC (n 26) art 20.

traversing the territorial sea of Albania via the Corfu Channel.¹³⁷ Britain had not previously been notified about the existence of these mines. Following the incident, British navy vessels swept Albanian waters for mines, without authorization by the Albanian government.¹³⁸

Three relevant issues arise when examining the *Corfu Channel case* in the context of PCASP. First, at the time of the judgement the regime of transit passage did not yet exist, but States had a right of innocent passage through straits used for international navigation.¹³⁹ Second, the case examines innocent passage of *warships* and not merchant ships. Nevertheless, it is possible to draw a number of useful conclusions from the case, which can be applied by analogy to merchant ships carrying PCASP. Finally, the political situation between the United Kingdom and Albania was not stable at the time.¹⁴⁰

In court the Albanian government claimed that the passage of British warships was not innocent because, *inter alia*, they were maneuvering and sailing in combat formation with soldiers on board and guns in position. In addition, the number of ships and armament exceeded what was necessary to achieve the objective and illustrated an intention to not just transit but also to intimidate.¹⁴¹ Essentially, the Albanian government argued the behavior of the British vessels were threatening and did not constitute ‘normal passage’.

The ICJ ruled that the maneuvering of British vessels only occurred after the first explosion from hitting a mine. Afterwards, the Court stipulated, the maneuvering was ‘necessary in order to save human life and the mined ships’.¹⁴² Concerning the guns, the ICJ rejected the arguments presented by the Albanian government as well. All guns onboard British vessels were in normal positions. As to the soldiers being in a position

¹³⁷ Jean-Piere Cot, ‘The Bar’ in Karine Bannelier, Theodore Christakis, and Sarah Heathcote, *The ICJ and the Evolution of International Law* (Routledge 2012) 20-21.

¹³⁸ *Corfu Channel Case (UK v Albania)* (Merits) [1949] ICJ Rep 4, 33.

¹³⁹ In fact, the present regime of transit passage was built upon the *Corfu Channel case* judgement. For a brief account of the development of the right of transit passage see Stuart Kaye, ‘International Straits’ in Karine Bannelier, Theodore Christakis, and Sarah Heathcote, *The ICJ and the Evolution of International Law* (Routledge 2012) 150-151.

Corfu Channel Case (n 138) 28.

¹⁴⁰ For more detailed information on the political situation between Albania and The United Kingdom see Aristoteles Constantinides, ‘The Corfu Channel Case in Perspective: The Factual and Political Background’ in Karine Bannelier, Theodore Christakis, and Sarah Heathcote, *The ICJ and the Evolution of International Law* (Routledge 2012)

¹⁴¹ *Corfu Channel Case* (n 138) 30.

¹⁴² *Corfu Channel Case* (n 138) 31.

ready for retaliation, this was judged to be a precaution, since during a previous passage two British cruisers had been shot at by Albania while navigating through the North Corfu Channel.¹⁴³ Therefore, British warships had legitimate concerns of being shot at again.

Now the findings of the *Corfu Channel case* must be applied to the situation of merchant ships carrying PCASP while exercising transit passage. There are two main scenarios. In the first scenario PCASP are on board, with their arms stowed away. Following the reasoning of the ICJ in the *Corfu Channel case*, this manner of passage is incidental to the normal mode of continuous and expeditious transit. Hence, there is no breach of article 39(1d) LOSC.

In the second scenario PCASP are on board and openly carry their arms. Here the first issue is whether this constitutes an *activity which is not incidental to the vessel's normal modes of operation*. One could argue this depends on the specific circumstances of the case. Specifically, whether the strait is located in an IMO high risk area or generally in an area where piracy and armed robbery attacks are known to occur. There the presence of PCASP openly carrying their weapons could be considered as the 'normal mode of operation'.

One could argue this conclusion is supported by the ICJ's judgement in the *Corfu Channel case*. The Court stated that the maneuvering after the explosion was 'necessary in order to save human life and the mined ships'.¹⁴⁴ Somewhat similarly, one can argue that in straits where piracy and armed robbery attacks are likely to occur, PCASP serve to protect the crew.¹⁴⁵

In light of the above, the presence of PCASP on board a merchant ship cannot be considered to constitute a violation of article 39(1d) LOSC.

