

Faculty of Law

# **Assessing State Jurisdiction and Industry Regulation over Private Maritime Security**

*An international and comparative regulatory review*

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# Assessing State Jurisdiction and Industry Regulation over Private Maritime Security

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*An international and comparative regulatory review*

*By Simon O. Williams*<sup>1</sup>

## **1. Introduction**

The next twenty years will see maritime traffic increase by fifty-percent while world navies shrink by thirty-percent.<sup>2</sup> There is no indication that threats to the global shipping industry will disappear, or decrease proportionally. Conversely, seaborne threats appear to be multiplying in High Risk Areas (HRAs) around the world.<sup>3</sup>

This drop in military naval deployment, combined with spikes in attacks against commercial vessels over the last decade, caused shipping companies and other maritime industry stakeholders to seek alternative responses for securing global sea lines of communication and ensuring uninterrupted maritime supply chain resilience.<sup>4</sup> The industry has turned to the services of Private Maritime Security Companies (PMSCs) to augment their security posture and protect assets in high risk areas.<sup>5</sup>

Privatization of security is a phenomenon of increasing importance in international security affairs, especially in the maritime sector. This is distinguished from the use of security contractors by the United States, Britain, and other nations in support of wars in Iraq and Afghanistan where private security companies were hired by sovereign governments and their operations took place within countries' physical borders. Private Maritime Security Companies (PMSCs), in contrast, are being solicited by other private companies, namely shipping companies, to protect their assets in high-risk maritime zones, including and especially in Areas Beyond National Jurisdiction (ABNJ.)

The International Chamber of Shipping representing 80% of world tonnage, numerous national shipowning associations, various insurance companies and organizations, and since 2011, even

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<sup>2</sup> Cook, Peter, Head of the Security Association for the Maritime Industry via <http://www.cato.org/publications/commentary/rise-private-maritime-security-companies> (Accessed 21 August 2014).

<sup>3</sup> UNOSAT Global Report on Maritime Piracy a Geospatial Analysis 1995-2013, p. 26 International Group of P&I Clubs,

<sup>4</sup> "Provisional guidelines – use of armed guards on board Norwegian ships," 01 July 2011, p. 1.

<sup>5</sup> *ibid.*

<sup>5</sup> *ibid.*

the IMO have all accepted the industry's move toward privately contracted armed maritime security.<sup>6</sup> This demonstrates a reversal in IMO policy stance worldwide regarding private security and the carriage of weapons for self defense aboard commercial vessels.

At the state level, some countries have also agreed to allow the provision of Privately Contracted Armed Security personnel (PCASP) aboard their flagged vessels following their ship-owners' overwhelming transportation ministries with requests for military vessel protection details (VPDs- embarked marines or soldiers on a commercial vessel to protect it from piracy or other threats) and if unable to receive such, threatening to move their fleets under other more permissive flags [of convenience.]

At the same time that the global maritime community sought permission for PCASP use, PCASP providers have been seeking to distinguish themselves as maritime professionals. Surprisingly, the biggest pushes for regulation have not come from government, but actually from within this industry sub-sector. The maritime security industry has proactively created standards and best management practices for itself, preempting government involvement. These standards, have even helped shape government and international regulatory policies toward use of PCASP. Professional associations have also sprung up as organizations to advance professionalism and influence policy in this sector.

This paper will examine the evolving role of PMSCs, specifically state jurisdiction over their activities in international law as well as explain the myriad of soft law and industry-led regulations which have emerged in the maritime security sector. It will begin by depicting the private maritime security evolution against the backdrop of the modern maritime industry's development. It will go on to evaluate the main framework-setting instruments, as legal sources, for private maritime security activities in international law, namely UNCLOS (zones, jurisdiction, innocent passage), SUA, SOLAS, UN Firearms Protocol, as well as the Principle of Self Defense and the Doctrine of Necessity.

This section will also touch on the challenges related to evaluating provision of armed guards aboard a merchant ship as contrary to innocent passage and/or the need for giving prior notification, as argued for by some coastal states. Although lightly discussed, this paper will

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<sup>6</sup> *Private Security: Market Responses to Piracy, Terrorism, and Waterborne Security Risks in the 21<sup>st</sup> Century*, Introduction by Editors p. 5.  
(Note: IMO was careful to mention "recommendations are not intended to endorse or institutionalize the use of PCASP.")

not delve into academic debate regarding the definition and classification of piracy, as that subject has been widely studied in academic and operational circles and deemed not fitting the scope of this paper which seeks to explore regulation of security responses to piracy, not of piracy itself.

The paper will go on to explain market responses to the maritime security industry boom, namely the emergence of soft law, industry-led regulations, codes of conduct, and certification schemes designed to add order, oversight, and accountability to this industry, closing the governance gaps left open in hard-law frameworks. Such examples will be International Maritime Organization Circulars, the Montreux Document, the International Code of Conduct for Private Security Providers (ICoC), and ISO/PAS 28007. The paper will conclude with a summary of findings and outlook for the future regulatory trends in this sector.

## 2. Historical Background

Before countries had the industrial and technological capacity to create and maintain ocean going navies, privateers dominated security and private contract combat at sea. As major ocean-going countries developed their armed forces, they phased out privateering in order to ensure monopoly over armed conflict,<sup>7</sup> and therefore state power.<sup>8</sup>

The last century continued this trend, bringing with it two parallel maritime developments; legal and technological. At the same time as the codification of the law of the sea and law of armed conflict progressed, technological developments swept across commercial marine and naval sectors.<sup>9</sup> In tandem, these developments changed the face of maritime and specifically maritime security, affairs forevermore.

These changes brought the introduction of modern warships, advanced mining systems, submarines, and most importantly- naval aviation. Simultaneously, advancements in law led to increased regulation of ocean spaces, both for merchant and military activities taking place in maritime environments.

Today, however, we are at another turning point in maritime security affairs. As state budgets are declining and demands on world navies are placing them in increasingly precarious positions, we witness the maritime community take private measures to enhance their own protection against asymmetric threats, thus liberating our naval forces to defend our freedoms on the high seas.<sup>10</sup>

Accordingly, the maritime industry's self-help measures can be considered a resurgence, or even renaissance, of private maritime security. This time, however, not ungoverned as in the

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<sup>7</sup> Carafano, James Jay, "The United States' use of maritime private security from the War of Independence to the 21<sup>st</sup> Century," *Private Security: Market Responses to Piracy, Terrorism, and Waterborne Security Risks in the 21<sup>st</sup> Century*, p. 13.

<sup>8</sup> Weber, Max, from a speech 1918, printed in *Politik als Beruf (Politics as a Vocation)* by Duncker & Humblodt in 1919, available online: <https://www.d.umn.edu/~bmork/2111/readings/weberpoliticsasavocation.htm> (Accessed: 02 August 2014).

<sup>9</sup> Geneva Conventions of 1949 and their Additional Protocols via ICRC, Available at: <http://www.icrc.org/applic/ihl/ihl.nsf/vwTreaties1949.xsp> (Accessed: 28 August 2014).

<sup>10</sup> McKnight, Terence, Rear Admiral, USN (Ret.), *Private Security: Market Responses to Piracy, Terrorism, and Waterborne Security Risks in the 21<sup>st</sup> Century*, Foreword, p. xvi.

unruly pre-industrialization period, but full of legal and industry compliance challenges in the post-United Nations Convention on the Law of the Sea (UNCLOS), paradigm.

Non-state actors entered the maritime scene with a bang. Literally. The western world first shifted focus to maritime threats in the year 2000 with the USS Cole bombing in Yemen. This was followed by increased maritime counter-terrorism and naval force protection operations, mimicked in the commercial world with the adoption of International Ship and Port Facility Security (ISPS) Code (of SOLAS) coming into effect in 2004, and seeing many countries join as signatories.

On the heels of maritime terrorism came the biggest threat to the physical security of maritime trade; piracy/armed robbery at sea.

Between 2002 and 2005 terrorist attacks and armed robbery spiked in the Malacca Straits. This caused the first private maritime security boom. Just after, in 2008, East African piracy surged, notably around Somalia (Gulf of Aden region).<sup>11</sup> This operating area, extending well into the Red Sea and Indian Ocean region is much larger than the Malacca Straits. The shipping industry continued to suffer loss from hijacking, stolen cargo, and ransom despite the redirection of world naval powers to combat the pirate infestation in the region. The United Nations Security Council passed five separate directives aimed at authorizing member navies to patrol the waters off the Somali coast and apprehend pirates, whether on the high seas or in Somali territorial waters (including on Somali beaches.)<sup>12</sup> Now, additional piracy and armed robbery hotspots have emerged in the Gulf of Guinea region, leaving regional coastal states, global players, and non-state actors scrambling to implement security responses and the legal framework necessary to control it.

The spike in Somali attacks since 2008 and West African attacks in since 2013 forced ship owners and charterers to find alternative ways to mitigate risk and avoid, if possible, increasing “exception” insurance premiums for routes like the Gulf of Aden and West African coast.<sup>13</sup> The ‘threat :: response’ ratio of sending multimillion dollar warships to stop a few pirates in

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<sup>11</sup> Bateman, Sam, “Maritime security and port state control in the Indian Ocean Region,” *Journal of the Indian Ocean Region*, Volume 8, Number 2, p. 188.

<sup>12</sup> Martin, Jennifer, “Fighting Piracy With Private Security Measures: When Contract Law Should Tell Parties to Walk the Plank,” *American University Law Review*, Volume 59, Issue 5, Article 5, 2010, p. 1366.

<sup>13</sup> Isenberg, David, “The Rise of Private Maritime Security Companies,” *Somalia Report*, 2008, available at <http://www.cato.org/publications/commentary/rise-private-maritime-security-companies> (Accessed 21 June 2014).

outboard skiffs, simply did not add up; the response was not congruent to the threat and world naval powers are finding it difficult to maintain these costs and efforts.<sup>14</sup>

On-board security emerged as the best, most cost-effective mitigation strategy. Thus the PMSC industry received a steroid treatment following the boom in post-2008 Somali piracy, being called in to supplement, if not virtually replace, a reliance on naval protection.

Security at sea revolves around the protection of infrastructure that is mainly owned and operated by commercial entities of the private sector. Securing these globally dispersed and heavily interconnected supply chains, such as ships and offshore oil-and-gas infrastructure that rely on the maritime domain for transport and extraction can best be done by utilizing private sector assets- specifically, private security.<sup>15</sup>

To demonstrate the vitality of private maritime security to the shipping sector some statistics will be given below, elucidating figures and supporting the need for research, specifically legal, into this booming industry.

In 2009, 10% of vessels transiting the Horn of Africa/Indian Ocean had private armed guards on board.<sup>16</sup> In 2010 that number jumped to 27%, and today it is suspected to be around 40% worldwide.<sup>17</sup> Regarding cost, Chinese shipping giant COSCO says it pays 12 million USD per year for British PCASP services aboard its 80 vessel fleet.<sup>18</sup>

Further financial analysis from numbers released by the Independent Maritime Security Association, highlights the cost of hiring a private armed security team at about \$50,000 per transit.<sup>19</sup> If only 25% of vessels in the Gulf of Aden region employed guards, the math would work out to 10,612 transits per year.<sup>20</sup> At the 25% range that equates to \$530.6 million per year for private maritime security in the Gulf of Aden region alone.<sup>21</sup> At 50% it would be a billion dollar per year business. Current calculations actually appear to surpass this estimate.<sup>22</sup>

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<sup>14</sup> (Note: Costs minimum of USD 50,000 per day to operate a small frigate).

