

## THE USE OF FORCE AND FIREARMS BY PRIVATE MARITIME SECURITY COMPANIES AGAINST SUSPECTED PIRATES

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**Abstract** The legal framework pertaining to the use of private armed guards protecting merchant ships from Somalia-based piracy is complex, sometimes ambiguous, and currently in a state of flux. Against the background that commercial shipping increasingly relies on Private Maritime Security Companies and that various regulatory projects on the subject matter are underway, this article sketches out what domestic and international rules govern the use of force and firearms by private armed guards on board merchant ships today. It concludes that at this juncture an effort to coordinate this legal framework is necessary, both regarding the interpretation of existing rules and the creation of new norms.

**Keywords:** piracy, private armed guards, private security companies, Somalia, use of force.

### I. A PRIVATE RESPONSE TO PROTECT VULNERABLE SHIPS FROM PIRATE ATTACKS

Somali-based pirates have managed to establish a unique and profitable business model: hijacking vessels and kidnapping their crews for the sole purpose of extorting a large ransom. Since 2008, they have taken over 3000 seafarers hostage.<sup>1</sup> The ransom amount demanded has increased steadily since then<sup>2</sup> and, as of 2011, is estimated to be at almost five million USD per vessel and crew.<sup>3</sup> The international community's response to the scourge of piracy is multifaceted. Among the many actions taken to disrupt Somali-based pirate activity, the Security Council set up an ad hoc legal framework allowing for unimpeded law enforcement in Somali territorial waters and on its mainland,

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<sup>1</sup> H-G Ehrhart and K Petretto, 'The EU and Somalia: Counter-Piracy and the Question of a Comprehensive Approach: Study for the Greens/European Free Alliance' (Hamburg, February 2012) 4, 8, 33 <[www.greens-efa.eu/fileadmin/dam/Documents/Studies/Ehrhart\\_Petretto\\_EUandSomalia\\_2012\\_fin.pdf](http://www.greens-efa.eu/fileadmin/dam/Documents/Studies/Ehrhart_Petretto_EUandSomalia_2012_fin.pdf)> accessed 22 February 2013.

<sup>2</sup> UNODC, 'The Globalization of Crime: A Transnational Organized Crime Threat Assessment' (Vienna, 2010) 199.

<sup>3</sup> A Bowden and S Basnet, 'The Economic Cost of Somali Piracy 2011: Working Paper One Earth Future Foundation' (2012) 11 <[oceansbeyondpiracy.org/sites/default/files/economic\\_cost\\_of\\_piracy\\_2011.pdf](http://oceansbeyondpiracy.org/sites/default/files/economic_cost_of_piracy_2011.pdf)> accessed 22 February 2013.

which complements the pre-existing counter-piracy enforcement regime for the high seas.<sup>4</sup> At the operational level, not only are there an unprecedented number of national and multinational missions contributing to the regional law enforcement operation, but the quest to suppress Somali-based piracy and armed robbery at sea has received a truly international response with States around the globe deploying assets and personnel.<sup>5</sup>

The strategy of using naval presence and retaliatory force to prevent and deter pirate attacks has been relatively successful. It has proven effective in the Gulf of Aden, where a security corridor was established, and along the closely patrolled Somali coastline.<sup>6</sup> The number of attacks in this region has been significantly reduced. Also, the percentage of *successful* attacks by Somali pirates dropped from 50 per cent in 2008 to a mere 12 per cent in 2011. This, however, should not obscure the fact that the overall number of attempted attacks by Somali-based pirates is still growing,<sup>7</sup> partly due to a 'crowding-out' effect that has forced pirate operations into other maritime regions.<sup>8</sup> Pirates now operate at distances of up to 1750 nautical miles off the coast of Somalia and within a geographical area of approximately 2.8 million square nautical miles.<sup>9</sup> This is made possible largely through the use of (often previously hijacked) ocean-going vessels, so-called mother ships, which are able to carry several skiffs, weapons and fuel, thus allowing for increased autonomy.<sup>10</sup> Hence, Somali pirates have yet again demonstrated their ability quickly to adapt their strategy in response to counter-piracy measures.<sup>11</sup>

As a response to the ever-expanding area within which attacks take place, the operational area of the patrolling naval forces has also been extended. For instance, the operational area of the European Union Naval Force (EUNAVFOR, also known as 'Operation Atalanta'), currently covers two million square nautical miles, which is equivalent to 1.5 times the size of mainland Europe.<sup>12</sup> Despite the vast extent of this patrol zone, EU Member

<sup>4</sup> R Geiss and A Petrig, *Piracy and Armed Robbery at Sea: The Legal Framework for Counter-Piracy Operations in Somalia and the Gulf of Aden* (Oxford University Press 2011) 55–85.

<sup>5</sup> UNSC, 'Report of the Secretary-General Pursuant to Security Council Resolution 1950 (2010)' (25 October 2011) UN Doc S/2011/662, paras 39–47; UNSC, 'Report of the Secretary-General on Specialized Anti-Piracy Courts in Somalia and Other States in the Region' (20 January 2012) UN Doc S/2012/50, para 9.

<sup>6</sup> UNSC, 'Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia' (25 January 2011) UN Doc S/2011/30, paras 25 and 28.

<sup>7</sup> Ehrhart and Petretto (n 1) 33.

<sup>8</sup> UNSC, 'Report of the Secretary-General on Specialized Anti-Piracy Courts in Somalia' (n 5) para 9.

<sup>9</sup> UNSC, 'Report of the Secretary-General on Specialized Anti-Piracy Courts in Somalia' (n 5) para 9.

<sup>10</sup> UNODC (n 2) 198.

<sup>11</sup> UNSC, 'Report of the Special Adviser to the Secretary-General on Legal Issues Related to Piracy off the Coast of Somalia' (n 6) para 25.

<sup>12</sup> EUNAVFOR, 'Operation Atalanta' (2012) 4 <[www.eunavfor.eu/wp-content/uploads/2011/08/20120912\\_Informationbrochure\\_english.pdf](http://www.eunavfor.eu/wp-content/uploads/2011/08/20120912_Informationbrochure_english.pdf)> accessed 22 February 2013.

States have not increased the naval forces deployed.<sup>13</sup> On the contrary, in 2011, the economic crisis affecting several of the principle EU contributor States resulted in a growing reluctance to deploy assets to counter Somali-based piracy.<sup>14</sup> On average, EUNAVFOR has five vessels and two patrol aircraft on patrol.<sup>15</sup> Force generation is also a pressing problem for national missions<sup>16</sup> and, at present, is an especially acute problem for NATO's Operation Ocean Shield, which has only two or three vessels deployed at any given time.<sup>17</sup>

The imbalance between the expanding operational area and the scarcity of available resources to combat Somali-based piracy makes it increasingly difficult for patrolling naval forces to fulfil their mandate to protect vulnerable ships from pirate attacks—however efficiently they perform their duties.<sup>18</sup> Two years after the EUNAVFOR mission commenced, a self-assessment found that 'strategically, a naval presence is not deterring the pirates',<sup>19</sup> and consequently, important adjustments occurred on the operational level and in the shipping industry. Two adjustments in particular bear mentioning. First, the deter-and-disrupt strategy has expanded its directed attention to include not only pirate activity at sea, but piracy on land as well. In March 2012, the Council of the European Union extended Operation Atalanta's area of operation to include Somali coastal territory and internal waters. Less than two months later, the first disruptive action against pirate supplies on the Somali coast took place—referred to as Disruption of Pirate Logistic Dumps (DPLD).<sup>20</sup> Second, the strategy has shifted away from primarily trying to secure the piracy-infected maritime area to also protecting vulnerable vessels. There are two possible means of protecting vulnerable objects at sea: the public solution of using so-called Vessel Protection Detachments (VPDs) or, alternatively, relying on the services of Private Maritime Security Companies (PMSCs).

VPDs are small teams of law enforcement officials embarked on board merchant ships to protect them from pirate attacks. They are fundamentally different from PMSC personnel because VPD teams are comprised of uniformed State officials acting within their capacity as military or law enforcement agents, are subject to disciplinary procedures and are authorized to execute the State's monopoly on the use of force. Since 2010, EUNAVFOR

<sup>13</sup> Ehrhart and Petretto (n 1) 35.

<sup>14</sup> Ehrhart and Petretto (n 1) 35.

<sup>15</sup> Ehrhart and Petretto (n 1) 35; EUNAVFOR, 'Operation Atalanta' (n 12).

<sup>16</sup> Ehrhart and Petretto (n 1) 35.

<sup>17</sup> N Gros-Verheyde, 'L'opération Ocean Shield en peine de navires' (26 July 2012) <[www.bruxelles2.eu/piraterie-maritime/loperation-ocean-shield-en-peine-de-navires.html](http://www.bruxelles2.eu/piraterie-maritime/loperation-ocean-shield-en-peine-de-navires.html)> accessed 22 February 2013.

<sup>18</sup> Ehrhart and Petretto (n 1) 34–5; UNSC 'Report of the Secretary-General on Specialized Anti-Piracy Courts in Somalia' (n 5) para 9.

<sup>19</sup> EUNAVFOR, 'European Union's Naval Force Counter-Piracy operation enters its 3rd year as an extension to 2012 is confirmed' (15 December 2010) <[eunavfor.eu/european-unions-naval-force-counter-piracy-operation-enters-its-3rd-year-as-an-extension-to-2012-is-confirmed-2/](http://eunavfor.eu/european-unions-naval-force-counter-piracy-operation-enters-its-3rd-year-as-an-extension-to-2012-is-confirmed-2/)> accessed 22 February 2013.

<sup>20</sup> EUNAVFOR, 'Operation Atalanta' (n 12) 4.

sporadically uses VPDs to protect World Food Programme ships<sup>21</sup> and also trains soldiers from the African Union Mission in Somalia (AMISOM) as VPDs.<sup>22</sup> While some European States are reluctant to deploy VPDs—notably for legal and budgetary reasons—France, Spain, Belgium, Italy and the Netherlands offer commercial shipping companies the option to hire VPDs.<sup>23</sup> The Netherlands has opted to protect Dutch-flagged ships with VPDs because under Dutch law the use of PMSCs on board private ships is prohibited.<sup>24</sup> Thus far, the Netherlands has deployed 26 VPD teams and planned to deploy 100 teams each of ten persons during 2012, and to increase the number of teams to 175 in 2013.<sup>25</sup> Further, since 2009, the Russian Navy sporadically deploys VPDs, and Indonesia (which has 76000 citizens employed as seafarers) is currently considering offering VPD services.<sup>26</sup> While industry representatives express a strong preference for VPDs over private armed guards, resources are limited.<sup>27</sup> As a result, civilian shipping companies do rely on the services of PMSCs. It is estimated that between 15 and 35 per cent of vessels currently transiting the area where Somali-based pirates are active rely on armed guards.<sup>28</sup> Some authors conclude from discussions with leading shipping industry representatives that the number of vessels employing armed guards has increased considerably and that by the end of 2011 the figure was closer to 50 per cent.<sup>29</sup>

Certainly, the fact that private contractors are protecting commercial ships from criminal activity is a challenge to the idea that a State's coastguard and

<sup>21</sup> Ehrhart and Petretto (n 1) 37; J Brown, 'Pirates and Privateers: Managing the Indian Ocean's Private Security Boom' (September 2012) 9 <[lowyinstitute.cachefly.net/files/brown\\_pirates\\_and\\_privateers\\_web.pdf](http://lowyinstitute.cachefly.net/files/brown_pirates_and_privateers_web.pdf)> accessed 22 February 2013.

<sup>22</sup> EUNAVFOR, 'EU NAVFOR Trains AMISOM Vessel Protection Detachment Troops' (9 February 2012) <[eunavfor.eu/eu-navfor-trains-amisom-vessel-protection-detachment-troops/](http://eunavfor.eu/eu-navfor-trains-amisom-vessel-protection-detachment-troops/)> accessed 22 February 2013.