Next, article 39(1d) states ships must 'comply with other relevant provisions in [...] Part [III].' In the present context this means article 42 LOSC, which provides bordering States with the power to adopt law and regulations relating to navigation,

¹⁴³ This incident was followed by diplomatic correspondence in which the Albanian government claimed that 'foreign warships and merchant ships had no right to pass through Albanian territorial waters without prior notification to, and the permission of, the Albanian government.' *Corfu Channel Case* (n 138) 27. *Corfu Channel Case* (n 138) 27.

¹⁴⁴ *Corfu Channel Case* (n 138) 31.

¹⁴⁵ It may also, however, be argued that generally crew is not harmed during piracy attacks and the presence of PCASP actually escalates the situation.

pollution, fishing, and the loading and unloading of any commodity, currency or person in contravention of customs, fiscal, immigration or sanitary laws and regulations.

The last is relevant in the context of PCASP: the loading and unloading of any commodity in contravention of customs laws.¹⁴⁶ Due to the wording ‘loading and unloading’, vessels *carrying* PCASP are not in breach of article 42(1d) LOSC so long as they do not load or unload weapons, equipment, or persons while exercising transit passage.

Notably, the wording is precisely the same as in article 19(2g) LOSC providing grounds for loss of innocence. This highlights the differences as well as the similarities between the innocent passage and transit passage regimes. In the innocent passage regime, the loading and unloading of any commodity in contravention of customs laws and regulations renders a vessel in non-innocent passage, thus allowing the coastal State to take action against it. The difference in the transit passage regime is, however, that the consequence of violating article 42(1d) is *not* a loss of the right of transit passage. The consequences of breaching laws and regulations adopted under article 42 LOSC are not provided for in the LOSC. This is similar to article 21 LOSC which empowers coastal States to adopt laws on certain matters for vessels in innocent passage. Neither provision stipulates the consequences for a breach. What is clear though is the fact that consequences cannot entail the loss or suspension of the right to transit passage.

The innocent passage allows the coastal State to adopt laws and regulations under article 21 LOSC which will prevent breach of what are essentially import and export laws. The transit passage regime is restricted to only *loading and unloading* of commodities, thus excluding *carriage* or *transport*. Therefore, while exercising innocent passage the coastal State may regulate the import and export of weapons and equipment, for example that they have to be stowed away. This is not the case during transit passage.

¹⁴⁶ LOSC (n 26) art 42(1d).

5.2 Evaluation and conclusion

The previous section presented and analyzed the relevant provisions in the LOSC and will be evaluated next. First, the previous section ruled out the loss or suspension of the right of transit passage due to the carriage of PCASP. This is a reasonable conclusion, since the freedom of navigation, and thus international trade, must be protected. The very purpose of article 44 LOSC prohibiting the suspension of transit passage was to prevent the closure of the most important straits.¹⁴⁷

Rather than arguing for the loss or suspension of transit passage when a vessel carries PCASP, coastal States should focus their attention on adopting laws and regulations concerning the loading and unloading of arms and ammunition in their territorial sea under article 42 LOSC. This is an effective way for them to protect their interests, but at the same time not restrict the freedom of navigation. The important distinction here is the wording ‘loading and unloading’, which means that bordering States cannot regulate aspects such as the stowage of firearms and ammunition.

Second, arguments asserting the presence of PCASP on board a merchant ship could constitute a violation of article 39 LOSC are not convincing. As presented in the previous section, the presence of PCASP cannot be regarded as outside the vessel’s ‘normal mode’. In addition, the presence of PCASP cannot be generally considered a threat of force. It is, however, important to note that this may depend on the circumstances of the case.