<sup>15</sup> Carafano *op. cit.*, p. 23.

<sup>16</sup> UNOSAT Global Report on Maritime Piracy, *op. cit.*

<sup>17</sup> Kraska, James, "International and Comparative Regulation of Private Maritime Security Companies Employed in Counter-Piracy" as featured in: *Modern Piracy- Legal Challenges and Responses*, ed. Douglas Guilfoyle, 2013, Chapter 10, p. 241.

<sup>18</sup> *Private Security: Market Responses, op. cit.*, p. 6.

<sup>19</sup> Isenberg, *op. cit.*

<sup>20</sup> *ibid.*

<sup>21</sup> *ibid.*

<sup>22</sup> *ibid.*



Although the private security sector is largely populated by former military, law enforcement and other trained professionals who must meet the stringent vetting criteria of shipping companies and are aware of Rules for the Use of Force, the possibility for accidents to occur with grave legal consequences remains. Major concerns for ship-owners, masters, and insurers include accidental misfires, wrongful murder of fishermen,<sup>23</sup> ship arrest due to unlicensed weapons carriage,<sup>24</sup> and inability to adjudicate or gather evidence in the occasion that a security response incident has gone awry.<sup>25</sup>

It is frequently argued that the proliferation of maritime security providers has created an operational legal gray zone and PCASP thus work in regulation-free vacuum, both because regulations in this sector are thought to not always exist, and because they are on the high seas, an Area Beyond National Jurisdiction, which many believe lack's effective state control. Thus there is a mounting public, government, and industry held belief that the private maritime security providers are yet another armed group that needs to be further regulated.<sup>26</sup>

Much of this perception, like similar situations in Iraq, has arisen from stories or even videos or fear, rather than direct evidence and scholarly assessment of the legal machinery which governs this sector. Nonetheless, it has fueled the belief that the provision and oversight of private security operations at sea is more complicated than on land. Complicated, the legal regime may indeed be, but as evidenced by the numerous hard and soft law instruments which exist to govern this sector, a legal gray area this is not, as elucidated in the following analysis.

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<sup>23</sup> (Example: BBC, "India allows Italian ship *Enrica Lexie* to leave," 2 May 2012, Available at: <http://www.bbc.com/news/world-asia-india-17920840> (Accessed 24 August 2014)).

<sup>24</sup> (Example: Gulf Ship News, *AdvanFort* vessel arrested with illegal arms onboard, Available at: [http://www.gulfshipnews.com/news\\_content.php?fid=3w3c499](http://www.gulfshipnews.com/news_content.php?fid=3w3c499) (Accessed: 24 August 2014)).

<sup>25</sup> Isenberg, *op. cit.*

<sup>26</sup> *ibid.*

### 3. International Legal Framework Governing Maritime Security

Before analyzing legal frameworks which govern maritime security activities, an important legal distinction must be made between peacetime legal frameworks and laws which apply during times of armed conflict. During times of war, and naval warfare is no exception, Hague Law, the 1949 Geneva Conventions and Protocols, along with the specific legislation that applies to naval warfare and maritime operations as codified in the *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* are in-force.

During peacetime, UNCLOS remains the over-arching legal regime for oceans management.<sup>27</sup> UNCLOS, however, does include a brief, though nonetheless specific, security component, addressing key tenets of responding to piracy amongst other issues and seeks to promote all states' cooperation and peaceful uses of the oceans.

In today's international security paradigm, however, distinctions between war and peace are not so clear, and thus the applicability of the UNCLOS regime with regard to maritime security is often called into question. Traditional, state-on-state warfare, for which naval combat has become so excessively prepared, is being replaced by two forms of non-state actors, embodying both threats to maritime security and protectors of international shipping commerce. In this situation, marked by low intensity conflict on the water, an absence of state-on-state warfare and a presence of non-state actors, such as terrorists, pirates, armed robbers on one hand, and PCASP on the other, the Law of Armed conflict lays dormant, and UNCLOS is the dominant regime.

#### 3.1. UNCLOS

Law of the sea sources, specifically the 1982 United Nations Law of the Sea Convention (UNCLOS),<sup>28</sup> provides an engaging starting point for regulatory analysis of private maritime

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<sup>27</sup> Rothwell, Donald; Stevens, Tim, *The International Law of the Sea*, 2010, p. 258.

<sup>28</sup> United Nations Convention on the Law of the Sea (UNCLOS) Signed on 10 December 1982 in Montego Bay, Jamaica. Entered into force on 16 November 1994.

security. UNCLOS sets the backdrop for oceans management, providing the foundation for uniform ocean governance.

UNCLOS is often regarded a framework convention; it sets up institutions, balances rights, obligations, and interests of states in different capacities with interests of the international community. It is supplemented by other conventions, organizations, treaties, protocols, and even soft law.

Yet UNCLOS does much more than simply set up broad frameworks. It also specifies detailed nautical mile limits of maritime zones, establishes rules of the road, and other highly technical criteria for oceans management and seaborne operation.

The Convention provides two specific regimes which are fundamental to maritime security; the regime of consecutive maritime zones and the jurisdiction trinity-- flag, coastal, and port state control. In fact, UNCLOS is the only international convention which stipulates a framework for state jurisdiction on the oceans.

### **3.1.1. Maritime Zones**

UNCLOS sections the oceans, splitting marine areas into five main zones, each with different legal status. These are Internal Waters, Territorial Sea, Contiguous Zone, Exclusive Economic Zone (EEZ), and High Seas.

UNCLOS provides the backbone for offshore governance by coastal states and those navigating the oceans. This convention does not only zone coastal states' offshore areas, but provides specific guidance for states' rights and responsibilities in the said concentric zones.<sup>29</sup>

#### **3.1.1.1. Internal Waters**

Internal waters include littoral areas such as ports, rivers, inlets, and other marine spaces landward of the baseline (low-water line).<sup>30</sup> In these spaces, the port state has jurisdiction to enforce domestic regulations upon vessels in its internal waters, specifically ports. Such enforcement measures can be taken for violations of static standards while at the port as well as for violations having occurred within the coastal state's maritime zones and beyond. However, foreign vessels are not usually held to non-maritime or security port state laws such as those

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<sup>29</sup> Williams, Simon, "Offshore Installations: Practical Security and Legal Considerations," MAST EurAsia Confex, Istanbul, Turkey, 21 May 2014, p.3.

<sup>30</sup> UNCLOS, Part II, Section 2, Article 8.

governing religious practice or sexual orientation, so long as activities conducted are not to detrimental to the peace and security of the locale.

In the maritime security context, specifically, however, a coastal state can prevent PCASP from entering their ports and internal waters if carriage of weapons is forbidden national legislation. Moreover, once entering port, PCASP (and the vessel which they are aboard) can be held accountable for other violations which took place on seas, granted that they in some-way impacted the port state or for other reasons with the permission of the flag state.

### **3.1.1.2. Territorial Sea**

In the territorial sea, a coastal state has unlimited jurisdiction over all (including foreign) activities unless restrictions are imposed by law. All coastal states have the right to a territorial sea extending 12 nautical miles (nm) from baselines.<sup>31</sup>

This measurement evolved from the “Canon Shot procedure” which historically set a 3 nm minimum, now the customary international law mandatory minimum which compulsorily gives coastal states territory at least 3 nm seaward, and allocates them all the responsibilities that come with it. Thus 3 nm is the automatic allocation, and anything else up to 12 nm must to be set by proclamation, though it is arguably becoming customary international law for 12 nm to be the standard norm.

In the maritime security context, the coastal state can set and enforce any laws to restrict movement of PCASP, forbid maritime security operations (including making illegal the carriage or discharge of weapons) within the territorial sea, so long as it is not prejudicial to general freedom of navigation/innocent passage.<sup>32</sup>

### **3.1.1.3. Contiguous Zone**

The contiguous zone is an intermediary zone between the territorial sea and the high seas, extending enforcement jurisdiction of the coastal to a maximum of 24 nm from baselines for the purposes of preventing or punishing violations of customs, fiscal, immigration, or sanitary (and thus residual national security) legislation.<sup>33</sup>

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<sup>31</sup> UNCLOS, Part II, Section 2, Article 3.

<sup>32</sup> UNCLOS, Article 27.

<sup>33</sup> UNCLOS, Part II, Section 4, Article 33.

In the maritime security context, this can certainly include monitoring any activities which can result in armed violence or weapons import into the state. Therefore the coastal state can take measures to prevent or regulate armed maritime security activities out to 24nm under the reasoning it is undertaking customs enforcement operations to prevent movement of arms into its waters/ports.

#### **3.1.1.4. Exclusive Economic Zone (EEZ)**

The EEZ is another intermediary zone, which lies between the territorial sea (12 nm) and the high seas to the maximum extent of 200 nm. Although high seas freedoms concerning general navigation principles remain in place, in this zone the coastal state maintains exclusive sovereignty over exploring, exploiting, and conserving all natural resources.<sup>34</sup> The coastal state therefore can take action to prevent infringement by third parties of its economic assets in this area, including, inter alia, fishing, bioprospecting, and wind-farming. In order to safeguard these rights, the coastal state may take necessary measures, including boarding, inspection, arrest and judicial proceedings, as may be necessary to ensure compliance with the laws and regulations.<sup>35</sup>

#### **3.1.1.5. High Seas**

High seas are to be open and freely available to all, governed by principle of equal rights for all. In agreeing to UNCLOS, all states parties acknowledged that the oceans are for peaceful purposes. (the convention's aim is to maintain peace, justice, and progress for all people of the world.) On the high-seas (beyond 200 nm), no states can act/interfere with justified and equal interests of other states. The Convention establishes freedom of activity in six fields:

1. Navigation
2. Overflight
3. Laying of cables and pipelines
4. Artificial islands and installations
5. Fishing
6. Marine Scientific research

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<sup>34</sup> UNCLOS, Part V, Article 56.

<sup>35</sup> UNCLOS, Part V, Article 73.

Freedom of navigation is of utmost importance for all, and maritime security activities can be considered part of navigational activities, as they protect vessels from interferences in navigation by third parties.

### **3.1.1.6. Problems with the Zone Structure and Counter-Piracy in the Maritime Security Law Context**

Understanding geographic location of attacks does not only assist in developing appropriate maritime security strategies for PCASP, but can also assist legal scholars in assessing the congruence of international legal frameworks governing threat response measures.<sup>36</sup>

UNCLOS classifies piracy as offences committed on the high seas,<sup>37</sup> which leaves open a huge gap—piracy-like threats within a coastal state’s jurisdiction. In order to rectify this missing designation as a crime IMO MSC members have introduced a separate term “armed robbery against ships” to address similar crimes occurring within state’s jurisdiction (i.e. territorial and internal waters).<sup>38</sup> This is defined as “any illegal act of violence or detention or any act of depredation, or threat thereof, other than an act of piracy, committed for private ends and directed against a ship or against persons or property on board such a ship, within a State’s internal waters, archipelagic waters and territorial sea.”<sup>39</sup>

Thus the combined phrase “piracy and armed robbery against ships” together has become a catch-all phrase for piratical acts conducted anywhere in the world.