<sup>23</sup> Brown (n 21) 10; N Ronzitti, 'The Use of Private Contractors in the Fight against Piracy: Policy Options' in F Francioni and N Ronzitti (eds), *War by Contract: Human Rights, Humanitarian Law, and Private Contractors* (Oxford University Press 2011) 44–5.

<sup>24</sup> Government of the Netherlands, 'The Netherlands Increases its Protection of Merchant Vessels of the Kingdom' (Press Release, 11 October 2011) <[www.government.nl/documents-and-publications/press-releases/2011/10/07/the-netherlands-increases-its-protection-of-merchant-vessels-of-the-kingdom.html](http://www.government.nl/documents-and-publications/press-releases/2011/10/07/the-netherlands-increases-its-protection-of-merchant-vessels-of-the-kingdom.html)> accessed 22 February 2013 (Government of Netherlands, VPDs); Brown (n 21) 9.

<sup>25</sup> Brown (n 21) 10. <sup>26</sup> Brown (n 21) 9.

<sup>27</sup> UK House of Commons – Foreign Affairs Committee, 'Piracy off the Coast of Somalia: Tenth Report of Session 2010–12' (5 January 2012) 20 <[www.publications.parliament.uk/pa/cm201012/cmselect/cmaff/1318/131802.htm](http://www.publications.parliament.uk/pa/cm201012/cmselect/cmaff/1318/131802.htm)> accessed 22 February 2013.

<sup>28</sup> UK House of Commons, 'Piracy off the Coast of Somalia' (n 27) 7 (15–35 per cent); A Thorp, 'Preventing and Prosecuting Piracy at Sea: Legal Issues: Standard Note 6237' (28 February 2012) 21 <[www.parliament.uk/briefing-papers/sn06237.pdf](http://www.parliament.uk/briefing-papers/sn06237.pdf)> accessed 22 February 2013 (15–25 per cent); INCE & Co, 'Piracy – Armed Guards Revisited and General Overview' (2012) <[incelaw.com/ourknowledge/publications/piracy-armed-guards-revisited-and-general-overview](http://incelaw.com/ourknowledge/publications/piracy-armed-guards-revisited-and-general-overview)> accessed 22 February 2013 (35 per cent); C Ménard and J-C Viollet, 'Rapport d'information par la commission de la défense nationale et des forces armées sur les sociétés militaires privées' (Assemblée Nationale, 14 February 2012) <[www.assemblee-nationale.fr/13/rap-info/i4350.asp#P455\\_118562](http://www.assemblee-nationale.fr/13/rap-info/i4350.asp#P455_118562)> accessed 22 February 2013 (30 per cent).

<sup>29</sup> Bowden and Basnet (n 3) 17.

naval forces are the main providers of security at sea.<sup>30</sup> This is one of the main reasons why the very idea of having PMSCs on board merchant ships or relying on their escort services to provide protection against potential pirate attacks in the Gulf of Aden and Indian Ocean region was initially met with considerable scepticism. Indeed, the 'Best Management Practices to Deter Piracy in the Gulf of Aden and Off the Coast of Somalia', issued by the Commission of the European Union in 2010, stipulated that whilst the use of security guards was at the discretion of the company, it was not recommended. This was endorsed by 16 different international industry representatives, among them the International Association of Independent Tanker Owners (Intertanko), the International Chamber of Shipping (ICS), the Baltic and International Maritime Council (BIMCO), the International Group of Protection and Indemnity Clubs (IGP&I) and the International Maritime Bureau (IMB).<sup>31</sup>

However, the belief that PMSCs play a major role in protecting merchant ships, in addition to VPDs, has gained considerable acceptance since then. Many actors have now endorsed the use of private armed guards on board merchant ships transiting the High Risk Area, or take at least a neutral stance. Due to the heavy reliance on PMSCs by commercial ships and mounting pressure from the shipping industry for guidance on the proper use of PMSCs, the IMO has striven to regulate the use of private armed contractors on board merchant ships.<sup>32</sup> Yet, at the same time, the IMO recommendations on the use of PMSCs 'are not intended to endorse or institutionalize their use'.<sup>33</sup> BIMCO, the largest of the international shipping associations representing a group of shipowners that control roughly 65 per cent of the world's tonnage and with members in more than 120 countries, follows an equally pragmatic approach. BIMCO has a preference for the use of armed government-provided VPDs since this resolves a number of liability and legal issues, albeit with the same physical risk. Nevertheless, while emphasizing that the decision whether or not to employ private guards on board merchant vessels is an operational one to be made by its members, it supports the use of armed guards as a supplement to the non-lethal Best Management Practices which it recommends, but only after a detailed risk assessment. It also stresses that the use of PMSCs must be seen as a temporary measure lasting only until governments fulfil their responsibility to protect crews and ships from pirate attacks and that an unnecessary

<sup>30</sup> N Florquin, 'Escalation at Sea: Somali Piracy and Private Security Companies' in Small Arms Survey, *Small Arms Survey 2012: Moving Targets* (Cambridge University Press 2012) 204.

<sup>31</sup> 'Best Management Practices to Deter Piracy in the Gulf of Aden and off the Coast of Somalia' (Version 2, August 2009) annexed to Commission Recommendation of 11 March 2010 on measures for self-protection and the prevention of piracy and armed robbery at sea [2010] OJ L67/13, art 2(b)(vii).<sup>32</sup> See below n 40.

<sup>33</sup> IMO, 'Revised Interim Recommendations for Flag States Regarding the Use of Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area' (25 May 2012) MSC.1/Circ.1406/Rev.2, Annex, r 1 (IMO Flag State Recommendations).

proliferation of PMSCs and their institutionalization must be avoided.<sup>34</sup> A change in attitude can also be witnessed among national shipowner associations. For instance, the German Shipowner Association (*Verband Deutscher Reeder*) initially opposed the use of PMSCs, arguing that state forces should protect their vessels, but since 2011 they now support the use of PMSCs on board merchant ships.<sup>35</sup> Finally, flag State policies and laws concerning the use of private armed guards on board merchant ships vary greatly. They range from an outright prohibition in France and Japan<sup>36</sup> to the position of the United States which *recommends* the use of PMSCs on board ships flying their flag, arguing that no ship equipped with armed guards has ever been the subject of a successful pirate attack. Thus, US authorities are reportedly working closely with industry and transit countries to make it less burdensome for PMSC personnel to transit foreign ports with weapons intended for the defence of ships. In line with this approach, a national policy encouraging countries to allow commercial ships transiting high-risk waters to have armed security teams on board has been adopted.<sup>37</sup>

The increased use of PMSCs to protect commercial shipping from pirate attacks has triggered legal reform at various levels. A number of States which currently prohibit the use of armed guards on board merchant ships, or which do not have any PMSC-specific rules in place, are reviewing their legislation.<sup>38</sup> As to soft law, a series of initiatives have been launched to create new guidelines on the use of PMSCs. The IMO, for example, adopted three sets of interim recommendations on the use of PMSCs in 2011: one set for flag States, one for port and coastal States, and another for shipowners, ship operators and shipmasters, which were all revised in May 2012.<sup>39</sup> At the same time, the IMO issued new interim guidance designed to complement the three sets of

<sup>34</sup> BIMCO, 'BIMCO's Position: Piracy, Armed Robbery, Kidnapping, Torture and Murder at Sea' (November 2011, last updated March 2012) <[www.bimco.org/en/About/Viewpoint/03\\_Piracy.aspx](http://www.bimco.org/en/About/Viewpoint/03_Piracy.aspx)> accessed 22 February 2013.

<sup>35</sup> K Berkenkopf, 'German Shipowners Threaten Flag Exodus in New Anti-Piracy Row' (Lloyd's List, 26 January 2012).

<sup>36</sup> Oceans beyond Piracy, 'Introduction to Private Maritime Security Industry' (2011) 8 <[http://oceansbeyondpiracy.org/sites/default/files/pm\\_sc\\_map\\_final.pdf](http://oceansbeyondpiracy.org/sites/default/files/pm_sc_map_final.pdf)> accessed 22 February 2013 (OBC, Introduction to PMSCs) [see generally for an overview on Flag States' stance on PMSCs].

<sup>37</sup> R Abeyratne, 'The Use of Armed Guards on Board Merchant Vessels' [2012] Journal on Transportation Security 3 [citing AJ Shapiro, 'Remarks to the Defense Trade Advisory Group' (US Department of State, 9 November 2011) <[www.state.gov/t/pm/rls/rm/176925.htm](http://www.state.gov/t/pm/rls/rm/176925.htm)> accessed 22 February 2013].

<sup>38</sup> For a compilation of various PMSCs flag State laws and legal reform projects, see International Chamber of Shipping, 'Comparison of Flag State Laws on Armed Guards and Arms on Board Vessels' (updated June 2012) <[www.ics-shipping.org/ICS-ECSA%20Private%20Armed%20Guards%20Flag%20State%20Laws%20June%202012.pdf](http://www.ics-shipping.org/ICS-ECSA%20Private%20Armed%20Guards%20Flag%20State%20Laws%20June%202012.pdf)> accessed 22 February 2013 (ICS, Flag State Law Comparison).

<sup>39</sup> IMO Flag State Recommendations (n 33); IMO, 'Revised Interim Recommendations for Port and Coastal States Regarding the Use of Privately Contracted Armed Security Personnel On Board Ships in the High Risk Area' (25 May 2012) MSC.1/Circ.1408/Rev.1, Annex (IMO Port and Coastal State Recommendations); IMO, 'Revised Interim Guidance to Shipowners, Ship Operators, and Shipmasters on the Use of Privately Contracted Armed Security Personnel On

recommendations.<sup>40</sup> Meanwhile, Working Group 3 of the Contact Group on Piracy off the Coast of Somalia is about to draft comprehensive guidelines on the use of privately contracted armed security personnel.<sup>41</sup> As to regulations on the use of force, Working Group 3 consulted and cooperated with the IMO, which is indicative of a general desire to synthesize the guidance given to the shipping industry.<sup>42</sup> The United Kingdom<sup>43</sup> and India<sup>44</sup> have also adopted guidelines. Further, shipping organizations such as BIMCO, ICS, INTERCARGO, Intertanko and OCIMF<sup>45</sup> and several insurance associations<sup>46</sup> have also issued guidelines. BIMCO recently drafted the standard contract GUARDCON, which aims to harmonize PMSCs terms of engagement and thus limit the legal uncertainty that comes from PMSCs being hired under differing contractual terms.<sup>47</sup> These maritime (or rather piracy) specific instruments complement existing general soft law on PMSCs. The International Code of Conduct for Private Security Service Providers (ICoC)<sup>48</sup> is of considerable importance since, among those companies that have signed it, 48 per cent specialize in maritime security and 18 per cent offer maritime

Board Ships in the High Risk Area' (25 May 2012) MSC.1/Circ.1405/Rev.2, Annex (IMO Shipowner Recommendations).

<sup>40</sup> IMO 'Interim Guidance to Private Maritime and Security Companies Providing Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area' (25 May 2012) MSC.1/Circ.1443, Annex (IMO PMSC Guidance).

<sup>41</sup> UNSC, 'Report of the Secretary-General Pursuant to Security Council Resolution 1950 (2010)' (n 5) para 24.

<sup>42</sup> Information on file with author.  
<sup>43</sup> UK Department for Transport, 'UK Interim Guidance to UK Flagged Shipping on the Use of Armed Guards to Defend Against the Threat of Piracy in Exceptional Circumstances' (Version 1.1, November 2011, updated June 2012), <[assets.dft.gov.uk/publications/use-of-armed-guards-to-defend-against-piracy/use-of-armed-guards-to-defend-against-piracy.pdf](http://assets.dft.gov.uk/publications/use-of-armed-guards-to-defend-against-piracy/use-of-armed-guards-to-defend-against-piracy.pdf)> accessed 22 February 2013 (UK Interim Guidance on PMSCs).