Third, States have used ‘security’ as a reason to restrict the exercise of transit passage through their straits.¹⁴⁸ These instances almost all relate to transit passage exercised by *warships*, not merchant ships. However, some apply to nuclear powered vessels or those carrying nuclear or hazardous materials. The latter are clearly also environmental concerns, illustrating the flexibility of the term ‘security’. It is reasonable to argue that if ‘security’ includes environmental reasons, it will surely encompass the carriage of PCASP. It is crucial to note that the LOSC does not provide legal ground for such kind of assertions.¹⁴⁹ Therefore, ‘security as grounds to restrict the right to transit passage must be dismissed in the present context.

¹⁴⁷ Kaye (n 139) 153.

¹⁴⁸ *ibid* 155-175.

¹⁴⁹ *ibid* 157.

Fourth, one can examine States bordering the Strait of Malacca in Southeast Asia, namely Indonesia, Malaysia, and Singapore. This focus is warranted by the increase of piracy in that region. The Strait of Malacca is a choke point through which at least one-third of all international shipping travels. China and Japan are especially vulnerable to attacks on oil tankers, as 70-80% of their oil imports are shipped through the Strait of Malacca.¹⁵⁰

Due to the fact that these regional approaches such as ReCAAP¹⁵¹ do not seem to be as effective as they could be, ship owners and operator may consider employing PCASP while transiting the Strait of Malacca. In turn, the positions of the States bordering the strait are thus relevant.

A State which seems to have recently changed its position regarding the use of PCASP is Indonesia. In 2012 Indonesian the Transportation Minister rejected the use of PCASP in order to ensure the safety and security on board Indonesian merchant ships. Indonesia would continue to reject the use of PCASP, *inter alia* due to the lack of national and international legal instruments. Instead, Indonesia's Minister of Transportation preferred to fight piracy and armed robbery by strengthening bilateral, regional and international cooperation.¹⁵²

In addition, Indonesia will 'not allow Singapore or any other countries to act as security guards for international ships passing through the Straits of Malacca on its side of the waterways' and 'will object strongly to any security guard escorting ships in [Indonesia's]waters.'¹⁵³

However, Indonesia's position seems to have changed slightly. In July 2016 a spokesman of the Indonesian Foreign Ministry said that 'allowing private security armed forces in Sulu waters was among the options being deliberated' by Indonesia,

¹⁵⁰ Michal Vojtuš, 'Shifting the Trend in Maritime Piracy: Southeast Asian Pirates' (*POST* 19 August 2016) <<http://postnito.cz/shifting-trend-in-maritime-piracy-southeast-asian-pirates/>> accessed 1 September 2016.

¹⁵¹ The Regional Cooperation Agreement on Combating Piracy and Armed Robbery against Ships in Asia (ReCAAP) currently has 20 Contracting Parties. Its function is to exchange information and support capacity building efforts between Contracting Parties. One of the problems ReCAAP faces is distrust between Contracting Parties, and the fact that Inodonesia has not joined the program.

¹⁵² Ridwan Max Sijabat, 'RI Says No to Private Armed Guards Aboard Vessels' (*The Jakarta Post*, 13 June 2012) <<http://www.thejakartapost.com/news/2012/06/13/ri-says-no-private-armed-guards-aboard-vessels.html>> accessed 1 September 2016.

¹⁵³ Van Hespén (n 9) 395.

the Philippines, and Malaysia.¹⁵⁴ PCASP could then be employed voluntarily and only in addition to joint patrols from naval forces provided for by the three States. At the very least, this opens the door for the idea of allowing PCASP in Indonesian legislation.

If Indonesia were to allow PCASP on board its vessels, this may have implications for PCASP aboard foreign merchant ships navigating through Indonesian territorial waters, for example through the Strait of Malacca, in which transit passage applies.¹⁵⁵ Protesting other vessels using PCASP in Indonesia's territorial waters will be more difficult to justify when Indonesia employs PCASP itself. Hence, the fact that Indonesia recently started to open up to the idea of allowing PCASP on its own ships could eventually lead to accepting foreign vessels to carry PCASP in Indonesia's waters.

The situation of the States bordering the Strait of Malacca also illustrates the problem with State practice concerning the research question of this chapter in general: There is basically no information available about the positions States take on the issue of PCASP and right of transit passage. Therefore, the little information that is provided cannot carry meaningful weight. That is why the question as to whether merchant ship may carry PCASP while exercising transit passage must be answered on the basis of the analysis of the relevant LOSC provisions.