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<sup>36</sup> UNOSAT, *op. cit.*, p. 25.

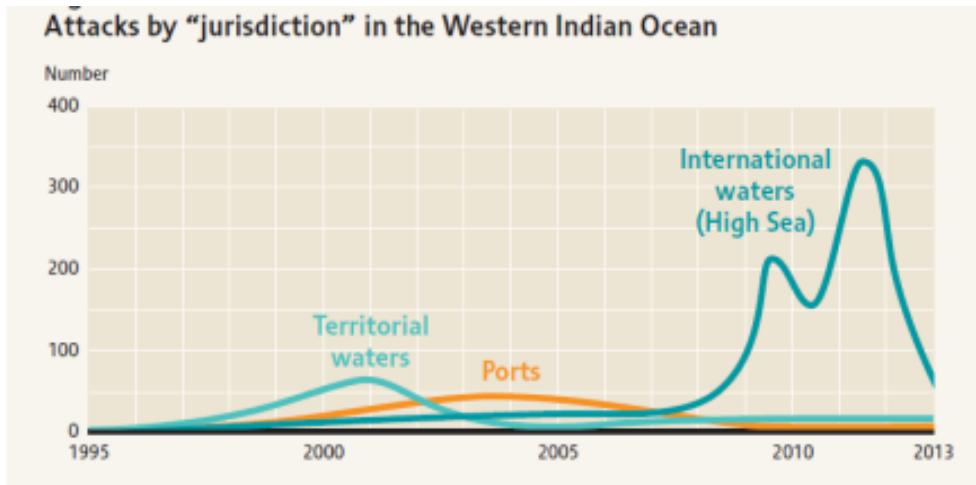
<sup>37</sup> UNCLOS, Art. 101. Definition: Piracy consists of any of the following acts:

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
  - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
  - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).

<sup>38</sup> (Note: This has been used in IMO MSC statements, guidelines, and clarifications as well as further supplemented in SUA, as described in detail in sections 3.2.1.)

<sup>39</sup> IMO Assembly resolution A.922(22) “Code of practice for the investigation of the crimes of piracy and armed robbery against ships,” adopted in November 2001, updated in December 2009 by IMO Assembly resolution A.1025(26) on Code of practice for the investigation of the crimes of piracy and armed robbery against ships.

**Figure 1.**



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As evidenced in the above chart, piracy attacks in the Indian Ocean region, for example, are most frequent on the High Seas, beyond coastal state jurisdiction. This affects regulation of threat responses, and state oversight of PCASP, because no coastal state has jurisdiction on the high seas, as would be the case conversely should armed robbery attacks, and security responses thereto, occur in territorial or internal waters (ports). However, this does not make the high seas ungoverned, as other types of jurisdiction are present governing counter-piracy operations and PCASP activity.

### **3.1.2. Types of Jurisdiction**

Numerous types of jurisdiction can be rendered from UNCLOS and international law broadly. First, three main types of jurisdiction activities exist, combined with three categories of maritime states which can have jurisdiction. First there is Prescriptive jurisdiction, or the power to make rules.<sup>41</sup> Second, there is Enforcement jurisdiction, this is the power to apply rules, monitor compliance, conduct inspections, and make arrests. Third, there is Adjudicative jurisdiction; this is the power to undertake court proceedings after enforcement.

These three types of jurisdiction apply to states and can fall into both Territorial and extra-territorial jurisdiction. Territory refers to the domain over which a state maintains power (generally its physical/political borders. To act outside those limits, “extra-territorially, it needs justification, which is based on certain principles.

<sup>40</sup> Figure 1. from: UNOSAT Global Report on Maritime Piracy a geospatial analysis 1995-2013, p. 26.

<sup>41</sup> (Note: AIRS, not to be confused with GAIRS, are enforcement powers of Flag, Coastal, and Port states.)

Principles for extra-territorial jurisdiction:

- Nationality (i.e. flag state jurisdiction)
- Impacts, effects, protective, security (wherever you are, subject to laws)
- Universality (i.e. piracy—protect the common good, danger for all)<sup>42</sup>
- Treaty, whatever rationale.

The aforementioned principles overlap, thus concurrent jurisdiction exists: i.e. vessels have nationality of one state, fishing agreement of another state, crew from five states, etc.)

In the maritime, specifically private maritime security context, six or more states may have jurisdiction over private maritime security activities at any one time: the flag state of the merchant ship, the state where the shipping company is registered, the home state or states of the merchant crew, the state where the private security company is registered, the home states of the individual security guards, and the coastal state whose waters they transit or ports they enter. Thus oversight of private maritime security operations becomes confusing as state jurisdiction is unclear, and occasionally the states involved may tiff to avoid responsibility and jurisdiction.<sup>43</sup>

UNCLOS regime channels three types of maritime states: Coastal State, Port, State, and Flag States, however, the balance of power between flag and coastal states under UNCLOS tilts in favor of Flag States.<sup>44</sup>

However, when we discuss regulation of private security in the maritime context, additional states also come into play, which will be further discussed in a following section regarding the Montreux Document in section 4.2. of this paper.

### **3.1.2.1. Flag State Jurisdiction**

Flag State refers to the country where a vessel is registered. This country has extra-territorial jurisdiction over its vessels sailing anywhere in the world by virtue of the nationality principle.

<sup>45</sup> Every state has the right to sail ships under its flag and thus participate in international

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<sup>42</sup> (Note: While UNCLOS prescribes universal state jurisdiction over piracy, there is no universal state jurisdiction regulating private counter-piracy activities and other security measures at sea.)

<sup>43</sup> America's Future, "Warships for Hire, a Private Solution to Maritime Piracy," available at <http://americasfuture.org/doublethink/2013/07/warships-for-hire-a-private-solution-to-maritime-piracy/> (Accessed: 20 June 2014).

<sup>44</sup> Molenaar, *Coastal State's Jurisdiction Over Vessel Source Pollution*, 1998, p. 83.

<sup>45</sup> *ibid.*



navigation. However, this right comes with certain responsibilities. Flag states are responsible for enforcing international obligations everywhere and exclusively on high seas over their vessels.<sup>46</sup> This is derived from Article 94 of UNCLOS which stipulates that “every state shall effectively exercise its jurisdiction and control in administrative, technical, and social matters over ships flying its flag.”<sup>47</sup> Flag State Jurisdiction typically includes management of vessel registration, effective jurisdiction and control over vessels including inspection, detention, and arrest as necessary, as well as ensuring vessel conformity to generally accepted international rules and standards (GAIRS).

In the context of flag states, GAIRS are the mandatory minimum standards, and flag states can, at will, establish more stringent requirements aboard their vessels. In the case of maritime security, many can and do establish stricter measures for vetting, employing, operating, and reporting of PCASP, as well as carrying weapons than is mandated by the IMO or recommended by the international community.<sup>48</sup>

Flag state regulations, however, generally only cover issues such as the types of weapon systems that can be brought onboard by PCASP, how many guards can be embarked, certification requirements and background credentials for embarked PCASP, and in some circumstances application procedures to gain Flag State approval for taking a security detail onboard.<sup>49</sup> However, these flag-state restrictions do not address other pertinent issues such as embark and disembark procedures for PCASP, which frequently take place in other countries beside the Flag State, Rules for the Use of Force, oversight and reporting protocols, and code of conduct.<sup>50</sup> Moreover for many Flag States a licensing system for PCASP or anti-piracy teams is non-existent.<sup>51</sup> Enforcement of Flag State regulations upon PCASP is frequently impossible because operations often take place vast distances away from the country of registration and shielded from the eyes of observers.<sup>52</sup> As many vessels are registered in open

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<sup>46</sup> Hosanee, Nivedita, A Critical Analysis of Flag State Duties as Laid Down Under Article 94 of UNCLOS, United Nations, 2009.

<sup>47</sup> Pozdnakova, Alla, *Criminal Jurisdiction over Perpetrators of Ship-Source Pollution: International Law, State Practice and EU Harmonisation*, 2013, p. 111.

<sup>48</sup> Kraska, James, “International Regulation of Private Maritime Security Companies”, *Information Paper Series* 13-4, US Naval War College, 5 June 2013, p. 3.

<sup>49</sup> (Example: Williams, Simon, “Deciphering the Japanese Ship Guarding Act,” *The Maritime Executive*, Available at: <http://www.maritime-executive.com/article/Deciphering-the-Japanese-Ship-Guarding-Act-2014-07-01> (Accessed: 27 August 2014)).

<sup>50</sup> Jakobi, Anja P.; Dieter Wolf, Klaus, *The Transnational Governance of Violence and Crime: Non-State Actors in Security*, 2013.

<sup>51</sup> *ibid.*

<sup>52</sup> *ibid.*

registries or flag of convenience states which maintain little tangible oversight over their vessels, verification, let alone inspection is near impossible.

*“Flag states enjoy the capacity to prescribe laws... applicable to their vessels, wherever those vessels may be. They may also enforce these laws not only in their ports and in their territorial seas, but also on the high seas. Flag state capacity and flag state responsibility are of course quite different things; the existence of entitlement to exercise jurisdiction over vessels is no guarantee that this competence will be utilized.”*<sup>53</sup>

- Rothwell & Stephens

This is best depicted in the flag of convenience and open registry system which exponentially complicates jurisdiction, accountability, and oversight.<sup>54</sup> Ship-owners can simply change vessel registration from one open registry to another, which changes the nationality (and therefore Flag State Jurisdiction) of the vessel in order to place it under a jurisdiction with greater or lesser leniency in accountability and oversight for PCASP management depending on their wishes.<sup>55</sup> For example, a ship-owner with a tanker flagged in Japan, a country with arguably the most stringent PCASP who desires more flexibility, can simply reflag to a state that is not willing or able to exercise jurisdiction and control, like Liberia, an open registry with virtually no PCASP oversight, in order to ease regulations aboard his/her vessel.<sup>56</sup>

The flag state is also the only state (in addition to the state where an individual is a national) which can institute proceedings against a person who is alleged to conduct an violation at sea.<sup>57</sup> This is according to Article 97 (1) of UNCLOS. This Article was created for general investigation and prosecution for duty misconduct aboard a vessel, such as causing a collision. However, it can arguably be relevant in the case of PCASP inclusive of activities to mitigate a potential pirate or terrorist attack, loss of life, or any firearms discharge, perhaps even resulting in the wrongful death of a third party. On the other hand, it could exclude any deliberate use of force on high seas as collision implies accidental incident, and even further can be argued that a death by shooting or otherwise not onboard the vessel does not interfere with navigation.

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<sup>53</sup> Rothwell, Stephens, *op. cit.*, p. 353.

<sup>54</sup> Jakobi; Dieter Wolf, *op. cit.*

<sup>55</sup> Liss, Caroline, “Regulating Private Military and Security Companies at Sea: New Developments and Challenges” Institute for Near East and Gulf Military Analysis (INEGMA), Regional Response to Maritime Piracy: Enhancing Public-Private Partnerships and Strengthening Global Engagement, June 2012, p. 4.

<sup>56</sup> (Example: Williams, “Deciphering the Japanese Ship Guarding Act,” *op. cit.*)

<sup>57</sup> (Note: Except in cases of universal jurisdiction such as piracy.)