<sup>44</sup> Government of India, 'Shipping Ministry Issues Guidelines for Deployment of Armed Guards in Merchant Ships' (Press Information Bureau, 29 August 2011) <[www.pib.nic.in/newsite/erelease.aspx?relid=75281](http://www.pib.nic.in/newsite/erelease.aspx?relid=75281)> accessed 22 February 2013; H Devineni, 'Summary of Indian Ministry of Shipping Guidelines on Deployment of Armed Security Guards on Merchant Ships' <[oceansbeyondpiracy.org/sites/default/files/indian\\_policy\\_armedguards.pdf](http://oceansbeyondpiracy.org/sites/default/files/indian_policy_armedguards.pdf)> accessed 22 February 2013 (Indian PMSC Guidelines).

<sup>45</sup> See eg 'Industry Guidelines for the Use of Private Maritime Security Contractors (PMSC) as Additional Protection in Waters Affected by Somali Piracy' (May 2011) <[psm.du.edu/media/documents/industry\\_initiatives/industry\\_guidelines\\_for\\_use\\_of\\_private\\_maritime\\_security\\_contractors\\_somali\\_piracy.pdf](http://psm.du.edu/media/documents/industry_initiatives/industry_guidelines_for_use_of_private_maritime_security_contractors_somali_piracy.pdf)> accessed 22 February 2013 (Industry Guidelines).

<sup>46</sup> See eg The Norwegian Shipowners' Mutual War Risk Insurance Association, 'Guidance on the Selection of Private Security Companies (PSC)' (29 March 2011) <[www.warrisk.no/filestore/Sirkulrer\\_og\\_informasjon\\_til\\_medlemmer/PSCGuidanceMaypdf.pdf](http://www.warrisk.no/filestore/Sirkulrer_og_informasjon_til_medlemmer/PSCGuidanceMaypdf.pdf)> accessed 22 February 2013 (Norwegian PMSC Guidelines).

<sup>47</sup> BIMCO, 'GUARDCON' <[www.bimco.org/Chartering/Documents/Security/GUARDCON.aspx](http://www.bimco.org/Chartering/Documents/Security/GUARDCON.aspx)> accessed 22 February 2013; The Shipowners' Protection Limited, 'BIMCO GUARDCON contract for the employment of security guards on vessels' (March 2012) <[www.shipownersclub.com/media/377127/bimcoguardconcontractfortheemploymentofsecurityguardsonvesselsmarch2012.pdf](http://www.shipownersclub.com/media/377127/bimcoguardconcontractfortheemploymentofsecurityguardsonvesselsmarch2012.pdf)> accessed 22 February 2013.

<sup>48</sup> *Confédération Suisse*, 'International Code of Conduct for Private Security Service Providers' (9 November 2010) <[www.icoc-psp.org/uploads/INTERNATIONAL\\_CODE\\_OF\\_CONDUCT\\_Final\\_without\\_Company\\_Names.pdf](http://www.icoc-psp.org/uploads/INTERNATIONAL_CODE_OF_CONDUCT_Final_without_Company_Names.pdf)> accessed 22 February 2013 (ICoC).

services among other services.<sup>49</sup> The ICoC not only applies to security services provided on land but also to those provided at sea, this flowing from reading Rule 13 (which provides that the code applies to security services provided in Complex Environments) together with the definition of ‘Complex Environments’ in Section B (which refers to ‘any area’ rather than ‘any territory’). Furthermore, Rule 7 states that the signatories will consider the development of ‘additional principles and standards for related services, such as . . . the provision of maritime security services’. The word ‘additional’ in Rule 7 can be understood as referring to other rules as well as to the principles and standards set out in the ICoC itself.<sup>50</sup> This conclusion is, however, different from that of the IMO which, whilst accepting that the ICoC is a ‘useful reference point for PMSCs’, takes the view that it was drafted ‘only for land-based security companies, and is therefore not directly applicable to the peculiarities of deploying armed guards on board merchant ships to protect against acts of piracy and armed robbery at sea’.<sup>51</sup>

Many of the rules on the use of PMSCs specify that they should have access to competent maritime legal advice at all times, given ‘the imprecise position of armed guards under various national jurisdictions and international law’<sup>52</sup> and ‘the complexity of applicable laws concerning the carriage and use of firearms and security-related equipment on board merchant ships’<sup>53</sup>. Indeed, the legal framework relating to the protection of merchant ships from pirate attack by private armed guards is complex, ambiguous, and currently in a state of flux. The following sections aim to provide an overview of the rules relating to arms and other security-related equipment used by PMSCs, such as communication equipment, and the powers of PMSC personnel. The question of whether the master of a ship with PMSC personnel on board must render assistance to other merchant ships in distress or to alleged pirates at risk of drowning will also be addressed, as will be the relationship between the master of a ship and PMSC personnel. Finally, consideration will be given to whether coastal and port States can pursue violations of their criminal law by PMSCs and their personnel.

<sup>49</sup> T Haueter, ‘Countering Piracy: What Are the Rights and Obligations of States and Private Security Providers?’ (Wilton Park Conference, ‘Countering Piracy: What Are the Rights and Obligations of States and Private Security Providers?’, 30 January–1 February 2012) [quoted with permission]. The figures are based on self-declaration by the companies and were not verified by DCAF.

<sup>50</sup> A Priddy and S Casey-Maslen, ‘Counter-Piracy Efforts and Operations: Law and Policy Issues’ (draft dated 13 January 2012, Background Paper for the Wilton Park Conference, ‘Countering Piracy: What Are the Rights and Obligations of States and Private Security Providers?’, 30 January–1 February 2012).

<sup>51</sup> IMO PMSC Guidance (n 40) r 2.1.

<sup>52</sup> UK Interim Guidance on PMSCs (n 43) r 3.2.

<sup>53</sup> IMO PMSC Guidance (n 40) r 3.3.2.



II. ISSUES RELATED TO ARMS AND OTHER SECURITY-RELATED EQUIPMENT USED  
BY PMSCS

The legal issues pertaining to the procurement, embarkation, disembarkation, carriage, and on-board management of arms and security-related equipment by PMSCs are most probably more difficult than those relating to the use of force by PMSC personnel. Public information on the types and quantities of arms, including ammunition, consumables, spare parts and maintenance equipment, and security-related material used by PMSCs, such as communication equipment, is scarce.

PMSCs do not rely on a standard ‘weapon kit’. Some use a single type of firearms whilst others rely on a combination of several specialized weapons. PMSCs that equip their personnel with a single type of firearm most commonly use assault rifles or shotguns. The range of this type of weapon does not exceed 300 to 400 metres at sea. The strategy of these PMSCs is primarily to deter attacks, an effect offered by the mere presence of armed guards, prompting the alleged pirates to refrain from an attack and to seek softer targets. Often the decision on which type of weapon to rely on is the result of strict port, coastal or flag State law limiting the types of weapons that can be carried on board their ships or on ships navigating in their waters. PMSCs using a combination of more specialized arms generally equip their personnel with weapons having a range of 20 to 1200 metres, such as pistols and shotguns (20 metres), light machine guns (400 to 600 metres), general purpose machine guns and sniper rifles (1000 to 1200 metres). Having such a variety of weapons allows for both a more graduated and an earlier response.<sup>54</sup>

*A. The Plethora of Applicable Legal Frameworks*

The use of *armed* private security personnel on board merchant ships gives rise to a range of legal issues. They pertain, inter alia, to the procurement and movement of weapons by PMSCs, to requirements regarding the embarkation and disembarkation of arms and/or of armed guards, and to conditions pertaining to the on-board carriage, storage and management of weapons.<sup>55</sup> These are usually addressed by domestic law such as arms regulations, export, import and custom provisions, and/or laws specifically dealing with PMSCs. In the absence of a system of harmonized domestic law or of comprehensive international rules on the use of armed guards on board merchant ships, the matter is, then, subject to—often differing—domestic legal requirements. The result is a patchwork of domestic law which may apply cumulatively and/or consecutively, depending upon the actual *locus* of the ship.

<sup>54</sup> Florquin (n 30) 207–8. More on a graduated response in the present context, see below at section 3B.

<sup>55</sup> Legal frameworks and rules pertaining to the *use* of firearms are discussed below at section 3B.

Arms and armed guards on board ships navigating the high seas are primarily governed by the law of the flag State. Ships have the nationality of the State whose flag they are entitled to fly.<sup>56</sup> Among other functions, the nationality of a ship indicates which State is permitted and obliged<sup>57</sup> under international law to exercise its jurisdiction, namely to prescribe and enforce rules.<sup>58</sup> Thus, through the concept of nationality, the vessel is attached to a particular State whose law is applicable on board.<sup>59</sup> Consequently, on the high seas, it is the law of the State whose flag the merchant vessel using PMSCs is flying which governs issues relating to arms. Flag State law on the procurement, movement, carriage and on-board management of arms by PMSC personnel varies considerably, ranging from very permissive rules to outright prohibitions of embarking arms and/or armed guards on board merchant ships.<sup>60</sup> Especially in jurisdictions without PMSC-specific legislation in place, general rules govern arms and armed guards on board merchant ships. The application of general rules potentially results in legal uncertainty or does not provide for satisfactory outcomes. In Germany, for instance, in the absence of PMSC-specific rules, armed guards were mainly governed by the trade regulation act (*Gewerbeordnung*) and the weapons law (*Waffengesetz*) neither of which was drafted with a view to their applying to private armed guards embarked on merchant vessels for the purpose of defence against pirate attack. On the one hand, the criteria stipulated by the trade regulation act for PMSCs to enter the regulated market is quite low and therefore did not allow for efficient vetting and certification of companies.<sup>61</sup> On the other hand, the weapons law is too restrictive to permit PMSCs to be equipped with the 'weapon kit' necessary for a graduated and efficient response to pirate attacks.<sup>62</sup> Against this background, shipowners have threatened to flag out their ships or not return to the German flag until specific PMSC legislation is

<sup>56</sup> United Nations Convention on the Law of the Sea (adopted 10 December 1982) 1883 UNTS 3 (UNCLOS) art 91(1), 2nd sentence.

<sup>57</sup> UNCLOS (n 56) art 94; on the flag State's obligation to exercise its jurisdiction, see R-J Dupuy and D Vignes, *A Handbook on the New Law of the Sea*, vol 1 (Martinus Nijhoff Publishers 1991) 405–6; a State not regulating the use of PMSCs on board its ships may violate this provision.

<sup>58</sup> UNCLOS (n 56) art 92(1).

<sup>59</sup> Dupuy and Vignes (n 57) 401; D König, 'Flag of Convenience', *The Max Planck Encyclopedia of Public International Law* (online edition) paras 16–17 <[www.mpepil.com](http://www.mpepil.com)> accessed 22 February 2013.

<sup>60</sup> On the differing national concepts, see ICS, Flag State Law Comparison (n 38).

<sup>61</sup> D König and T René Salomon, 'Private Sicherheitsdienste auf Handelsschiffen – Rechtliche Implikationen', PiraT-Arbeitspapiere zur Maritimen Sicherheit Nr 2 (March 2011) 25–30 <[www.maritimesecurity.eu/de/publikationen/workingpapers.html](http://www.maritimesecurity.eu/de/publikationen/workingpapers.html)> accessed 22 February 2013 (König and Salomon, Private Sicherheitsdienste); D König et al, 'Piraterie und maritimer Terrorismus als Herausforderungen für die Seesicherheit: Objektive Rechtsunsicherheit im Völker-, Europa- und deutschem Recht', PiraT-Arbeitspapiere zur Maritimen Sicherheit N. 7 (July 2011) 38–42 and 62 <[www.maritimesecurity.eu/de/publikationen/workingpapers.html](http://www.maritimesecurity.eu/de/publikationen/workingpapers.html)> accessed 22 February 2013 (König, Rechtsunsicherheit).