To conclude, the presence of PCASP does not affect a vessel's right of transit passage. The right of transit passage strongly protects foreign vessels from interference from bordering States. Once the right of transit passage is established, it cannot be lost or suspended. Finally, bordering States have very limited means to regulate weapons carried by PCASP because their power is restricted to the loading and unloading of weapons such as firearms and ammunition.

¹⁵⁴ Anggi M Lubis, 'RI Mulls Deploying Armed Guards on Ships' (*The Jakarta Post*, 22 July 2016) <<http://thejakartapost.com/news/2016/07/22/ri-mulls-deploying-armed-guards-ships.html>> accessed 1 September 2016.

¹⁵⁵ For more information on the Strait of Malacca and the applicability of the transit passage regime see: Mojd Hazmi bin Mohd Rusli, 'The Application of the Transit Passage Regime in Straits Used for International Navigation: A Study of Straits of Malacca and Singapore' (2012) 4/4 *Asian Politics & Policy*, 549, 533 <<http://onlinelibrary.wiley.com/doi/10.1111/j.1943-0787.2012.01374.x/full>> accessed 1 September 2016.

6. Conclusion

This work has attempted to answer the question of whether the presence of PCASP affects a merchant ship's right of innocent passage or transit passage respectively. Both questions have generally been answered negatively, i.e. the presence of PCASP does not affect those rights.

Regarding the right of innocent passage, it has been concluded that PCASP's presence does not render a vessel non-innocent. Coastal States may adopt laws and regulations relating to weapons carried by PCASP, such as firearms and ammunition. Such local laws may include prior authorization or notification for firearms entering the coastal State's territorial sea. While the violation of such laws may not render a vessel non-innocent, ship owners and operators as well as private maritime security companies must nevertheless be aware of them. Concerning the violation of such laws coastal States may base their enforcement action on article 27 LOSC.

The right of transit passage is not affected by the presence of PCASP either. Here, the protection of transit for foreign vessels is even stronger than that provided by the innocent passage regime. Transit passage cannot be lost or suspended, and bordering States have limited power to regulate passage and firearms carried by PCASP. In light of the fact that States bordering straits are in unique positions, similar to a monopoly, it is reasonable that the overall interest of the freedom of navigation is protected.

One must also briefly address the consequences of these conclusions. On the one hand, States which have highly trafficked territorial waters may not approve of the above conclusions. Indonesia, for example, has archipelagic waters in which innocent passage applies, and is one of the States bordering the Strait of Malacca. In addition, Indonesia's waters are plagued with piracy and armed robbery. Both research questions are therefore relevant for Indonesia; both conclusions are, as far as the author is aware, against Indonesia's interests. Such States will naturally want to regulate passage as extensively as possible.

However, on the other hand, States which have sizable merchant fleets are likely to welcome these conclusions. Their primary interest is the safety of their vessels and

crew. Sea routes through, for example, Indonesian archipelagic waters and the Strait of Malacca are vital for the operation of their vessels.

It is important to reiterate that coastal or archipelagic States have the right to adopt laws and regulations in order to regulate weapons carried by PCASP under article 21 and 42 LOSC respectively. Those powers are, however, much stronger under article 21 LOSC. This strikes a reasonable balance between the freedom of navigation and security concerns of bordering and coastal States.

There is no doubt that this topic will attract increasing attention in the years to come. States as well as the international community will seek to solve the very basic issues such as the legality of PCASP or the regulation of private maritime security companies, striving for the harmonization of regulations on the international level. These then may evolve into more specific questions such as the affect of PCASP on navigational rights of the vessels carrying them. Increasing use of PCASP through areas such as the Strait of Malacca, where bordering States protest their use, will shine the spotlight on the research questions of this thesis.

International organizations such as the ICS and IMO will play an important role in bringing the issue to the attention of States, developing common standards, and asking States for their positions.

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Final word count: 15816

Style of citation: OSCOLA