Nonetheless, as Italian Prime Minister, H.E. Mario Monti, stated to the UN General Assembly, 26 September 2012, “international efforts to protect sea lanes and fight piracy can be effective only if all nations cooperate in good faith, according to the established rules of the international customary law and UN conventions, including those protecting the jurisdiction of the flag state in international waters.”<sup>58</sup>

Flag states, are required to adopt laws to ensure international regulations are applied and enforced upon vessels which fly its flag. Flag states are to take appropriate measures to ensure that vessels flying their flag are prohibited from sailing unless they can proceed to sea in compliance with standards.<sup>59</sup> Furthermore, they are tasked under customary international law and directly under UNCLOS with investigating and punishing violations aboard their vessels irrespective of where the infraction took place.<sup>60</sup>

Flag states may, however, delegate some authority to classification societies to inspect vessels and issue certificates to vessel/crew, or similarly to port or other states to inspect their vessels when geographically displaced. This is crucial because the flag state may be very remote from its vessel, whereas a coastal (or even port) state may be closer, and the vessel will eventually make call at port, where the port state can make inspection on behalf of the flag state.<sup>61</sup>

### **3.1.2.2. Coastal State Jurisdiction**

There is no prohibition of concurrent jurisdiction under UNCLOS, and vessels therefore can be subject to the jurisdiction of states besides the flag state in certain circumstances, such as entering their maritime zones and ports.

The prescriptive power of coastal states can be seen as a way to control the condition of ships navigating lawfully in their territorial seas. UNCLOS lays down rules for enforcement powers by coastal states toward vessels in their maritime zones, specifically in their territorial sea.<sup>62</sup> This is most importantly derived from Article 27, which provides direct details for coastal state jurisdiction, specifically stating that:

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<sup>58</sup> Monti, Mario, Prime Minister of Italy, Statement to the United Nations General Assembly 26 September 2012 available at: [http://www.governo.it/Presidente/Interventi/testo\\_int.asp?d=69280](http://www.governo.it/Presidente/Interventi/testo_int.asp?d=69280) (Accessed 24 August 2014).

<sup>59</sup> Rothwell, Stephens, *op. cit.*, p. 355.

<sup>60</sup> *ibid.*

<sup>61</sup> Kaye, S., “International measures to protect oil platforms, pipelines, and submarine cables from attack,” *Tulane Maritime Law Journal*, (2007), Volume 31, p. 394.

<sup>62</sup> Molenaar, *Coastal State Jurisdiction Over Vessel-source Pollution, op. cit.*

*1. The criminal jurisdiction of the coastal State 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 its passage, save only in the following cases:*

*(a) if the consequences of the crime extend to the coastal State;*

*(b) if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea;*

*(c) if the assistance of the local authorities has been requested by the master of the ship or by a diplomatic agent or consular officer of the flag State; or*

*(d) if such measures are necessary for the suppression of illicit traffic in narcotic drugs or psychotropic substances.*

*2. The above provisions do not affect the right of the coastal State to take any steps authorized by its laws for the purpose of an arrest or investigation on board a foreign ship passing through the territorial sea after leaving internal waters.*

*3. In the cases provided for in paragraphs 1 and 2, the coastal State shall, if the master so requests, notify a diplomatic agent or consular officer of the flag State before taking any steps, and shall facilitate contact between such agent or officer and the ship's crew. In cases of emergency this notification may be communicated while the measures are being taken.*

*4. In considering whether or in what manner an arrest should be made, the local authorities shall have due regard to the interests of navigation.*

*5. Except as provided in Part XII or with respect to violations of laws and regulations adopted in accordance with Part V, the coastal State may not take any steps 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 before the ship entered the territorial sea, if the ship, proceeding from a foreign port, is only passing through the territorial sea without entering internal waters.*

This clear article indicates the measures a coastal state can take to ensure peace and good-order in their territorial sea. Carriage of arms and PCASP in fire positions can arguably be threatening to the good-order, and as mentioned above, and may also be contrary to customs regimes regarding import of arms, should the PCASP have intent to embark or disembark with weapons within/from the coastal state's ports (sans licenses). Such a provision allows the coastal state necessary latitude to take measures to investigate or prevent such an occurrence. This article, however, is careful, in sub-section five to prevent creeping coastal state jurisdiction over violations which have occurred prior to the ship entering the territorial sea from a foreign port, granted it is in transit and not entering the coastal state's internal waters or ports. Further discussion of this matter can be found in sections 3.1.3. and 3.1.4. of this paper regarding innocent passage and prior notification, respectively.

In order for a coastal state enforce further control beyond the territorial sea in the EEZ, they must contact the subject vessel's flag state to fulfill flag state obligations, or develop and exercise port state jurisdiction. Eventually, ship will have to make call at a port. National legislation criminalizing PCASP violations or agreements with other port states with related legislation can then provide port state jurisdiction to enforce compliance as described below.

### **3.1.2.3. Port State Jurisdiction**

Port state jurisdiction is not covered by UNCLOS directly, but UNCLOS provisions confirm this practice, indicative of "residual jurisdiction in relation to port-state-control."<sup>63</sup> This is especially important in the private maritime security context. If understanding flag state jurisdiction on the high seas and coastal state jurisdiction in the territorial sea are both challenging, then what happens when a ship-borne security team heads to port? A myriad of national rules and regulations then come into force regarding the disembarkation of personnel, equipment (especially weapons), etc., making more mayhem in the legal machinery

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<sup>63</sup> Erik Molenaar, Svalbard Lecture Series, March 2014.

Although each port state has its individual traits in regards to legislation governing the carriage or off/loading of weapons in their ports, there are a number of issues remaining common to all, most notably the prevention of undocumented immigration and proliferation of small arms and light weapons (SALW) that could result from disembarkation of PCASP in their ports.

In an effort to enhance broader security issues, especially good governance, anti-trafficking, anti-corruption, and counter- SALW proliferation. Port states take measures to prevent unwanted vessels, including those with armed security teams from entering or disembarking at their ports. Port State Control compliments the obligation of flag states to inspect and control vessels, by undertaking investigation or verification at vessels calling at their port to ensure they comply with international obligations or standards.<sup>64</sup> In case of violation they can be forced to pay reparations to the port state, refit, reform, arrest, or even blacklist.

Generally, the port state control arrangement is the epitome for investigating and apprehending violators irrespective of a vessel's flag as it will eventually need to make berth to unload cargo.<sup>65</sup> Port state control violation inspections are most frequently targeted for pollution matters, however, there have been numerous investigations and vessel arrests in recent years due the proliferation of small arms for defensive purposes and armed maritime security teams on-board in violation of the port-state's domestic legislation.<sup>66</sup> This is indicative of port-state-control crack-downs on maritime security operations, to push for better standards, compliance, or keep unwanted PCASP activities at bay.

Interestingly, a study by the Rajamathan School of International Studies (RSIS) in Singapore has yielded remarkable results, suggesting that substandard ships in pollution control and shipboard compliance are also more likely to be victims of piratical attack than ships in stellar condition.

*“Well-operated and maintained vessels will follow the best management practice guidelines to avoid attack recommended by the IMO and ship owner associations, but poor quality vessels are less likely to do so...Of the 54 commercial vessels hijacked by Somali pirates in 2010 and 2011, 23*

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<sup>64</sup> IMO, Port State Control, Available at: [http://www.imo.org/blast/mainframe.asp?topic\\_id=159](http://www.imo.org/blast/mainframe.asp?topic_id=159) (Accessed: 20 June 2014).

<sup>65</sup> Rothwell, Stephens, *op. cit.*, p. 354.

<sup>66</sup> (Example: Helman, Christopher, “Venezuela Holds U.S. Vessel And Crew On Suspicion Of Arms Trafficking,” *Forbes*, September 06 2012, Available at: <http://www.forbes.com/sites/christopherhelman/2012/09/06/venezuela-seizes-u-s-vessel-on-suspicion-of-arms-trafficking/> (Accessed: 24 August 2014)).

*vessels, or about 42% of the total hijacked, could be assessed as being sub-standard either by virtue of age and their PSC record.*<sup>67</sup>

- Sam Bateman, RSIS

Thus, tightening port state control inspections, cracking-down on fraud, ports of convenience, and other deficiencies in this system for non-maritime security inspections could actually have a positive effect on adherence to maritime security recommendations and subsequently lower victim rates.

### **3.1.3. Innocent Passage**

UNCLOS enshrines the concept of innocent passage through a coastal state's territorial sea.<sup>68</sup> Passage is innocent so long as it is not prejudicial to the peace, good order, or security of the coastal state.<sup>69</sup>

However, it remains unclear as to whether PCASP employment aboard a commercial vessels is prejudicial to the peace, good order, or security of the coastal state and thus contrary to innocent passage.<sup>70</sup> Each coastal state has its own interpretation as to whether specific vessels in its territorial sea may be prejudicial to peace, good, order, or security. At present, no global standard is defined regarding carriage of arms, armed personnel, personnel in fire positions, and other relevant condition, thus legal debate remains.

Some parallels can be drawn, however, from distinctions of innocent and non-innocent passage for military vessels. Military vessels must travel in "normal mode," which means they must:

- No submerged transit of submarines
- No activities necessary for the security of surface warships (such as formation steaming and other force protection measures)

While this is specifically in regard to military vessels, armed guards aboard commercial vessels may be considered by some to be a force-protection measure and therefore a violation of innocent passage, especially if they are in fire positions. Supporters of this view rely on Article 19 (2) (b), which states

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<sup>67</sup> Bateman, *op. cit.*, p. 196.

<sup>68</sup> UNCLOS, Part II, Article 17.

<sup>69</sup> UNCLOS, Article 19 (1).

<sup>70</sup> Kraska, *Information Paper Series, op. cit.*, p. 3.

*“Passage of a foreign ship shall be considered prejudicial to the peace, good order or security of the coastal state if in the territorial sea it engages in any of the following activities: .....any exercise or practice with weapons of any kind.”<sup>71</sup>*

Supporters of armed guards, on the other hand, maintain that mere carriage of weapons, locked or stowed, for example, certainly cannot be considered exercise or practice. Similarly, using a weapon in a bona fide self-defense situation against inter-alia piracy, armed robbery, or terrorism would also not classify as exercise or practice.

Yet, despite this, some coastal states continue to argue against innocent passage if crews are in battle stations/fire positions, and not traveling in “Normal Mode.” Normal mode has been defined for transit passage situations in Corfu Channel Case,<sup>72</sup> but the same definition and particulars are often extended to the innocent passage debate regarding both warships and employment of PCASP. According to the Virginia Commentaries (Vol 2, 342):

*“it is clear from the context and from the negotiating history that the term was intended to refer to the mode which is normal or usual for navigation for the particular type of ship.... Making the passage in given circumstances....” “Some guidance on this point can again be found in Corfu Channel where the ICJ was satisfied that even when the British warships passed through the channel with crews at action stations, and ready to retaliate if fired upon, this was consistent given the tensions that existed....”<sup>73</sup>*

By this interpretation, armed guards manning battle stations, preparing for contingencies, can be considered normal mode in high-risk situations where an attack could occur, and thus qualify as innocent passage.