<sup>62</sup> König and Salomon, Private Sicherheitsdienste (n 61) 30–1; König, Rechtsunsicherheit (n 61) 43–4.

enacted which clarifies the situation.<sup>63</sup> As a response, the German legislature adopted a legal reform project on the use of armed private guards on board merchant ships amending the trade regulation act and weapons law, which will enter into force on 1 August 2013.<sup>64</sup> Other European States, namely Greece and Cyprus, also adopted PMSC-specific regulations recently.<sup>65</sup>

In addition to flag State law, PMSCs and their personnel may be obliged to observe, regulations of the State where the company is incorporated.<sup>66</sup> Thus, for example, Article 8 of the Draft Swiss Federal Law on Security Services Provided Abroad<sup>67</sup> obliges security service providers to respect the ICoC. The ICoC, in turn, contains rules on the management of weapons<sup>68</sup> and weapons training.<sup>69</sup> A PMSC and/or its personnel on board a merchant vessel navigating the high seas is thus potentially bound by several laws at the same time which may contain differing and/or conflicting rules on arms. Even though Article 92 UNCLOS requires that ships shall sail under one flag (and consequently one law) only, a pragmatic approach can be taken by providing that both laws and policies must be respected, as do shiprider<sup>70</sup> clauses to solve a similar conflict of laws instance.<sup>71</sup>

If a commercial ship relying on private armed guards passes through the territorial waters of a third State or calls into port in a foreign State, compliance with coastal and port State laws and regulations on arms must also be ensured, and these may again differ from the relevant law of the flag State.<sup>72</sup> As will be seen below, whether the coastal State may regulate the use of arms and/or armed guards on board foreign merchant exercising the right of innocent passage within its territorial sea<sup>73</sup> cannot be determined with certainty at this juncture.<sup>74</sup> Nevertheless, some States surrounding the piracy-infected area,

<sup>63</sup> Berkenkopf (n 35).

<sup>64</sup> Bundesrat, Gesetz zur Einführung eines Zulassungsverfahrens für Bewachungsunternehmen auf Seeschiffen, Drucksache 12/13, 11 January 2013 <[www.bundesrat.de/SharedDocs/Beratungsvorgaenge/2013/0001-0100/0012-13.html](http://www.bundesrat.de/SharedDocs/Beratungsvorgaenge/2013/0001-0100/0012-13.html)> accessed 22 February 2013.

<sup>65</sup> For Greece, see Law No 4058: provision of security services by armed guards to commercial ships and other provisions <[www.hcg.gr/sites/default/files/docs/archive/n4058y2012eng.pdf](http://www.hcg.gr/sites/default/files/docs/archive/n4058y2012eng.pdf)> accessed 22 February 2013; for Cyprus, see Law No 77/2012: The Protection of Cyprus Ships against Acts of Piracy and Other Unlawful Acts Law of 2012 <[www.mcw.gov.cy/mcw/dms/dms.nsf/marsecvessels\\_en/marsecvessels\\_en?OpenDocument#11](http://www.mcw.gov.cy/mcw/dms/dms.nsf/marsecvessels_en/marsecvessels_en?OpenDocument#11)> accessed 22 February 2013.

<sup>66</sup> IMO PMSC Guidance (n 40) r 1.3.2.

<sup>67</sup> 'Loi fédérale sur les prestations de sécurité privées fournies à l'étranger (LPSP)' (2011) <[www.ohchr.org/Documents/Issues/Mercenaries/WG/Law/Switzerland/LPSP.pdf](http://www.ohchr.org/Documents/Issues/Mercenaries/WG/Law/Switzerland/LPSP.pdf)> accessed 22 February 2013.

<sup>69</sup> ICoC (n 48) r 59.

<sup>70</sup> Put simply, shipriders are law enforcement officials of State A who are embarked on a law enforcement vessel of State B.

<sup>71</sup> On potential conflicts of law arising from the use of shipriders and how they are practically solved, see Geiss and Petrig (n 4) 90–2.

<sup>72</sup> König, Flag of Convenience (n 59) paras 31 and 37; IMO PMSC Guidance (n 40) r 1.3.3.

<sup>73</sup> M Gavouneli, *Functional Jurisdiction in the Law of the Sea* (Martinus Nijhoff 2007) 39–40.

<sup>74</sup> On innocent passage, see below at section 2B1.

through whose territorial seas merchant ships with PMSC personnel on board may potentially pass have regulated the issue.<sup>75</sup>

A special regime applies to the Suez Canal, which provides a likely passage route for merchant ships which are utilizing PMSCs to protect from Somali-based piracy. The Canal is subject to the 1888 Convention Respecting the Free Navigation of the Suez Maritime Canal (Constantinople Convention).<sup>76</sup> Article 1 of the Constantinople Convention sets out the basic principle that the 'Suez Maritime Canal shall always be free and open ... to every vessel of commerce ... without distinction of flag. Consequently, the high contracting parties agree not in any way to interfere with the free use of the canal ...'. Article 13 of the Constantinople Convention reflects the balance struck between the rights and powers retained by Egypt with regard to operation of the Canal and the right of free passage granted to all ships. It stipulates that, except for the obligations expressly provided by the treaty, the sovereign rights of Egypt are in no way affected.<sup>77</sup> Concretely, Egypt, as the territorial State having sovereignty over the Canal, has regulatory power regarding navigation and safety but it has to respect the basic principle of the Constantinople Convention, this being the free use of the Canal by all nations. What regulations and measures are permissible is to be determined on an ad hoc basis, taking into account general rules on treaty interpretation and applicable standards regarding the safety of navigation.<sup>78</sup>

With regard to weapons and armed guards on board foreign ships, the Suez Canal Authority first decided that vessels transiting the Canal should hand over all weapons to the local authorities, who would return them upon completion of the transit. In August 2011, the Egyptian Ministry of Defence went a step further, prohibiting all vessels transiting the Canal from having any type of weapons and armed guards on board. All ships were to make a declaration to the competent local authorities that they did not have any weapons or armed guards on board while transiting the Canal. Contravention could imply criminal liability under the Egyptian laws concerning the possession of unlicensed weapons. After consultations between the Ministry of Defence, the Ministry of Transport and the Suez Canal Authority, it was decided not to apply this regulation given its negative impact on shipping through the Suez Canal and the difficulties related to its implementation. Instead, it was decided that transiting vessels must submit a letter certified by the flag State, which provides, inter alia, details of all weapons, ammunition and the number of

<sup>75</sup> See below at section 2B2.

<sup>76</sup> Reprinted in AJIL Supplements 3 (1909) 123–7.

<sup>77</sup> M Arcari, 'Suez Canal', *The Max Planck Encyclopedia of Public International Law* (online edition) para 9 <[www.mpepil.com](http://www.mpepil.com)> accessed 22 February 2013 (Arcari).

<sup>78</sup> Arcari (n 77) para 21.

armed guards on board, as well as confirmation that weapons and ammunition will not be used during the vessel's presence in the Canal.<sup>79</sup>

In sum, depending on the locus of the ship, different sets of rules apply to the question of whether, and under which circumstances, arms and/or armed guards are allowed on board merchant ships. These rules may not only differ and/or contradict each other, but their interpretation by domestic authorities often cannot be anticipated with a sufficient degree of certainty. This holds particularly true with regard to the rules pertaining to innocent passage, to which we turn now.

### *B. Arms and Innocent Passage*

Ships of all States, whether coastal or landlocked, enjoy the right of innocent passage through the territorial sea of third States.<sup>80</sup> The term 'passage' includes traversing the territorial sea without entering internal waters, or proceeding to or from internal waters.<sup>81</sup> The concept of innocent passage, which is laid down in Articles 17 to 32 of UNCLOS and reflects customary law<sup>82</sup>, is a cornerstone of the law of the sea. With regard to PMSCs, two questions flow from the regime on innocent passage. First, does the simple presence of armed private security service providers on board a merchant ship and/or the use of arms in self-defence constitute a non-innocent activity? Second, is the coastal State allowed to regulate or even prohibit the use of armed guards on board merchant ships within the rather strict confines imposed by UNCLOS with regard to the regulation of innocent passage by the coastal States?

#### *1. Non-innocent activity?*

Passage is qualified as 'innocent' so long as it is not prejudicial to the peace, good order, or security of the coastal State.<sup>83</sup> If a ship engages in non-innocent activities, it becomes subject to the full enforcement powers of the coastal State, which can take the necessary steps to prevent passage which is no longer

<sup>79</sup> Egyptian Marine Insurance Consultations & Services (EMICS), 'Piracy – Weapons and Armed Guards on board vessels transiting the Suez Canal' (on file with author); Gard, 'Gard Alert, Egypt/Suez Canal – new instructions regarding weapons and armed security guards onboard commercial vessels' (November 2011) <[www.gard.no](http://www.gard.no)> accessed 22 February 2013 and 'Gard Alert, UPDATE – Instructions regarding weapons and armed security guards onboard commercial vessels in Egypt' (December 2011) <[www.gard.no](http://www.gard.no)> accessed 22 February 2013.

<sup>80</sup> UNCLOS (n 56) art 17.

<sup>81</sup> UNCLOS (n 56) art 18(1); R Churchill and A Vaughan Lowe, *The Law of the Sea* (Manchester University Press 1999) 81–2; H Yang, *Jurisdiction of the Coastal State Over Foreign Merchant Ships in Internal Waters and the Territorial Sea* (Springer 2006) 148–9; K Hakapää, 'Innocent Passage', *The Max Planck Encyclopedia of Public International Law* (online edition) para 6 <[www.mpepil.com](http://www.mpepil.com)> accessed 22 February 2013.

<sup>82</sup> Hakapää (n 88) para 43; Yang (n 81) 143–5.

<sup>83</sup> UNCLOS (n 56) art 19(1).

innocent.<sup>84</sup> This means that a ship can be stopped, inspected and diverted from the territorial sea or detained and forced to a coastal port for the institution of legal proceedings.<sup>85</sup>

Article 19(2) UNCLOS contains a catalogue of activities rendering passage *ipso facto* non-innocent.<sup>86</sup> The first activity listed is ‘any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations’.<sup>87</sup> Article 19(2) UNCLOS contains a catalogue of activities rendering passage *ipso facto* non-innocent.<sup>88</sup> The first activity listed is ‘any threat or use of force against the sovereignty, territorial integrity or political independence of the coastal State, or in any other manner in violation of the principles of international law embodied in the Charter of the United Nations’.<sup>89</sup> The wording of this subparagraph of Article 19(2) UNCLOS is modelled after Article 2(4) UN Charter,<sup>90</sup> which prohibits the use of force by one State against another and applies between States only.<sup>91</sup> Consequently, Article 19(2)(a) UNCLOS, which restates the UN Charter’s prohibition of the use of force as regards ships,<sup>92</sup> is basically addressed to warships and government ships used for non-commercial purposes.<sup>93</sup> Hence, the flag State is obliged under this provision (as it is already by virtue of the UN Charter)<sup>94</sup> to ensure that its ships will refrain from such threats or use of force.<sup>95</sup> Merchant ships therefore fall outside the scope of Article 19(2)(a) UNCLOS. Even if, *arguendo*, they were covered by the provision, the simple presence of PMSC personnel on board merchant ships does not represent a threat of force—as in the case of a warship whose mere presence does not amount to a ‘threat or use of force’ for the purposes of

<sup>84</sup> UNCLOS (n 56) art 25(1).

<sup>85</sup> Churchill and Lowe (n 82) 87–8; Hakapää (n 82) para 19.

<sup>86</sup> It suffices that a ship engages in one of these activities in order to render passage non-innocent; whether or not the activity involves a violation of coastal State law is not decisive: Churchill/Lowe (n 81) 86; Yang (n 81) 164.

<sup>87</sup> UNCLOS (n 56) art 19(2)(a).

<sup>88</sup> It suffices that a ship engages in one of these activities in order to render passage non-innocent; whether or not the activity involves a violation of coastal State law is not decisive: Churchill/Lowe (n 81) 86; Yang (n 81) 164.

<sup>89</sup> UNCLOS (n 56) art 19(2).

<sup>90</sup> Dupuy and Vignes (n 57) 914; Yang (n 81) 164.

<sup>91</sup> A Randelzhofer, ‘Article 2’ in B Simma et al (eds), *The Charter of the United Nations: A Commentary*, vol I (2nd edn, Oxford University Press 2002) para 28; O Dörr, ‘Prohibition of Use of Force’, *The Max Planck Encyclopedia of Public International Law* (online edition) paras 26 and 30 <[www.mpepil.com](http://www.mpepil.com)> accessed 22 February 2013.

<sup>92</sup> SN Nandan and S Rosenne (eds), ‘Volume II, Articles 1 to 85’ in MH Nordquist (ed), *United Nations Convention on the Law of the Sea: A Commentary* (Martinus Nijhoff Publishers 1993) 174–5, para 19(10)(c) (UNCLOS Commentary Vol II); D Anderson, *Modern Law of the Sea* (Martinus Nijhoff Publishers 2008) 143.

<sup>94</sup> UNCLOS Commentary Vol II (n 92) 174, para 19(10)(c).

<sup>95</sup> Yang (n 81) 164.

Article 19(2)(a) UNCLOS.<sup>96</sup> Further, the most important exception to the prohibition of use of force is individual and collective self-defence.<sup>97</sup> Therefore, even if PMSCs were to fall within the ambit of Article 19(2)(a) UNCLOS, the use of force in self-defence would not amount to a prohibited form of use of force.

Article 19(2)(b) UNCLOS further lists ‘any exercise or practice with weapons of any kind’ as a non-innocent activity.<sup>98</sup> As with sub-paragraph (a), this provision is generally not relevant to merchant ships.<sup>99</sup> Even if commercial ships were covered by the provision, it hardly encompasses the *mere presence* of armed guards on board merchant ships<sup>100</sup> since the notions of ‘exercise’ and ‘practice’ seem to require some kind of activity (as does the introductory sentence of Article 19(2) UNCLOS which says that passage will be considered prejudicial if it ‘engages in any of the following activities’).<sup>101</sup> Further, the wording ‘exercise or practice with weapons’ suggest that it does not include the use of arms in self-defence.<sup>102</sup> This follows from a comparison with Article 25(3) UNCLOS where it is stipulated that the coastal State can temporarily suspend innocent passage in specific areas of its territorial sea for the protection of its security, including ‘weapons exercises’.<sup>103</sup> The notion clearly refers to the active use of force. Generally, the same term is not used in different ways in the same legal instrument and thus the notion of ‘exercise ... with weapons’ in Article 19(2)(b) UNCLOS cannot be read as encompassing self-defence measures. A systematic reading of Article 19(2)(b) UNCLOS also leads to the conclusion that it requires a hostile activity, similar to all other activities listed in sub-paragraphs (b) to (g), which follow the general clause in sub-paragraph (a) prohibiting ‘any threat or use of force’.<sup>104</sup> The use of armed force in self-defence or defence of others by PMSC personnel is thus not an active hostile use of force as required by the wording ‘any exercise or practice with weapons of any kind’.

Further, ‘the launching, landing or taking on board of any aircraft’ is also considered to be prejudicial to the peace, good order and security of the coastal State.<sup>105</sup> The term ‘any aircraft’ must be understood broadly, including both state aircraft and civil aircraft.<sup>106</sup> Some PMSCs are equipped with helicopters or small aircraft, such as *ACADEMI*<sup>107</sup> whose vessel *McArthur* features a

<sup>96</sup> Anderson (n 92) 143.

<sup>98</sup> UNCLOS (n 56) art 19(2)(b).

<sup>100</sup> König and Salomon, *Private Sicherheitsdienste* (n 61) 12.

<sup>101</sup> Churchill and Lowe (n 81) 85.

<sup>103</sup> UNCLOS Commentary Vol II (n 92) 175, para 19(10)(d) [where Articles 19(2)(b) and 25(3) UNCLOS are mentioned together].

<sup>104</sup> E Beckert and G Breuer, *Oeffentliches Seerecht* (Walter de Gruyter 1991) 115, para 309; UNCLOS Commentary Vol II (n 92) 175, para 19(1)(d) [stating that sub-paragraph (b) is related with sub-paragraph (f) of Article 19(2) UNCLOS].

<sup>105</sup> UNCLOS (n 56) art 19(2)(e).

<sup>106</sup> UNCLOS Commentary Vol II (n 92) 175, para 19(10)(f).

<sup>107</sup> The PMSC was formerly known under the names *Blackwater* and later *Xe*: J Ukman, ‘Ex-Blackwater Firm Gets a Name Change, Again’ *The Washington Post* (12 December 2011)

<sup>97</sup> Randelzhofer (n 91) para 48.

<sup>99</sup> Yang (n 81) 164.

<sup>102</sup> Yang (n 81) 164.

helicopter deck.<sup>108</sup> Launching, landing or taking on board such aircraft while in the territorial waters of a third State would violate Article 19(2)(e) UNCLOS. An exception seems to be, again, self-defence.<sup>109</sup> Another non-innocent activity, listed in Article 19(2)(g), UNCLOS which is of potential relevance to the use of private armed guards for protecting commercial shipping is ‘the loading or unloading of any commodity, currency or person contrary to the customs, fiscal, immigration or sanitary laws and regulations of the coastal State’.<sup>110</sup> Therefore, embarkation or disembarkation of arms and PMSC personnel while in the territorial sea of a third State must only be made in accordance with the coastal State’s laws on such matters.

The catalogue of non-innocent activities in Article 19(2) UNCLOS concludes with a general reference to ‘any other activity not having a direct bearing on passage’.<sup>111</sup> This broad clause provides coastal States with considerable discretion in determining which activities render passage non-innocent.<sup>112</sup> Attempts during the drafting process to narrow down the scope of this open-ended sub-paragraph failed. The International Chamber of Shipping proposed deleting the sub-paragraph, arguing that the catch-all provision would undermine the basic structure of the provision since it could be used by any State to prevent innocent passage and thereby restoring the uncertainty which it was designed to remove. If deleting the provision was unacceptable, it proposed amending it to read ‘any *similar* activity not having a direct bearing on passage’.<sup>113</sup> This change in wording should have ensured that the *ejusdem generis* rule of interpretation would be applied. However, neither the deletion nor the amendment of the provision received sufficient support.<sup>114</sup> The *travaux préparatoires* are only a supplementary means of interpreting an international treaty;<sup>115</sup> sub-paragraph (l) can still be construed as being narrower than the drafting history might suggest. Since the object and purpose of the provisions on innocent passage is to strike a balance between coastal and maritime interests,<sup>116</sup> the sub-paragraph should be interpreted to reflect the basic idea enshrined in Article 19(1) UNCLOS, which is that ‘Passage is innocent for so

<[www.washingtonpost.com/blogs/checkpoint-washington/post/ex-blackwater-firm-gets-a-name-change-again/2011/12/12/gIQAXf4YpO\\_blog.html](http://www.washingtonpost.com/blogs/checkpoint-washington/post/ex-blackwater-firm-gets-a-name-change-again/2011/12/12/gIQAXf4YpO_blog.html)> accessed 22 February 2013; ACADEMI, ‘Leading Training and Security Service Provider Xe Services Announces Name Change to ACADEMI’ (Press Release, 12 December 2011) <[www.academi.com/press\\_releases/](http://www.academi.com/press_releases/)> accessed 22 February 2013.

<sup>108</sup> J Seper, ‘Blackwater Joins Fight against Sea Piracy’ *The Washington Post* (4 December 2008) <[www.washingtontimes.com/news/2008/dec/04/blackwater-joins-fight-against-sea-piracy/?page=all](http://www.washingtontimes.com/news/2008/dec/04/blackwater-joins-fight-against-sea-piracy/?page=all)> accessed 22 February 2013.

<sup>109</sup> Ronzitti (n 23) 48.

<sup>110</sup> UNCLOS (n 56) art 19(2)(g).

<sup>111</sup> UNCLOS (n 56) art 19(2)(1).

<sup>112</sup> The clause compromises to a large extent the exhaustive character of the list of non-innocent activities provided in art 19(2) UNCLOS (n 56): Dupuy and Vignes (n 57) 913.

<sup>113</sup> Emphasis added.

<sup>114</sup> UNCLOS Commentary Vol II (n 92) 171, para 19(6); 173, para 19(7); 173–4, para 19(8); 174, para 19(9).

<sup>115</sup> Vienna Convention on the Law of Treaties (entered into force on 27 January 1980) 1155

UNTS 331, art 32.

<sup>116</sup> Hakapää (n 81) para 44.



long as it is not prejudicial to the peace, good order or security of the coastal State.’ Thus, even if an activity does not have a direct bearing on passage, it should only be qualified as non-innocent if it violates one of the three interests mentioned in Article 19(1) UNCLOS.<sup>117</sup>

Article 19(2) UNCLOS leaves coastal States with considerable discretion to decide what kind of activities are non-innocent.<sup>118</sup> Still, a reasonable argument can be made for not qualifying the mere presence of armed guards on board merchant ships and the use of force and firearms in self-defence as non-innocent activities. Arguably, the kind of ship or the fact that it is armed should not be decisive when determining whether its passage is non-innocent. Rather, the ship and its internal economy, coupled with the character and manner of the passage should be determinative. This flows from the phrase in Article 19(1) UNCLOS that ‘passage shall take place’ coupled with the list of activities deemed innocent in Article 19(2) UNCLOS.<sup>119</sup> Thus, as long as the external acts of a vessel engaged in passage do not threaten the coastal State’s peace, good order or security, passage should be qualified as innocent.<sup>120</sup> What is more, the *concrete* activities mentioned in Article 19(2) UNCLOS suggest that an abstract and *a priori* determination of non-innocence, for example, due to specific cargo being embarked on a ship, is not allowed.<sup>121</sup> The same argument could be made for the embarkation of arms and armed guards on board private ship for self-defence purposes. Finally, since even nuclear-powered vessels and ships carrying nuclear or other inherently dangerous or noxious substances are allowed to exercise the right of innocent passage if they carry the necessary documents and conform to internationally agreed precautionary measures,<sup>122</sup> it seems difficult to argue that the simple presence of arms or armed guards on board a private ship is a non-innocent activity. However, Article 19(2) UNCLOS, and especially the general clause at the end of the catalogue, leaves coastal States with a considerable margin of interpretation. In the light of this legal uncertainty, it would be desirable to see the coastal States in the region prone to Somali-based piracy cooperating by moving towards a unified interpretation of the meaning of innocent passage as found in Article 19 UNCLOS with regard to the use of PMSCs on merchant ships.

<sup>117</sup> However, some authors suggest that sub-paragraph (l) dispenses with the need for the coastal State to prove that in the specific case in question its peace, good order or security are threatened: see eg W Vitzthum, ‘Maritimes Aquitorium und Anschlusszone’ in W Vitzthum (ed), *Handbuch des Seerechts* (CH Beck 2006) 124, para 123.

<sup>118</sup> B-O Bryde, ‘Militärische und sicherheitspolitische Implikationen der neuen Seerechtskonvention’ in Jost Delbrück, *Das neue Seerecht* (Duncker & Humblot 1984) 174.

<sup>119</sup> D Guilfoyle, *Shipping Interdiction and the Law of the Sea* (Cambridge University Press 2009) 242.

<sup>120</sup> See eg Beckert and Breuer (n 104) 117, paras 314(a) and 314(b) [referring to the Okinawa incident and arguing that towing a Soviet nuclear-powered submarine, which went on fire on the high seas, through Japanese territorial waters was in line with UNCLOS for it is the manner of the ship and not its features or armament which is decisive for qualifying whether passage is innocent].