Moreover, modern interpretations of UNCLOS, especially in regard to environmental security, stress that actual damage [environmental, violent, or other] has to occur before a coastal state can declare a vessel’s passage in its territorial sea non-innocent.<sup>74</sup> According to legal scholar Erik Molenaar, one of the most challenging things for a coastal state is to establish, without-a-

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<sup>71</sup> Askins, Stephen, “Piracy- Issues Arising from the Use of Armed Guards,” *Ince & Co Shipping Brief*, 2012, p. 3.

<sup>72</sup> ICJ, The Corfu Channel Case, (United Kingdom v. Albania). ICJ Decision of 9 April 1949, Para. 4, 31.

<sup>73</sup> Rothwell, Stephens, *op. cit.*, p. 272.

<sup>74</sup> Molenaar, *Coastal State Jurisdiction Over Vessel-source Pollution*, *op. cit.*



doubt, that a ship is in non-innocent passage, if wrongly accused, the coastal state can be held liable for damages to the ship or charterer.<sup>75</sup>

This is corroborated by Donald Rothwell and Tim Stephens, in their pertinent Law of the Sea text, which argues:

*“A number of issues arise from these provisions [of innocent passage]. One is the capacity of the coastal state to interpret the [Law of the Sea Convention] unilaterally and determine that either the mere presence of a warship within the territorial sea constitutes a threat to its security, or that the actions of the warship whilst engaged in passage are not innocent. There is a widely held view that a presumption of innocence exists, which can only be rebutted by proof from the coastal state, relying upon the objective and specific criteria in Article 19, of a non-innocent act.”*<sup>76</sup>

Moreover, their assessment continues, reaffirming that military and commercial vessels alike always enjoy the right of innocent passage and self defense whilst within the territorial sea of a foreign state, granted they do not undertake in activities which can be interpreted as a threat to the coastal state or engage in the use of force against the coastal state;<sup>77</sup> including the “launching, landing, or taking aboard any aircraft or military device,” per Article 19 (2) (f) of UNCLOS.<sup>78</sup>

In the contemporary maritime security context, defending a vessel against bona fide pirates or terrorists would not be a use of force against the coastal state because the attackers are *hostis humani generis*,<sup>79</sup> or enemies of all mankind, not representative of nation-states in today’s paradigm. By this logic, engaging in genuine self-defense against pirates would not necessarily be a violation of innocent passage.

The second part of this interpretation, regarding the “launching, landing, or taking aboard any aircraft or military device,”<sup>80</sup> however, may complicate the matter as PCASP themselves must eventually embark, disembark, and/or load and offload their weapons at some port or at a floating armory. Should these activities take place, specifically via floating armory or other

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<sup>75</sup> *ibid.*

<sup>76</sup> Rothwell, Stephens, *op. cit.*, p. 268.

<sup>77</sup> *ibid.*

<sup>78</sup> UNCLOS, Part II, Article 19 (2) (f).

<sup>79</sup> Coke, Edward, *Institutes of the Laws of England*, 1628, Part III, Chapter 49, p. 113.

<sup>80</sup> UNCLOS, Part II, Article 19 (2) (f).

vessel in a state's territorial sea without that coastal state's permission, it may be considered as taking aboard a "military device," and thus a violation of innocent passage.<sup>81</sup> This is especially true if the weapons taken aboard are not for commercial, private, maritime security personnel, but for a military vessel protection detail (VPD,) in which a small team of military personnel are deployed to a commercial vessel, usually by the flag state, to protect it while transiting high risk areas.

The concept of VPDs further complicates the innocent passage regime, as it introduces military personnel, equipment, and activities directly into the commercial maritime sector, aboard private vessels. However, despite VPD presence, a vessel itself remains a commercial ship, lacks clear markings identifying it as being on government service, because it has simply taken aboard agents on government service to protect the vessel, not changed its designation to a government ship immune by UNLCOS and authorized to take action against pirates.<sup>82</sup> The VPD is simply performing point-to-point protection against piratical attacks. Neither the VPD or the civilian client vessel is authorized to patrol the seas, board, inspect or arrest suspect pirate ships. Yet, transit of commercial vessels with embarked VPDs, could still, by some, be considered a type of military passage, due to the presence of military personnel and thus arouse other suspicions or concerns.

This is especially true following the *Enrica Lexie* incident, where Italian marines as part of an embarked VPD opened fire and killed Indian fishermen.<sup>83</sup> If coastal states interpret this unfortunate incident in line with India's perspective, that trigger-happy guards are posing danger to their nationals who transit, work, or leisure in those waters it may lead to increased coastal state calls for VPDs to be regulated in a different manner, and their roles, rights, and obligations to be clarified in international law.

Another issue is that VPD (as military personnel) are trained to follow very strict and defined rules of engagement through traditional military chain of command. Yet in the commercial maritime setting, VPD personnel may have to be re-wired to take orders from a civilian ship Master or learn to take decisions independently. Some governments have made agreements to codify such relationships. For example, the Italian ministry of defense signed a memorandum

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<sup>81</sup> (Note: Carriage of firearms or other weapons systems within contiguous zone and/or territorial sea can be viewed, potentially, as being in breach of a coastal states weapons import/export laws, licensing laws, and thus justify to interference.)

<sup>82</sup> UNCLOS, Part II, Subsection C, Article 32; UNCLOS, Part VII, Article 95; Part VII, Article 96.

<sup>83</sup> Sankar, Hari, "Jurisdictional and Immunity Issues in the Story of Enrica Lexie : A Case of Shoot & Scoot turns around!," *EJIL*, 25 March 2013, Available at: <http://www.ejiltalk.org/jurisdictional-and-immunity-issues-in-the-story-of-enrica-lexie-a-case-of-shoot-scoot-turns-around/> (Accessed: 28 August 2014).

of understanding with Italian Shipowners Association indicating that ship Masters have no responsibility to oversee VPD personnel. Such policies are further discussed in the section 3.2.2. of this paper in relation to SOLAS.

#### **3.1.4. Prior Notification:**

Building on the discussion of innocent passage, above, the topic of prior notification naturally follows suit as some coastal states request that vessels carrying armed security personnel provide prior notification to their maritime authority before entering their territorial sea.<sup>84</sup> Legal debate remains as to whether international law requires transiting vessels employing PCASP to adhere to this coastal state request or if a requirement for prior notification is a violation of the right to innocent passage.

Differing interpretations between East and West have traditionally existed regarding the concept of prior notification. This precedent is historically evident in naval passage contexts, but the trends can be applied to the commercial vessels as well.

To put this debate to rest, the two most powerful naval countries of the Cold War, the USA and USSR issued, in 1989, a *Joint Statement on the Uniform Interpretation of Rules of International Law Governing Innocent Passage* which provided as follows:

*“All ships, including warships, regardless of cargo, armament, or means of propulsion enjoy the right of innocent passage through the territorial sea in accordance with international law, for which neither prior notification nor authorization is required.”*<sup>85</sup>

Twenty-five years since issue of this Statement, it has in many contexts, been accepted by the international community and carries substantial weight in operations planning, analysis, and legal debate by government and industry players.<sup>86</sup> It reaffirms trends set by the major international powers of the time that ships do not need prior notification to enter territorial seas under innocent passage

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<sup>84</sup> Symmons, Clive, “Embarking Vessel Protection Detachments and Private Armed Guards on Board Commercial Vessels: International Legal Consequences and Problems under the Law of the Sea,” in *Agora: Legal Issues Pertaining to Vessel Protection Detachments and Embarked Private Armed Security Teams, Military Law and the Law of War*. 2012, p. 64.

(Note: This includes Algeria, Bangladesh, China, Croatia, Egypt, Iran, Malta, Oman, Romania, Serbia and Montenegro, and Yemen. India even requires reporting within EEZ.)

<sup>85</sup> Rothwell, Stephens, *op. cit.*, 2010 p. 270.

<sup>86</sup> (Note: China and India still requesting prior notification for military and other security related activities.)

### 3.2. Legal Security Response Beyond UNCLOS

UNCLOS was ahead of its time, pre-empting environmental protection and low intensity conflict paradigm shifts of the late 1990s by already encompassing many ‘new’ security challenges at the time of its codification in 1982; including environmental security, immigration, and piracy.<sup>87</sup> This allowed UNCLOS to remain relatively flexible and current with international security strategic concepts.

But are further changes in the maritime security threat and threat-response arena required additional instruments to support UNCLOS, in order to provide sufficient legal basis to meet and regulate contemporary security responses?

The global character of shipping requires global regulation, and UNCLOS is not alone in this endeavor. There is not simply one international treaty on maritime security law. While UNCLOS includes several articles relating to state responses against piracy (Articles 100 to 107 and 110), the Convention provides no foundation or guidance for private efforts for combating piracy.<sup>88</sup> Instead there are many fragmented treaties, conventions, legal principles and soft law instruments which supplement UNCLOS.

Although UNCLOS sets the static legal framework of maritime zones and jurisdiction, the convention is silent in regard to specific non-state actions for countering piracy, and has no specific comments about responses to piracy beyond state jurisdiction in Articles 100 to 107 and 110.<sup>89</sup> Instead, a kaleidoscope of overlapping, confusing, and occasionally conflicting international and domestic policies, practices, and laws have emerged in an attempt to tame this often considered unwieldy industry.

UNCLOS is static in order to provide a stable platform, but must also be dynamic to adapt to changes and developments evolving within the international law arena. As alluded to above, it

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<sup>87</sup> Aldis, Anne; Herd, Graeme, "Managing Soft Security Threats: Current Progress and Future Prospects," *European Security* 13, no. 1&2 (2004), 171; Julian Lindley-French, "The Revolution in Security Affairs: Hard and Soft Security Dynamics in the 21st Century," *European Security* 13, 2004, no. 1; 2.

<sup>88</sup> International Group of P&I Clubs, "Provisional guidelines – use of armed guards on board Norwegian ships," 01 July 2011, p. 2.

<sup>89</sup> Kraska, *Information Paper Series*, *op. cit.*

is a framework convention, and therefore sets the playing field and rules-of-the-game for interaction between other instruments.

Therefore, UNCLOS is not a standalone, all-encompassing code for the seas. It is complimented and implemented by a large number of global, regional, and bilateral instruments and bodies, as well as legal principles. These other instruments can be viewed as having the same objective as UNLCOS—standardization and uniformity, but are different, even supplementary, tools.

Problems of ocean spaces, specifically security affairs, are closely related amongst maritime zones and countries, however, as maritime security specific issues are not so comprehensively presented in UNCLOS, other international conventions, international organizations, soft law, and even national legislation, has emerged to supplement the framework convention and implement its stipulated policies.

### **3.2.1. SUA**

The Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA) Convention and Protocol was designed to fill voids in international law necessary to combat other threats to human life and security of navigation and commerce at sea not fully prescribed under UNCLOS.<sup>90</sup> It requires state parties to pass legislation making unlawful piratical and terroristic type acts against navigation described in the treaty a serious criminal offenses in their national law. The SUA framework came in two waves.

#### **3.2.1.1. SUA Framework 1988**

First was the 1988 Convention and Protocol. Under this legislation, states parties have an obligation to establish jurisdiction to extradite or prosecute violators even if the alleged offenses were committed outside their physical territory.