<sup>121</sup> Vitzthum (n 117) 124, para 123.

<sup>122</sup> UNCLOS (n 56) art 23; see eg Churchill and Lowe (n 81) 76.

*2. Laws and regulations of the coastal State relating to innocent passage*

The second question to consider with regard to innocent passage and the use of armed guards on board merchant ships is whether coastal States are allowed under Article 21 UNCLOS, which limits the coastal State's competence to adopt rules on innocent passage, to regulate or even outlaw the use of armed PMSC personnel on board commercial ships.

Article 21 UNCLOS limits the coastal State's power to adopt laws and regulations relating to innocent passage in two ways.<sup>123</sup> First, Article 21(2) UNCLOS limits the coastal State's power to regulate the 'design, construction, manning or equipment of foreign ships' unless these domestic provisions give effect to generally accepted international rules or standards.<sup>124</sup> As regards PMSCs, it is the 'manning of ships' which is most relevant. The rationale behind prohibiting the coastal State from enacting regulations on the manning of ships (unless they give effect to generally accepted international standards) is to 'protect the integrity of global maritime navigation':<sup>125</sup> if every coastal State were free to enact its own manning standards, the resulting plethora of (potentially conflicting) coastal State laws would hamper the freedom of navigation.<sup>126</sup> It follows that the prohibition mainly relates to manning standards which a ship cannot adjust during a voyage<sup>127</sup> and which would, de facto, deprive a ship of its right of innocent passage. However, private contractors can, at least theoretically, be disembarked for certain periods of passage and firearms can be stored and sealed either on board the merchant ship itself whilst it is passing through foreign territorial waters or they could even be transferred to a ship remaining on the high seas that functions as an arms depot.<sup>128</sup> Therefore, the use of armed guards is, arguably, not an unchangeable circumstance, and so coastal State regulation is not per se precluded by Article 21(2) UNCLOS.<sup>129</sup>

Second, Article 21 UNCLOS limits the coastal State's competence to adopt laws and regulations to specific subject matters, one of which is the 'safety of navigation and the regulation of maritime traffic'<sup>130</sup> and 'the prevention of infringements of the customs . . . laws and regulations of the coastal State'.<sup>131</sup>

<sup>123</sup> Churchill and Lowe (n 81) 91; König, Flag of Convenience (n 59) para 37.

<sup>124</sup> UNCLOS (n 56) art 21(2).

<sup>125</sup> UNCLOS Commentary Vol II (n 92) 175, para 21(11)(f).

<sup>126</sup> D Nelson, 'Maritime Jurisdiction' in *The Max Planck Encyclopedia of Public International Law* (online edition) para 11 <[www.mpepil.com](http://www.mpepil.com)> accessed 22 February 2013; Beckert and Breuer (n 104) 116, para 313.

<sup>127</sup> König and Salomon, Private Sicherheitsdienste (n 61) 13.

<sup>128</sup> See section 2C regarding other practices to avoid a potential violation of law.

<sup>129</sup> König and Salomon, Private Sicherheitsdienste (n 61) 13.

<sup>130</sup> UNCLOS (n 56) art 21(1)(a).

<sup>131</sup> UNCLOS (n 56) art 21(1)(h). The subject matter listed in sub-paragraph (b), (c), (d), (e), (f) and (g) of art 21 UNCLOS are not relevant to the use of armed guards on board merchant and so are not considered further here.

The provision further requires that these rules be in conformity with the provisions of UNCLOS and other rules of international law.<sup>132</sup> The use of armed guards arguably does not fall within the ambit of 'safety of navigation and regulation of maritime traffic'. The term 'safety of navigation', which also appears in other provisions of UNCLOS,<sup>133</sup> refers, *inter alia*, to the construction, equipment, labour conditions and seaworthiness of the ships<sup>134</sup> and thus does not really relate to private security on board commercial ships. The coastal State also possesses prescriptive power regarding innocent passage and 'the prevention of infringement of the customs . . . laws and regulations of the coastal State'.<sup>135</sup> Therefore, measures aimed at ensuring that arms on board private ships passing through territorial waters conform with customs laws and regulations seem to be allowed.

It is doubtful whether, in theory, the prescriptive power of the coastal State to regulate arms on board merchant ships extends beyond customs matters under Article 21 UNCLOS. This contrasts with the practice of various coastal States which do broadly regulate the use of arms and/or armed guards on board commercial ships passing through their territorial waters. For example, Saudi Arabia declared that merchant ships in its waters are permitted to carry weapons for the purpose of self-defence. While not specifying the maximum calibre of weapons allowed for such purposes, it requires the master of the ship to furnish a list specifying the arms and ammunition carried prior to its arrival in the territorial waters. Further, weapons must be kept in storage and sealed by Saudi officials, and these seals may only be broken once the ship leaves Saudi waters.<sup>136</sup> While some States ban weapons altogether from their territorial waters, Oman limits the type of arms allowed on board merchant ships to semi-automatic weapons.<sup>137</sup> Oman has also recently introduced the restriction that vessels may only hold arms for 96 hours. The State has been criticized both for imposing unrealistic conditions and for constantly changing its requirements.<sup>138</sup> In South-East Asia, States have enacted regulations prohibiting the passage of merchant ships with armed PMSC personnel on board in their territorial waters unless a certain sum of money is paid. For instance, the formal policy in Malaysia is that any PMSC wishing to operate in its territorial waters must apply for a permit from the Ministry of Internal Security, and PMSCs found in Malaysian waters without a permit will be detained and the crew

<sup>132</sup> UNCLOS (n 56) art 21(1), introductory sentence.

<sup>133</sup> See UNCLOS (n 56) arts 22(1)(a), 39(3)(a), 42(1)(a), 60(3) and 225.

<sup>134</sup> See eg art 34 of the International Law Commission's Articles Concerning the Law of the Sea and the related commentary, which deals with 'safety of navigation', ILC, 'Commentary on the Articles Concerning the Law of the Sea' (Yearbook, 1956, Vol 2, 265–301) 280 (ILC Commentary on Law of the Sea Articles).

<sup>135</sup> UNCLOS (n 56) art 21(1)(h).

<sup>136</sup> D Osler, 'Ships Openly Allowed to Carry Arms in Saudi Waters' (Lloyd's List, 25 May 2010) (Osler).

<sup>137</sup> Florquin (n 30) 209.

<sup>138</sup> L McMahon, 'Insurance Backed Private Navy to Launch Next Year' (Lloyd's List, 4 November 2011).

arrested as either terrorists or mercenaries.<sup>139</sup> However, PMSC personnel have reported that local authorities, usually either naval or law enforcement agents, will grant unofficial ‘tacit permissions’ to work in the area in exchange for a payment or bribe.<sup>140</sup> Similar occurrences have been reported in Indonesian waters.<sup>141</sup> In other South-East Asian countries, PMSCs may apply for permits or simply employ local security guards who already have permission to operate in the country concerned.<sup>142</sup> It is reported that this practice is beginning to emerge in East Africa. This is not without consequence for the costs incurred by shipping companies.<sup>143</sup>

In sum, the two questions considered in connection with innocent passage—whether the use of armed guards constitutes a non-innocent activity and whether the coastal State is allowed to adopt rules on armed guards on board ships passing through its territorial waters—cannot be answered with certainty. As a result of this legal uncertainty, and given that some States do regulate the use of armed guards on board ships passing through their territorial waters, different practices have emerged to avoid the risk of engaging in a non-innocent activity or breaching coastal State law relating to innocent passage, which will now be considered.

### *C. Practices to Avoid Potential Violation of Law*

PMSCs have developed different strategies in order to avoid falling subject to coastal State enforcement measures due to their engaging in a non-innocent activity or otherwise infringing the coastal State’s laws and regulations. Some companies apparently dump their weapons at sea before entering waters subject to a third State’s sovereignty<sup>144</sup> and later acquire them anew.<sup>145</sup> Another practice used to avoid violating coastal and port State arms regulations is to use ships or floating platforms located on the high seas as armouries. PMSC personnel can thus be armed whilst on the high seas and still be unarmed when entering the territorial sea of a State.<sup>146</sup> The company *Protection Vessels International*, for instance, deployed its ship *Sea Scorpion* as a floating weapons hub. According to the UN Monitoring Group on Somalia and Eritrea, the *Sea Scorpion* violated the arms embargo imposed on Eritrea<sup>147</sup> when it entered Eritrea’s territorial waters carrying arms and ammunition.<sup>148</sup>

<sup>139</sup> C Liss, ‘Losing control? The privatisation of anti-piracy services in Southeast Asia’ (2009) 63 *Australian Journal of International Affairs* 309, 397. <sup>140</sup> Liss *ibid* 397.

<sup>141</sup> C Liss, ‘Southeast Asia’s Maritime Security Dilemma: State or Market?’ <[www.japanfocus.org/-Carolin-Liss/2444](http://www.japanfocus.org/-Carolin-Liss/2444)> accessed 22 February 2013. <sup>142</sup> Liss *ibid*.

<sup>143</sup> König and Salomon, *Private Sicherheitsdienste* (n 61) 15.

<sup>144</sup> Florquin (n 30) 210; Osler (n 136). <sup>145</sup> Osler (n 136).

<sup>146</sup> UNSC, ‘Report of the Monitoring Group on Somalia and Eritrea Pursuant to Security Council resolution 1916 (2010)’ UN Doc S/2011/433 (18 July 2011), annex 6.5, 310, para 2 (Report UN Monitoring Group on Somalia and Eritrea 2010); Osler (n 136); Brown (n 21) 9.

<sup>147</sup> UNSC Res 1907 (23 December 2009) UN Doc S/RES/1907.

<sup>148</sup> Report UN Monitoring Group on Somalia and Eritrea 2010 (n 146) annex 6.5, 312, para 11.

This resulted in its being intercepted by Eritrean naval forces<sup>149</sup> and four *Protection Vessels International* employees spent almost six months in detention in Eritrea.<sup>150</sup>

Other PMSCs leap the administrative hurdle and acquire the necessary coastal or port State authorizations and/or licenses necessary for their arms and armed guards. Alternatively, they lease state-owned material. Various governments began to take advantage of the booming PMSC business by 'offering expensive, customized permits that allow private maritime security companies to operate from their ports with weapons, security personnel and equipment and, in some cases, private patrol vessels'.<sup>151</sup> States not only generate income by issuing permits, but also lease out state-owned weapons to licensed PMSCs.<sup>152</sup> Djibouti and Sri Lanka, whose ports are strategically located on the main shipping routes crossing the area prone to piracy, are particularly active. Djibouti not only sells permits for PMSCs to operate from its port with weapons, but it also installed a gun-rental scheme whereby merchant ships relying on PMSCs can rent arms and take them on board for a fee. A presidential Decree gave a private entity, the *Djibouti Maritime Security Services (DMSS)*, authority to control PMSCs operating from Djibouti, including the transit, rental and storage of weapons.<sup>153</sup> *DMSS* even offers rendezvous with ships at sea in order to pick up leased weapons from returning ships before they call at ports not allowing armed guards to enter.<sup>154</sup> Similar services are offered in Sri Lanka, where the State has authorized private companies to rent weapons to PMSCs. The equipment, which can only be rented out on the condition that a retired or off-duty Sri Lankan navy or army officer is embarked on the merchant vessel to monitor the use of arms by the PMSC personnel, must be returned within a month of issue.<sup>155</sup> Sri Lanka even rents out teams of retired or off-duty officers to provide security on board merchant vessels.<sup>156</sup>

Obviously, enhanced clarity and uniformity at the normative level would be preferable to these emerging practices (and business models) in order to avoid a potential violation of coastal State law. Thus, it is commendable that the IMO agreed in May 2012 'to further assist policy development at the national level and facilitate greater harmonization of policies at the international level related to the issue of private armed security on board ships'.<sup>157</sup>

<sup>149</sup> Report UN Monitoring Group on Somalia and Eritrea 2010 (n 146) annex 6.5, 310, para 9.