Unlike the UNCLOS definition of piracy,<sup>91</sup> which only applies on the high seas, and therefore only allows responses on the high seas, the SUA framework criminalizes piracy-like offences against vessels which have journeyed out of the territorial sea or are scheduled to transit

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<sup>90</sup> Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation (SUA), Signed on 10 March 1988 in Rome. Entered into force on 1 March 1992.

<sup>91</sup> UNCLOS, Part VII, Article 101.

beyond the territorial sea.<sup>92</sup> Yet, a major gap in the 1988 SUA framework is that it only permitted flag states jurisdiction to mitigate, investigate, and respond to threats on, against, or utilizing their vessels.

### **3.2.1.2. SUA Framework 2005**

In 2005, the 1988 SUA Convention and Protocol were amended to become the 2005 SUA Convention and the 2005 SUA Protocol. The 2005 SUA framework contains three new categories of offenses.

1. Using a ship as a weapon or as a means for committing terrorist acts
2. Proliferation of weapons of mass destruction (WMD) on the high seas
3. Transporting a person alleged to have committed an offense under other UN anti-terrorism conventions.

In addition the 2005 SUA framework broadened state jurisdiction, to include not only the flag state, but also third states.<sup>93</sup> Thus, the SUA frameworks further the extent of criminalizing acts against navigation beyond UNCLOS, increasing states' legal latitude to prevent attacks and pursue violators in maritime zones shoreside of the High Seas. Examining the SUA framework from the broadest perspective, it is evident that it provides an agreement condemning maritime threats, acknowledging that countermeasures must be taken in shore-ward maritime zones, including, but not exclusively private ship borne responses to threat mitigation. Standards and guidelines for private responses have been created via the necessary channels in IMO such as SOLAS described below, and in the private sector as indicated in the subsequent section.

### **3.2.2. SOLAS**

The Safety of Life at Sea (SOLAS) Convention, first developed to increase safety aboard ocean going vessels after the Titanic disaster, has grown since 1914 into the most thorough marine safety convention. Its main purpose is to establish minimum standards for the construction, equipment and operation of ships, compatible with their safety.<sup>94</sup> It is enforced by flag states and port state control measures.

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<sup>92</sup> (Note: Including inter alia seizing a ship, acts or threats of violence against individuals aboard a vessel, or damaging a vessel.)

<sup>93</sup> Kaye, *op. cit.*, p. 394.

<sup>94</sup> *International Convention for the Safety of Life at Sea (SOLAS)*, Signed on 1 November 1974 in London. Entered into force on 25 May 1980.

In relation to private maritime security, a main legal conundrum with SOLAS is whether employing armed security on board a vessel can deprive the ship's master of their overall responsibility to control all actions aboard their vessel, as required by SOLAS. If so, this would be in contradiction to SOLAS Reg 34-1 and Reg 8, Chapter XI-2.<sup>95</sup> Many coastal states have taken additional steps to clarify the relationship between master and PCASP, amending national legislation to reaffirm the Master's overall authority to authorize PCASP targeting, deployment, and ultimately target engagement (specifically weapons discharge of any-kind). In an effort to resolve this dispute, the largest international shipping association, the Baltic International Maritime Council (BIMCO) has released a commercial contract template, GUARDCON, which establishes this clear line of superiority with the ship's Master remaining in command at all times.<sup>96</sup>

Despite this being reaffirmed in SOLAS, by flag states, and even in many industry contracts between PCASP and ship-owners/operators, many PCASP claim that in certain grave life-or-death situations, they would disobey a master's call to stand-down under their individual right to self defense should they believe their life or life of the crew to be in danger. GUARDCON aims to accommodate this extenuating circumstance, acting a contract between PCASP and Master to break this link in chain-of-command, freeing PCASP to act at will, without the Master's orders, and outside the conventional SOLAS protocols.

Relating this back to the Port State Control section, SOLAS allows port states to prevent ships from sailing when serious deficiencies are found that may pose a danger to persons, property, or the environment.<sup>97</sup> This can be extended to implementation of maritime security procedures within SOLAS and its family of regulations (ISPS, ISM etc) if PCASP, their behavior, or their equipment seem to be substandard and as a result a danger to those aboard the vessel, or the public.

### **3.2.3. U.N. Firearms Protocol**

In addition to law of the sea framework, especially flag and port state general maritime legislation, PCASP must also navigate the complex international legal regime of the U.N.

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<sup>95</sup> (Note: Also COLREGS 1972 Rule 2.)

<sup>96</sup> GUARDCON, BIMCO Website, <https://www.bimco.org/Chartering/Documents/Security/GUARDCON.aspx> (Accessed: 24 August 2014).

<sup>97</sup> STCW Art. X(2) via Rothwell, Stephens, *op. cit.*, p. 355.

Firearms Protocol,<sup>98</sup> a binding agreement entered into force in 2005, currently signed by 109 States parties plus the European Union to ensure port and transit state permits if necessary.

The UN suggests not only seeking pre-embarkation permission from the Flag State but also all countries through which PCASP will transit. This includes port and coastal states through which PCASP will embark, transport, carry, store, and disembark with (or without) security related equipment including and especially weapons to ensure they are in compliance with import/export laws for controlled items.

The Protocol sets the regulations for firearms transport. PCASP must be careful and take the necessary precautions to ensure their carriage of weapons systems is rightly permitted and does not qualify as illicit trafficking.

*“Illicit trafficking” shall mean the import, export, acquisition, sale, delivery, movement or transfer of firearms, their parts and components and ammunition from or across the territory of one State Party to that of another State Party if any one of the States Parties concerned does not authorize it in accordance with the terms of this Protocol”<sup>99</sup>*

The Protocol, however, prescribes the possibility for establishing a simplified system for temporary import and exports between States Parties, as follows.

*“States Parties may adopt simplified procedures for the temporary import and export and the transit of firearms, their parts and components and ammunition for verifiable lawful purposes such as hunting, sport shooting, evaluation, exhibitions or repairs.”<sup>100</sup>*

Some states have taken advantage of this clause to establish systems for transiting PCASP and VPDs. Spain, for example, has made an agreement with the Seychelles to allow simplified transit procedures for its VPDs to board Spanish flagged fishing vessels in the Seychelles.

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<sup>98</sup> *United Nations Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition* (Firearms Protocol), Signed on 11 July 2001 in New York. Entered into Force on 5 July 2004, Article 3, e.

<sup>99</sup> *ibid.*

<sup>100</sup> *ibid.*, Article 10, 6.



However, it remains uncertain which States in question qualify as State's Parties due to the numerous states with often overlapping, concurrent jurisdiction in the case of PCASP operations described above- the flag state of the vessel, the coastal state/port state, the home state of the individual PCASP team member, the origin/destination state of the firearms, or the registration country of the private security company, if any.

Floating armories have emerged as offshore supply stores delivering weapons and crews to client vessels, circumventing port and coastal state regulations, bypassing a need for import/export compliance.<sup>101</sup> Of course, this has opened a Pandora's box in terms of unaccounted for firearms, oversight, and regulation in and of itself. In other circumstances, PCASP have jettisoned weapons into the sea after completing missions in order to side-step such import/export regulations at their next port of call/disembark point.<sup>102</sup>

Thus, gaps remain in the regulation and practice of weapons acquisition, transfer, storage, and use. Oversight mechanisms as well as import/export controls can be tightened to limit transgressions, prevent wrongful use, and avoid issues such as disappearances or firearms falling into the wrong hands.<sup>103</sup>

#### **3.2.4. Principle of Self Defense**

Of chief importance to the legal reasoning behind private use of force at sea in counter-piracy is the principle of Self Defense. According to the International Group of P&I Clubs:

*“Customary international law, among other legal authorities, provides that the use of force is restricted to cases of necessity or self-defence, i.e. cases in which there is no other way out and in which the requirements of necessity, reasonableness and proportionality are observed in connection with the use of force. Such customary international law is binding [...] The use of force by private security guards must therefore be based on the general, internationally accepted principles of self-defence.”<sup>104</sup>*

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<sup>101</sup> SEACURUS, “Tackling the Floating Armouries Issue,” Insurance Bulletin, Issue 19, October 2012, pp. 2-4.

<sup>102</sup> Puri, H.S., Letter dated 11 July 2012 from the Chair of the UN Security Council Committee pursuant to resolutions 751 (1992) and 1907 (2009) concerning Somalia and Eritrea addressed to the President of the UN Security Council, p. 278.

<sup>103</sup> *ibid.*, p. 279.

<sup>104</sup> International Group of P&I Clubs, “Provisional guidelines – use of armed guards on board Norwegian ships,” 01 July 2011, p. 2.

This has been reaffirmed by the International Court of Justice (ICJ) in the *Oil Platforms* case, which stated that Iran had the right to protect its offshore installations against threats to their maritime and offshore infrastructure.<sup>105</sup>

Moreover, individual guards, or any persons aboard a vessel for that matter, have the right to self defense of their person. This is a fundamental human right. If pirates or other attackers are directing weapons fire in their direction, for example, and they believe their own life to be in grave danger, the same right of self defense for vessels applies at the personal level, just like on land, granting them, or any other individuals under threat, the ability to take a proportionate response to mitigate the treat.<sup>106</sup>

### 3.2.5. Doctrine of Necessity

After being discussed for decades in international law circles, the Doctrine of Necessity was finally incorporated into the International Law Commission's *Draft Articles on Responsibility of States for Internationally Wrongful Acts*.<sup>107</sup>

Article 25 of this document provides that an otherwise illegal act, such as using force to neutralize a terroristic or piratical attack at sea, can be justified if it meets two criteria:<sup>108</sup>

1. *The act was the only means of safeguarding an essential interest of the state against a grave and imminent peril*
2. *The act did not seriously impair an essential interest of the state toward which the obligation existed.*

Interestingly, identical text as the above appeared in a predecessor article Article 33 of the *Draft Articles on State Responsibility*,<sup>109</sup> which was referenced with approval by the ICJ in the *Gabčíkovo–Nagymaros* case<sup>110</sup> and by the International Tribunal for the Law of the Sea in the *M/V SAIGA* (Number 2) Case.<sup>111, 112</sup>

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<sup>105</sup> ICJ, Case concerning Oil Platforms (Islamic Republic of Iran v. United States of America) Summary of the Judgment of 6 November 2003, paras. 75-77.

<sup>106</sup> Personal interviews with industry practitioners, May 2014.

<sup>107</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 2001

<sup>108</sup> *ibid.*, Article 25.

<sup>109</sup> International Law Commission, *Draft Articles on State Responsibility*, Article 33.

<sup>110</sup> ICJ, *Gabikovo (Hungary v. Slovakia)*, 1997, pp. 5, 40-41.

<sup>111</sup> ITLOS, *The M/V "SAIGA" (No. 2) Case (Saint Vincent and the Grenadines v. Guinea)*, 1999, para. 133.

<sup>112</sup> Kaye., *op. cit.*, p. 416.

Critics may argue that the above court uses of this doctrine both concern environmental security. However, it is not farfetched to believe that using this doctrine to support interdiction/neutralization of terrorists or pirates before they attack a vessel could be a valid application.<sup>113</sup> Such activities could be justified on the basis that the ramifications of such an attack would be severe, with imminent loss of life, and also possible irreversible damage to the environment (i.e. attack on a tanker or offshore drillship resulting in a possible oil spill).<sup>114</sup> In such situations, minor interferences with navigation such as allowing PCASP to engage and disable an approaching vessel, or as a last resort neutralize attacking individuals, would be considered relatively minor when compared with the grave destruction or loss of life which could occur.<sup>115</sup>

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<sup>113</sup> Kaye., *op. cit.*, pp. 416-417.