<sup>150</sup> Report UN Monitoring Group on Somalia and Eritrea 2010 (n 146) annex 6.5, 312, para 10.

<sup>151</sup> Report UN Monitoring Group on Somalia and Eritrea 2010 (n 146) para 179.

<sup>152</sup> Report UN Monitoring Group on Somalia and Eritrea 2010 (n 146) para 179.

<sup>153</sup> Florquin (n 30) 210.

<sup>154</sup> Florquin (n 30) 210; Report UN Monitoring Group on Somalia and Eritrea 2010 (n 146) annex 6.4, 305, para 24.

<sup>156</sup> Florquin (n 30) 211.

<sup>155</sup> Florquin (n 30) 210–11.

<sup>157</sup> IMO, 'Interim Guidance to Private Maritime and Security Companies Providing Privately Contracted Armed Security Personnel on Board Ships in the High Risk Area' (25 May 2012) MSC.1/Circ.1443, para 3.

## III. POWERS OF PMSC PERSONNEL

In terms of legal issues in need of clarification, and given the risk of incurring liability for violating applicable law, taking and having guns on board ships is perhaps more problematic than their use. It seems that there is a common and universal understanding that PMSC personnel embarked on merchant ships can use force in self-defence or in the defence of others. Yet, the precise contours of their powers are not so obvious.

*A. Repelling an Attack*

International law does not provide a comprehensive answer to the question of whether and under which conditions PMSC personnel can use force in order to defend themselves or others from a pirate attack. Rather, the main source to consult is domestic criminal law.

It is an almost universally recognized principle of criminal law that a person who is unlawfully attacked or threatened with imminent attack is not criminally liable and/or is not to be punished for using (even lethal) force, or for its consequences, when fending off the attack. Generally, this ground for negating criminal liability and/or punishment is also available to third persons acting in the defence of others, and so this would include PMSC personnel acting in defence not only of themselves but also in defence of the crew of a merchant ship.<sup>158</sup> However, the concrete objective prerequisites for determining that a situation of self-defence has arisen—for example, the degree of imminence of an attack that is required and the legality of preventive self-defence—differ between jurisdictions. The same is true of the *mens rea*. Thus, as an example, the consequences will not be the same across all legal orders should PMSC personnel take action in self-defence when they are not, in fact, entitled to do so (e.g. if they had not correctly assessed whether the crew of an approaching boat are pirates as opposed to armed fishermen or even hostages). Furthermore, there is no uniformity regarding the requirements for, and constraints upon, the use of force. Thus, the interpretation of what is a reasonable or excessive amount of force and whether there is a duty to retreat before using force cannot be answered globally.<sup>159</sup>

Moreover, in many jurisdictions a person who engages in an act which carries a criminal penalty in order to protect a legal interest of his own or of another from immediate and otherwise unavoidable danger acts lawfully, or is at least not punished, if, by doing so, he safeguards an interest of a higher

<sup>158</sup> See eg Swiss Criminal Code of 21 December 1937, SR 311.0, art 15; an English translation of the code by the Swiss Government is available at <[www.admin.ch/ch/e/rs/c311\\_0.html](http://www.admin.ch/ch/e/rs/c311_0.html)> accessed 22 February 2013 (Swiss Criminal Code).

<sup>159</sup> See U Sieber and K Cornils (eds), *Nationales Strafrecht in rechtsvergleichender Darstellung*, Vol 5 (Duncker & Humblot 2010) comparing the requirements of self-defence in twelve different jurisdictions.

value.<sup>160</sup> This ground for negating criminal liability and/or punishment is in some jurisdictions called a situation of necessity or a ‘choice of evils’, and the differences of approach between jurisdictions in such cases are considerable.<sup>161</sup>

Apart from domestic law, the right to life under international human rights law,<sup>162</sup> as well as the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, addresses the legitimate use of force and firearms. However, unless PMSC personnel act as de facto law enforcement officials, those instruments do not apply *directly*. PMSC personnel hired by private actors and placed on board merchant ships are private persons using force in self-defence or defence of others and do not qualify as de facto state agents or organs bound by human rights law or the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials. However, it is possible that in the future governments may hire private armed guards and provide them with military status in order to deploy them as members of Vessel Protection Detachments, thus addressing this difficulty.<sup>163</sup>

Soft law on PMSCs, even though also containing substantive rules on the use of force, tends to refer to the ‘applicable law’ regarding the use of force, which, as has been seen, is mainly domestic criminal law. Thus, for example, the ICoC, the IMO Shipowner Recommendations and the Indian PMSC Guidelines all state that if force is used, it shall<sup>164</sup> be in a manner consistent with applicable law.<sup>165</sup>

In terms of substantive rules, the guidelines stipulate that as a general principle PMSCs will/should require their personnel to take all reasonable or responsible steps to avoid the use of force.<sup>166</sup> If force is nevertheless used, certain principles must be respected. First of all, various Guidelines adopted in the maritime context emphasize that the primary function of the on-board security team is to prevent illegal boarding of the vessel and to protect the lives of those on board, using the minimum force necessary to do so.<sup>167</sup> In the ICoC, the principle of necessity is stated in more general terms given its broader

<sup>160</sup> See eg Swiss Criminal Code (n 158) art 17.

<sup>161</sup> See Sieber and Comils (n 159) discussing the existence respectively requirements for the choice of evils defence.

<sup>162</sup> Eg, in the Convention for the Protection of Human Rights and Fundamental Freedoms as Amended by Protocol No. 11 (adopted 4 November 1950) 213 UNTS 222, art 2; and International Covenant on Civil and Political Rights (adopted 16 December 1966) 999 UNTS 171, art 6.

<sup>163</sup> The Government of the Netherlands mentions this option as a possible future scenario: Government of Netherlands, VPDs (n 24).

<sup>164</sup> In the ICoC (n 48) r 30, the verb ‘shall’ is used while the IMO Shipowner Recommendations (n 39) r 5.14, and the Indian PMSC Guidelines (n 44) r 6.9, the verb ‘should’ is used.

<sup>165</sup> ICoC (n 48) r 30; IMO Shipowner Recommendations (n 39) r 5.14; Indian PMSC Guidelines (n 44) r 6.9.

<sup>166</sup> ICoC (n 48) r 30; IMO Shipowner Recommendations (n 39) r 5.14; Indian PMSC Guidelines (n 44) r 6.9.

<sup>167</sup> UK Interim Guidance on PMSCs (n 43) r 8.3; IMO Shipowner Recommendations (n 39) rr 5.13 and 5.14; Indian PMSC Guidelines (n 44) r 6.9.

scope of application.<sup>168</sup> The IMO Guidelines to Shipowners and the Indian Guidelines also refer to the principle of necessity in an abstract way; the Indian Guidelines specify in addition that necessity must be measured by the goal of preventing illegal boarding.<sup>169</sup> The use of force must further be proportionate to the threat as it becomes manifested.<sup>170</sup> What is more, the use of *firearms* is not allowed except in self-defence or in the defence of others<sup>171</sup> in situations where there is an imminent threat of death or serious injury,<sup>172</sup> or in order to prevent the perpetration of a particularly serious crime involving a grave threat to life.<sup>173</sup>

The guidelines further aim at operationalizing the rather abstract principles of avoiding force if possible, of necessity and of proportionality, by requiring the adoption of rules which provide a graduated approach to the use of force.<sup>174</sup> Thus, for instance, the IMO Shipowner Recommendations stipulate: ‘PMSC should provide a detailed graduated response plan to a pirate attack as part of its teams’ operational procedures.’<sup>175</sup> The example of *pro forma* rules for the use of force annexed to the Guidance on the Selection of Private Security Companies (PSC) of 29 March 2011 issued by The Norwegian Shipowner’s Mutual War Risk Insurance Association<sup>176</sup> illustrates what a graduated response could look like in practice. After a person has been identified as a hostile target, a verbal/and or alternative challenge must be given to him.<sup>177</sup> A verbal challenge will be given by shouting ‘armed security – stop or I will fire’ or words to that effect.<sup>178</sup> Alternative forms of challenge includes the use of radio hails, the ship’s whistles, spotlights and/or flares, long-range acoustic device, the firing of a parachute flare above the pirate vessel approaching the victim vessel to indicate that it should change course, or firing a parachute flare into the immediate vicinity of a pirate vessel approaching the victim ship.<sup>179</sup> A verbal or alternative challenge must be given *before* any warning shots are fired, unless this would increase the risk of injury and/or death of a person other than the hostile target, a person on board the victim ship is under immediate armed attack, or time, distance or other factors prevent an effective verbal

<sup>168</sup> ICoC (n 48) r 30.

<sup>169</sup> IMO Shipowner Recommendations (n 39) r 5.14; Indian PMSC Guidelines (n 44) r 6.9.

<sup>170</sup> ICoC (n 48) r 30; Indian PMSC Guidelines (n 44) r 6.9.

<sup>171</sup> IMO Shipowner Recommendations (n 39) r 5.15.

<sup>172</sup> ICoC (n 48) r 31.

<sup>173</sup> Indian PMSC Guidelines (n 44) r 6.9.

<sup>174</sup> UK Interim Guidance on PMSCs (n 43) r 8.4 (read together with r 8.5.) and ICoC (n 48) r 29, require the adoption of rules on the use of force; the ICoC does not explicitly require that they provide for a graduated response, but since the ICoC obliges to observe the principles of necessity and proportionality a graduated response is implicitly required. Indirectly, the Industry Guidelines (n 45) r 3.6, also require rules on the use of force and a graduated response plan.

<sup>175</sup> IMO Shipowner Guidelines (n 39) r 5.13; the Indian PMSC Guidelines (n 44) r 6.9 contains almost identical language.

<sup>176</sup> Appendix to Norwegian PMSC Guidelines (n 46) (Norwegian Pro Forma Rules).

<sup>177</sup> Norwegian Pro Forma Rules (n 176) r 3.1.

<sup>178</sup> Norwegian Pro Forma Rules (n 176) r 3.2.

<sup>179</sup> Norwegian Pro Forma Rules (n 176) r 3.3.



challenge.<sup>180</sup> If a verbal and/or alternative challenge is either not possible or without effect, initial warning shots may be fired to gain the attention of the hostile target. They should be fired well above the hostile target.<sup>181</sup> If initial warning shots remain without effect, further warning shots may be fired into the water in front of the hostile target.<sup>182</sup> If the person still continues to demonstrate hostile intent and/or acts, final warning shots may be fired into the pirate ship's hull or engine in order to stop an attack; thereby all reasonable precautions must be taken in order not to injure any person on board the attacking ship.<sup>183</sup> If final warning shots do not lead to a termination of the attack and the PMSC personnel honestly believes that there is an immediate threat to their life, the life of another person on the victim ship or in the vicinity of the attack, they may use all reasonable force necessary in the circumstances to protect themselves or others. This may even include the use of lethal force.<sup>184</sup> While such force can generally only be used after warning shots have been fired, warning shots are not necessary if they would increase the risk of injury and/or death to a person other than the hostile target or if a person on board the victim ship is under immediate armed attack.<sup>185</sup> In cases where the reasonable force necessary to protect life includes engaging the alleged pirate in open fire and the use of lethal force, PMCS personnel must fire aimed shots only, must not fire more rounds than necessary and must take all reasonable precautions not to injure anyone other than the hostile target.<sup>186</sup> Finally, a graduated response requires that lethal force is only used *ultima ratio* in the event that the alleged pirate is committing or is about to commit an act that the PMSC personnel believes will endanger their life or the life of a person on the victim ship and there is no alternative to prevent the danger.<sup>187</sup>

Such a graduated response requires certain equipment.<sup>188</sup> The IMO Shipowner Recommendations therefore emphasize that when contracting a PMSC, shipowners should consider whether the company possesses an 'appropriate firearms package' allowing for an 'accurate and graduated level of deterrence, at a distance'.<sup>189</sup> However, as we have seen, many PMSCs seem only to be equipped with a single type of weapon with a maximum range of 300 to 400 metres due to flag or coastal State arms regulations.