<sup>114</sup> *ibid.*, p. 417.

<sup>115</sup> *ibid.*

#### 4. Soft Law

This section will evaluate the role of Soft Law and industry self-regulation in shaping rules for private security responses to maritime piracy and other unlawful offences at sea.

Despite international regulation grounded in international law (i.e. UNCLOS) and a myriad of coastal, port, and flag state policies, major institutional gaps remain.<sup>116</sup> From a governance perspective, many argue that there is a need for new approaches and instruments to enhance regulation in maritime security activities, increase harmonization of rules, set standards, and ensure compliance and cite that the best way to implement this is in a soft-law formant. This stems from a widespread commercial perspective that it is better to create controls, even self imposed ones now, than to launch new regulations later that will bring the industry to screeching halt.

Organizations play a crucial role in setting standards, advocating for and developing unified rules in their sector. Industry associations which PMSCs seek to join add credibility to their services have emerged. These organizations stipulate requirements for their members to adhere to some of the below presented guidelines or be certified to set standards, or their own standards. The three most prominent are the Security Association for the Maritime Industry (SAMI), the Independent Association of Maritime Security Professionals (IAMSP) Vetting Scheme, as well as membership of the Security in Complex Environments Group (SCEG).

Industry groups such as these view development of and adherence to soft law as cushioning the effects of possible future hard law “crack-downs” on operations, perhaps even allowing their self-imposed guidelines to become the templates for future national or international regulations. Soft law can act as a suitable test-run to evaluate if regulations work before escalating to (soft or hard) treaties. Moreover, it is undisputed that soft law may be a basis for customary international law.

Critics to this approach, such as “watch-dog” NGOs, press for even more stringent hard law policies, viewing voluntary, market developed soft law protocols and codes of conduct as a way for industry to sidestep or delay full force government regulation.

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<sup>116</sup> America’s Future, *op. cit.*

To close regulatory gaps and to develop some level of oversight and legitimacy, multiple voluntary industry-wide codes of conduct, certification schemes, and guidelines have cropped up. Actions have been taken through consortiums of public and private partners interested in setting standards and improving best practices in this often considered unwieldy industry.<sup>117</sup>

These voluntary certification schemes and codes of conduct can be considered soft law. Soft law is composed of non-legally binding instruments; often used when there is uncertainty or ineffective hard law. Parties to soft-law may behave in ways they negotiate and voluntarily sign up to. In this case, their actions reflect the industry attempting to pre-empt government or international regulation, to make standardization less painful and set trends in order to shape the future hard legal requirements in their sector.

What are advantages of soft law? It is low cost, involves fewer meetings, fewer procedures, less bureaucracy, and is an excellent way to provide guidelines, develop interests, and builds momentum, to evaluate effectiveness before rolling out a hard law package. The disadvantage of soft law is that it does not require compliance by states or parties who do not want to change, which ironically are often targets of the instrument.

Even if the industry has historically not been a major supporter of armed guards, all elements of the maritime industry which have reluctantly accepted the role of PCASP sought a code of practice for the use of force and a clear oversight structure for the provision of security. The industry has established “self regulating” doctrines beyond the limited hard law frameworks described above. This means that company management sets or adopts international private standards for their organization to follow. Historically, (if the private military contractor industry in Afghanistan and Iraq can serve as a comparison) there is a “race to the bottom” as providers respond to competitive pricing in an unregulated environment, but industry standards have emerged to provide a minimum threshold for quality services.

The reporting of incidents that are resolved without damage to the ship or injury to the crew is also effectively dis-incentivized, since the reporting PCASP may open themselves to lengthy investigation and review of certification and training. To complicate matters, confidentiality

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<sup>117</sup> Isenberg, *op. cit.*

agreements, where incidents cannot be reported to outside agencies are sometimes incorporated as a part of the PMSC contract with the shipping company.<sup>118</sup>

#### 4.1. IMO Circulars

“Universal and uniformed” is the spirit of International Maritime Organization (IMO) regulation because vessels travel through all maritime zones, under the jurisdiction of multiple countries, have crew from various countries and therefore need to be held to relatively uniform standards.

The IMO is the United Nations specialized agency for Maritime Affairs. It seeks to develop coordination and policy guidance between different policy areas and different uses of the sea. Amongst other issues ranging from marine environmental protection from vessels to arctic shipping safety, the Maritime Safety Committee (MSC) of the IMO has drafted resolutions and recommended guidelines for the employment of armed guards aboard ships.<sup>119</sup>

The IMO is considered the setter of Generally Accepted International Rules and Standards (GAIRS). Even if a state is not a party to specific IMO conventions, but a member of the IMO, then UNCLOS policy of enforcing GAIRS applies because GAIRS come from not only treaties, laws, but also resolutions of the IMO, which has near universal membership.<sup>120</sup>

According to a 2012 statement from the office of the EU High Representative for Foreign Affairs, Catherine Ashton: “the legal basis of arming cargo vessels needed to be looked into”.... Her spokeswoman added that the EU “would like the use of armed guards regulated within IMO.”<sup>121</sup>

While IMO has not, at the time of writing, issued any binding treaty or convention regarding the use of armed guards aboard merchant ships, the Organization has released guideline documents, in the form of IMO Circulars, which can be considered soft law (or even customary

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<sup>118</sup> Huggins and Walje, “The Challenges of Maritime Private Security Oversight,” *Private Security Monitor*, 2012, Available at: <http://www.globalpolicy.org/pmscs/52135-the-challenges-of-maritime-private-security-oversight.html> (Accessed: 22 June 2014).

<sup>119</sup> Kraska, “International and Comparative Regulation,” *op. cit.*, p.226.

<sup>120</sup> (Note: According to the Vienna Convention, conventions cannot be enforced against non-members, but can evolve into customary international law, especially in the case of IMO, which has near universal membership.)

<sup>121</sup> European Union, A 116/12, Statement by the Spokesperson of High Representative Catherine Ashton following her meeting with Italian Prime Minister Mario Monti, 13 March 2012, (Accessed: 2 August 2014 at [http://www.consilium.europa.eu/uedocs/cms\\_Data/docs/pressdata/EN/foraff/128903.pdf](http://www.consilium.europa.eu/uedocs/cms_Data/docs/pressdata/EN/foraff/128903.pdf)).

international law), advising flag states,<sup>122</sup> port and coastal states,<sup>123</sup> ship-owners, shipmasters, and ship operators,<sup>124</sup> and even private maritime security companies<sup>125</sup> on best practices and reaffirming their oversight responsibilities under international law when providing or procuring such services.<sup>126</sup>

IMO, however, has stated that their guidelines do not address Rules of Engagement for VPDs as this is a “military concept outside the organization’s remit.”<sup>127</sup>

IMO also makes specific reference to the International Code of Conduct for Private Security Providers and Montreux Document as reference points for PCASP guidance. Although neither of these texts deal explicitly with PCASP activity in the maritime domain, specifically in areas beyond national jurisdiction, as they were designed with terrestrial operations in mind, they act as a solid affirmations that the principles for good-conduct, compliance, and accountability should apply to the maritime domain, as well, especially the rule of law and human right law.

The IMO MSC has urged port and coastal states to decide and clarify their laws regarding embarkation, disembarkation and carriage of PCASP, their weapons, ammunition and other security-related equipment along with flag states to decide whether or not they will allow PCASP aboard their vessels, and if so under what conditions.<sup>128</sup>

In addition, the IMO has released the syllabus for a model course for maritime security officers.<sup>129</sup> Although this is not a piece of legislation, it is noteworthy as it has made a positive effect on the industry.<sup>130</sup> PCASP are completing this instruction from maritime training providers offering it as qualifying standard, often in conjunction with Flag State approval, thereby increasing PCASP benchmark competency and uniform training to respond to attacks against commercial vessels. The training, however, is not internationally compulsory by law,

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<sup>122</sup> IMO, MSC.1/Circ.1406, “Revised Interim Recommendations for Flag States Regarding the Use of Privately Contracted Armed Security Personnel On Board Ships in the High Risk Area,” 16 September 2011; IMO, MSC.1/Circ.1444, “Interim Guidance for Flag States on Measures to Prevent and Mitigate Somalia-Based Piracy,” 25 May 2012.

<sup>123</sup> IMO, MSC.1/Circ.1408, “Interim Guidance to Port and Coastal States Regarding the Use of Privately Contracted Armed Security Personnel On Board Ships in the High Risk Area, 12 October 2011.

<sup>124</sup> IMO, MSC.1/Circ.1405, “Revised Interim Guidance to Shipowners, Ship Operators and Shipmasters on the Use of Privately Contracted Armed Security Personnel On Board Ships in the High Risk Area,” 25 May 2012.

<sup>125</sup> IMO, MSC.1/Circ.1443, “Interim Guidance to Private Maritime Security Companies Providing Privately Contracted Armed Security Personnel On Board Ships in the High Risk Area, 25 May 2012.

<sup>126</sup> Martin, *op. cit.*, p. 1371.

<sup>127</sup> Manoj, P., IMO refuses to intervene in row over killing of fishermen, Wall Street Journal, 22 February 2014, (Accessed: 2 August 2014 at <http://www.livemint.com/Politics/JDyXsGPZrVscicgxn27rK/IMO-refuses-to-intervene-in-row-over-killing-of-fishermen.html>).

<sup>128</sup> Kraska, “International and Comparative Regulation,” *op. cit.*, p. 240.

<sup>129</sup> Askildt, Moritz and Kopperud, Kaare André; “Security at sea : the International Ship and Port Facility Security Code (ISPS Code) : with comments” *Norwegian Shipping Security*, 2004, p. 1.

<sup>130</sup> *ibid.*

yet ship-owners, insurers, and PMSCs actively seek personnel who have completed this training and/or other standards.<sup>131</sup>

Specifically, the IMO guidance makes some tactical recommendations. It approves the use of passive and non-lethal defensive measures, supporting implementation of dual-use products *inter alia*; water hoses, nets, long range acoustic devices, razor and electric wire in the fight against piracy. On use of firearms, IMO is not as supportive, indicating hazards of firearms discharge including dangers of flammable cargo and conflict of port state rules banning their use.<sup>132</sup>

#### 4.2. ICoC

The International Code of Conduct (ICoC) for private security service providers has been signed by 708 security companies, states, and other groups, identifying a set of principles and process for security providers to support rule of law and human rights.<sup>133</sup> Parties, however incur no binding legal obligations and simply acknowledge that the principles of the Code of Conduct should be reflected in their operations. Although an accountability and oversight measure is being discussed for the ICoC, it may be difficult to enforce the provisions of the Code in a complex maritime environment, as opposed to on land, where jurisdiction and political boundaries are more straight forward.

ICoC seeks to populate the absence of universal, uniform standards for performance protocols and requirements of security contractors, thus enhancing the likelihood that PCASP will respond uniformly to attacks, in this case attempts of piracy and armed robbery against their clients' vessels.<sup>134</sup>

The code of conduct, like most, is not legally binding. It simply implies there are international best practice standards to govern behavior, especially in this sector, and seeks to codify them into a document for providers and procurers of security services to voluntarily pledge adherence to.

Comparing this to the IMO, which has made many technical guidelines, while still non-binding, that carry more weight than CoCs due to "official" nature of the organization and

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<sup>131</sup> Martin, *op. cit.*, pp. 1373-1374.

<sup>132</sup> *ibid.*

<sup>133</sup> *The International Code of Conduct for Private Security Service Providers (ICoC)*, Signed on 9 November 2010 in Geneva, Switzerland.

<sup>134</sup> Martin, *op. cit.*, p. 1369.



subsequent acceptance of many IMO guidelines as soft law, due to near universal state members to IMO.

### 4.3. Montreux Document

*The Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict* grew out of international concern over the considered un-governed, or at least unwieldy activities of PCASP supporting land operations, mostly for the US Government in Iraq.

The Montreux Document, designed highlights seventy-three guidelines, reaffirming international law, specifically international human rights law and international humanitarian law. It is signed by fifty states, plus the EU, OSCE, and NATO. It encourages states and organizations to enact legislation requiring the vetting of private security companies and to impose penalties including criminal prosecution for violations of law.<sup>135</sup>

Although non-binding, the Montreux Document can be considered a code of practice, signed by states and organizations, alike, to abide by already existing international law, highlighted in the document, to ensure the ensure that their operations do not take place in a legal vacuum, devoid from accountability, no matter far away from home they may be.<sup>136</sup> This certainly can be, and has been, applied to the maritime context as well.

Moreover, just as the nationality principle applies to vessels anywhere they are in the world via flag state jurisdiction, the Montreux Document introduces other applications for the nationality principle in the private security context. It titles three new groups of states. “Contracting States” which are states that directly hire private security services.<sup>137</sup> “Territorial States” being states on whose territory private security activities take place,<sup>138</sup> which can arguably include maritime territories and ports. And “Home States,” which are the states of nationality of the private security company or individual PCASP.<sup>139</sup> As a result of these distinctions, further concurrent, or overlapping jurisdiction can apply to the individuals and firms in question,

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<sup>135</sup> Kraska, “International and Comparative Regulation,” *op. cit.*, p.224.

<sup>136</sup> *ibid.*

<sup>137</sup> *The Montreux Document on Pertinent International Legal Obligations and Good Practices for States related to Operations of Private Military and Security Companies during Armed Conflict*, Signed on 17 September 2008 in Montreux, Switzerland, p. 10.

<sup>138</sup> *ibid.*

<sup>139</sup> *The Montreux Document, op. cit.*

beyond simply the flag, coastal, and port state trifecta presented in the UNCLOS framework section.<sup>140</sup>

#### **4.4. ISO/PAS 28007**

While the Montreux Document and the ICoC are great stepping stones to guide the industry and advise on the best practices to be taken by crew and PCASP, they do not provide a benchmark standard for compliance activities in the maritime context. Thus industry leaders and organizations sought to develop a superior standard for private maritime security companies to meet, and be held accountable to.<sup>141</sup> After much deliberation in the main maritime security forums of the IMO's MSC, BIMCO, the Security Association for the Maritime Industry (SAMI), and the Security in Complex Environments Group (SCEG), it was decided that the International Standards Organization would release a pilot certification program, titled ISO/PAS 28007 as the standard.<sup>142</sup> ISO/PAS 28007 has emerged as the most thorough, pinnacle of compliance and best practice for private maritime security companies to follow and be certified to, indicating they are working at the highest possible standard.

The International Standards Organization, which standardizes many quality assurance systems, especially in the maritime sector, volunteered to design and produce the standard. It is hoped that ISO/PAS 28007 will be considered by major Flag States as a foundation to incorporate into their oversight regulations and standards for PMSCs operating on their flagged vessels.<sup>143</sup> The standard has developed in two parts, as described below.

##### **4.4.1. ISO PAS 28007: Part 1 - Guidelines for Private Maritime security Companies (PMSC) providing privately contracted armed security personnel (PCASP) on board ships (and pro forma contract)**

Part 1 is a list of best practice recommendations, to which private maritime security companies should strive to follow, and then achieve ISO certification to, attesting to their industry leadership, legal compliance, and good conduct. Being certified to this standard provides a clear frame reference to ship-owners and other possible clients, that the certified PMSC in

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<sup>140</sup> (Note: Sometimes these states can be the same, (i.e. flag state of vessel and home state of PMSC could be the same, etc.)

<sup>141</sup> Noakes, Giles, Safety4Sea Interview at Posidonia 2014, "Giles Noakes, BIMCO Chief Maritime Security Officer, discusses ISO PAS 28007 and piracy", available at: <http://youtu.be/NYwCGj60yQw> (Accessed 28 August 2014).

<sup>142</sup> International Standards Organization, "ISO/PAS 28007:2012(E): Ships and Marine Technology- Guidelines for Private Maritime Security Companies (PMSC) Providing Privately Contracted Armed Security Personnel (PCASP) On Board Ships (and Pro Forma Contract)", 15 December 2012.

<sup>143</sup> Huggins and Walje, *op. cit.*

question, can be relied on and trusted to conduct operations in line with the highest industry standards and recommended best practices.<sup>144</sup>

According to the managing director of an industry leading PMSC, it is “inevitable [...] that there will be significant variances in the quality, integrity and professionalism of the services being offered. Services can range [...] from a highly professional, vetted, regulated and trained company, to an opportunistic start-up that chooses not to comply with any existing standard and offers low cost maritime security to hard-pressed ship-owners. ISO 280007 represents real progress and potential.”<sup>145</sup>

ISO/PAS 28007 sets a standard for private maritime security operations, and creates a common understanding amongst service providers, procurers, and all state authorities of the role PCASP play in maritime security. The certification to ISO/PAS 28007 is the only accepted international certification scheme that can allow any interested party to quickly and confidently ascertain the legitimacy, competence, and compliance of a PMSC.<sup>146</sup>

#### **4.4.2. Part 2 - Guidelines for Private Maritime security Companies (PMSC) providing privately contracted armed security personnel (PCASP) on board ships- International Model Set of Maritime Rules for the Use of Force (RUF)- AKA- ‘The 100 Series Rules’**

On top of the issues of oversight and accountability, PCASP lack any standardized policy for the use of force.<sup>147</sup> Military service personnel follow strict Rules of Engagement (RoE); command directives on circumstances under which forces will enter into and continue combat against opposing forces.<sup>148</sup> In the military context, these are generally consistent with international law and state practice, proportionate to the opposing forces and their use of force. In the private sector, specifically private maritime security industry, military guidelines are not applicable to civilian personnel, and the international laws governing threat response, such as the *Geneva Conventions*, do not apply, although the right to self defense is permitted, as discussed in section 3.2.4.

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<sup>144</sup> Noakes, *op. cit.*

<sup>145</sup> Roche, Barry, Managing Director of Protection Vessels International, via Sea Ship News, “PMSC Check List,” Available at: [http://seashipnews.com/focus\\_content.php?fid=3w3c31](http://seashipnews.com/focus_content.php?fid=3w3c31) (Accessed 22 June 2014).

<sup>146</sup> *ibid.*

<sup>147</sup> Martin, *op. cit.*, p. 1373.

<sup>148</sup> *Encyclopedia Britannica Online*, “Rules of Engagement (ROE),” available at: <http://www.britannica.com/EBchecked/topic/1958997/rules-of-engagement-ROE> (Accessed 28 August 2014).

As a result, an industry effort emerged to clarify rules for self-defense at sea by private parties, shipowners, crews, ship masters, and PCASP, where a standardized, legal use of force policy did not earlier exist.<sup>149</sup> To provide such order, an optional industry-wide guideline emerged, which if followed, can mitigate the possibility that lethal force is used inappropriately and disproportionately. This guideline, dubbed the “100 Series Rules” has been developed as a civilian Rules for the Use of Force (RUF) version of military Rules of Engagement (RoE) to be appended to the *ISO/PAS 28007* guidelines.

*The 100 Series Rules* provide an international model set of RUF to which PCASP can be professionally trained to follow and their actions measured and evaluated by competent authorities in the event of a use of force incident. According to barrister and *The 100 Series Rules* chief author, Mr. David Hammond of *9 Bedford Row International*, “The point of this document is not one of imposition upon entities, but one of choice against which one can make an informed decision when reviewing and comparing RUF. At its core is the basic principle of the individual right of self-defence; itself a universal concept.”<sup>150</sup>

Thus, Parts 1 and 2 of *ISO/PAS 28007* together reaffirm international law and obligations, painting a holistic best practice standard to which the private maritime security industry can be held to, balancing operational necessities with legal compliance.

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<sup>149</sup> Martin, *op. cit.*, p. 1373.

<sup>150</sup> Hammond, David via “The 100 Series Rules: an International Model Set of Maritime Rules for the Use of Force (RUF)” *Hellenic Shipping News*, available at: <http://www.hellenicshippingnews.com/21de8a88-0559-4b5d-b5c8-56ff6f3c270d/> (Accessed 28 August 2014).

## 5. Conclusion

Although maritime terrorism, armed robbery, and piracy remain plagues to the global maritime industry, the private sector has successfully responded to protect lives and secure commercial infrastructure on their own where government activity lacks. This response, outside of direct state management, often thought to be ungoverned, is actually regulated by existing international hard-law mechanisms and soft law in the form of industry introduced best practice guidelines. As this paper highlighted, the trend to fill regulatory gaps in this sector has been taken proactively by the industry itself, with numerous of codes of conduct and guidelines emerging to supplement hard law established in international conventions and state practice.

There is always room for improvement and enhancements. Regulatory and oversight mechanisms will be tweaked in time and the system will continue to evolve, as it already has. Yet, the legal regime of the Law of the Sea, specifically that codified in UNCLOS, provides the basis for ocean governance, stipulating state responsibility, obligations, and jurisdiction. This foundation, especially the jurisdiction trifecta of flag, port, and coastal states, as well as the zonal structure established by UNCLOS is chief to ensuring uniform and universal oceans management in all industries, private maritime security certainly being no exception. It provides the necessary checks and balances, coupled with the redundancy of concurrent jurisdiction in certain circumstances, to maintain order over activities at sea.

Soft law has emerged to augment these measures, being fostered within the industry as a less costly and more immediate tool for the sector to regulate itself. This has brought with it a fast professionalization of the industry, accepted by the greater maritime community, especially the IMO. Such growth reflects the global acceptance that private maritime security operations, which are now industry commonplace, are indeed regulated and checked via multiple channels.

Challenges still remain in advocating for use of voluntary crisis reporting measures and standardizing the interplay between private security and insurance sectors to enhance transparency and business accountability. Yet there is no doubt that the efforts of private maritime security have made a substantial positive impact on the global shipping industry, as no vessel employing armed guards has fallen victim to piracy or armed robbery.<sup>151</sup>

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<sup>151</sup> Isenberg, *op. cit.*

The industry hopes to see this trend continue. Ensuring that the legal regime set down in hard law is respected, followed, and enforced, as well as encouraging industry leaders to adopt already existing soft law mechanisms will guarantee that trends toward increased legal compliance, accountability, and oversight best practices will continue on a positive trajectory.

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