<sup>180</sup> Norwegian Pro Forma Rules (n 176) r 3.4.

<sup>181</sup> Norwegian Pro Forma Rules (n 176) r 4.2.

<sup>182</sup> Norwegian Pro Forma Rules (n 176) r 4.3.

<sup>183</sup> Norwegian Pro Forma Rules (n 176) r 4.4.

<sup>184</sup> Norwegian Pro Forma Rules (n 176) r 4.5.

<sup>185</sup> Norwegian Pro Forma Rules (n 176) r 4.6.

<sup>186</sup> Norwegian Pro Forma Rules (n 176) r 4.7.

<sup>187</sup> Norwegian Pro Forma Rules (n 176) r 4.8.

<sup>188</sup> Even though not directly applicable, rule 2 of the 'UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials' highlights the relationship between differentiated equipment and a graduated response.

<sup>189</sup> IMO Shipowner Recommendations (n 39) r 5.6.5.

In sum, PMCS personnel are allowed to use force in order to repel a pirate attack so long as this is in line with applicable domestic criminal law, most notably the principles of proportionality and necessity requiring a graduated response in self-defence.

### *B. Seizure of Pirate Boats and Handover of Suspects*

Another question to consider is whether, in the course of defending the victim ship from an attack, PMSC personnel or the master of the ship, are allowed to seize the pirate boat, to hold the alleged offenders, and to hand them over to competent law enforcement authorities on shore or patrolling naval forces.

Under Article 107 UNCLOS and Article 21 of the Convention on the High Seas,<sup>190</sup> the right to seize a boat on account of piracy is limited to warships and government ships. Article 45 of the International Law Commission's 1956 Articles concerning the Law of the Sea is even narrower, in that it limited the right of seizure to warships. In its commentary on this provision the Commission stated: 'Clearly this article does not apply in the case of a merchant ship which has repulsed an attack by a pirate ship and, in exercising its right of self-defence, overpowers the pirate ship and subsequently hands it over to a warship or to the authorities of a coastal State. This is not a 'seizure' within the meaning of this article.'<sup>191</sup> It follows that private persons are not allowed to carry out a seizure on the basis of Article 107 UNCLOS. However, the International Law Commission acknowledged that private persons have the right to overpower the pirate ship and to hand it over to patrolling naval forces or competent authorities on shore. From the wording 'in exercising its right of self-defence', it can be assumed that the International Law Commission understood the right to seize and handover the *corpus delicti* as a component of self-defence. Indeed, domestic law generally not only grants a right to self-defence but also recognizes the consequential right to take the alleged offender into custody for the short time span necessary for handing him over to the competent law enforcement authorities.<sup>192</sup>

What is more, Article 8 SUA Convention<sup>193</sup> authorizes the master of a ship of a State party (but not PMSC personnel) to deliver to the authorities of any other State Party any person who the master has reasonable grounds to believe has committed an offence under the SUA. Most piracy attacks do fall within one or more of the offences described in Article 3 SUA Convention. If the master of the ship has the right to deliver a person to the authorities of another State Party, he must also have the implied right to overpower the ship and to

<sup>190</sup> Convention on the High Seas (adopted 29 April 1958) 450 UNTS 11 (Convention on the High Seas).

<sup>191</sup> ILC Commentary on Law of the Sea Articles (n 134) 283.

<sup>192</sup> Ronzitti (n 23) 43.

<sup>193</sup> Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (adopted 10 March 1988) 1678 UNTS 221.

temporarily hold the alleged offender. However, against the current background that even patrolling naval States which have access to diplomatic channels are often not able to find a State willing to accept the alleged offender for the purposes of prosecution,<sup>194</sup> it might be very difficult for a master of the ship to do so. It is more realistic for the alleged offender to be handed over to a patrolling naval State, whose officials can then also carry out initial forensic and investigative work. Article 8 SUA Convention does not oblige the master to deliver a suspected person; rather he is authorized to undertake this 'private extradition'.

### *C. Active Interdiction of Pirate Ships*

Today, PMSCs are almost always deployed for protecting merchant ships from pirate attacks, that is, for defensive purposes. Occasionally, however, the idea has been raised of providing PMSCs with government authorization to actively interdict alleged pirates.<sup>195</sup> This begs the question whether Article 107 UNCLOS allows for such 'private pirate hunting'.

Article 107 UNCLOS provides that only warships and 'other ships ... clearly marked and identifiable as being on government service and authorized to that effect' may seize pirate vessels. As has been seen, a merchant ship with private security personnel on board is, therefore, clearly not allowed to carry out an 'offensive seizure' on the basis of Article 107 UNCLOS. Seizing a pirate ship is only allowed as part of the exercise of self-defence.<sup>196</sup>

Further, a ship operated by a PMSC and having on board personnel commissioned by the government to actively interdict pirates would also not qualify as a vessel 'clearly marked and identifiable as being on government service and authorized to that effect'.<sup>197</sup> The rationale of Article 107 UNCLOS seems to require that such action be taken only by a government ship in the strictest sense of the term. Limiting the right to seize pirate ships to warships and government vessels was introduced to prevent abusive seizures and, in case of abuse, to allow for a clear allocation of responsibility and liability.<sup>198</sup> The requirement that the seizing ship is 'clearly marked and identifiable as being on government service' serves to demonstrate the official character of

<sup>194</sup> See eg UNSC, 'Report of the Secretary-General Pursuant to Security Council Resolution 1950 (2010)' (n 5) para 59.

<sup>195</sup> See eg T Richard, 'Reconsidering the Letter of Marque: Utilizing Private Security Providers against Piracy' (2010) 39 Public Contract Law Journal 411.

<sup>196</sup> See above at section 3B.

<sup>197</sup> UNCLOS (n 56) art 107.

<sup>198</sup> SN Nandan and S Rosenne (eds), 'Volume III, Articles 86 to 132' in MH Nordquist (ed), *United Nations Convention on the Law of the Sea: A Commentary* (Martinus Nijhoff Publishers 1995) para 107(2) (UNCLOS Commentary Vol III); ILC Commentary on Law of the Sea Articles (n 134) 283: the commentary on Article 45, on which Article 21 Convention on the High Seas (n 190) and Article 107 UNCLOS (n 56) are based, reads: 'the right to take action should be confined to warships, since the use of other government ships does not provide for the same safeguards against abuse.'

these units and their personnel. Identification of official ships and aircrafts in turn helps in the allocation of responsibility and liability based on Article 106 UNCLOS in case of unjustified seizure.<sup>199</sup>

Since the limitation under Article 107 UNCLOS is on the ship and not necessarily on the personnel serving on the ship, it might be possible to use PMSCs to offensively counter piracy by incorporating them into government forces. However, national law may bar the use of private security services for law enforcement activities as being incompatible with the State's monopoly on the use of force.<sup>200</sup>

#### IV. DUTY TO RENDER ASSISTANCE

Even where force in defence of a pirate attack is used in accordance with the applicable law, pirate ships may be damaged and alleged pirates may be at risk of drowning. This raises the question whether PMSC personnel or the master of the ship is under an obligation to rescue the alleged offenders. Various international treaties contain a provision stipulating a duty to render assistance to persons or ships in distress at sea.<sup>201</sup> Thus, for example, Article 98(1)(a) UNCLOS stipulates: 'Every State shall require the master of a ship flying its flag, in so far as he can do so without serious danger to the ship, the crew or the passengers: (a) to render assistance to any person found at sea in danger of being lost'.<sup>202</sup> As the wording 'any person' indicates, the obligation to render assistance includes every category of persons<sup>203</sup> and thus also an alleged pirate, including those who carry out an attack on the subsequent rescuer. Geographically, the obligation applies to persons in distress anywhere 'at sea' and thus includes the territorial sea, straits used for international navigation, archipelagic waters, the exclusive economic zone and the high seas.<sup>204</sup> However, the obligation is not absolute and exists only insofar as rendering assistance to an individual does not pose a 'serious danger to the ship, the crew or the passengers' of the rescuing vessel. The master's first

<sup>199</sup> UNCLOS Commentary Vol III (n 198) para 107(7)(b).

<sup>200</sup> Thus, for instance, Article 26 LPSP (n 67) limits the use of private security personnel by federal agencies to specific protection tasks, which are purely defensive in nature. The list is exhaustive and does not include further potential services offered by private security providers described in Article 4 of the draft law, namely the operational and logistical support of armed forces or security personnel.

<sup>201</sup> Dupuy and Vignes (n 57) 416; UNCLOS Commentary Vol III (n 198) para 98(11)(f): Other conventions stating an obligation to render assistance to persons in distress are: Annex to the 1974 International Convention for the Safety of Life at Sea (adopted 1 November 1974, entered into force 25 May 1980) 1184 UNTS 3, chap V, reg 10 (SOLAS Convention); Annex to the 1979 International Convention on Maritime Search and Rescue (adopted 27 April 1979, entered into force 22 June 1985) 1403 UNTS, chap 2, para 2.1.10; 1989 International Convention of Salvage (adopted 28 April 1989, entered into force 14 July 1996) 1953 UNTS 193, art 10 (International Convention of Salvage).

<sup>202</sup> Art 12 Convention on the High Seas (n 190) is almost identically worded.

<sup>203</sup> UNCLOS Commentary Vol III (n 198) para 98(11)(b).

<sup>204</sup> UNCLOS Commentary Vol III (n 198) para 98(11)(g).

obligation is thus to ensure the safety of his own ship and persons on board.<sup>205</sup> For the sake of completeness, it should be noted that a ship exercising its right of innocent passage is allowed to stop and anchor for the purpose of rendering assistance to persons or ships in distress, even though passage must generally be ‘continuous and expeditious’.<sup>206</sup>

Another question is whether a master of a ship with armed<sup>207</sup> PMSC personnel on board is under an obligation to assist other merchant ships which are in distress because of an imminent or ongoing pirate attack. According to Article 98(1)(b) UNCLOS, all States shall require the master of a ship flying their flag to proceed with all possible speed to the rescue of person in distress, if informed of their need for assistance. This obligation is not only subject to the limitation that such a rescue operation can be undertaken ‘without serious danger to the ship, the crew or the passengers’. The master is, in addition, only obliged ‘in so far as such action may reasonably be expected of him’. However, what kind of considerations can be taken into account when assessing ‘reasonableness’ in this context remains unknown. However, given that life is potentially at risk, economic considerations, such as costs incurred by a shipping company due to a delay caused by a rescue operation, should not be given too much weight.

The obligations pertaining to the duty to render assistance are either addressed to the flag State, which is required to oblige the master of the ship to rescue any person in danger of being lost at sea,<sup>208</sup> or directly to the master of the ship,<sup>209</sup> but not to PMSC personnel. Still, they may be bound by domestic law norms requiring individuals to render assistance to persons in danger. Under various criminal codes belonging to the civil law tradition, a person who fails to offer aid to another whom he has injured or who is in immediate life-threatening danger, where it could be reasonably expected from him, may incur criminal liability.<sup>210</sup>

#### V. THE RELATIONSHIP BETWEEN THE MASTER OF THE SHIP AND PMSC PERSONNEL

A further issue to consider is the implications of the use of armed guards for command-and-control procedures on board merchant ships, or more specifically, who is to take the decision to use force against alleged pirates. According to international maritime law, the master of the ship has the ultimate responsibility for the safety and security of the ship. The master remains in

<sup>205</sup> UNCLOS Commentary Vol III (n 198) para 98(11)(b).

<sup>206</sup> UNCLOS (n 56) art 18(2); UNCLOS Commentary Vol III (n 198) para 98(11)(g).

<sup>207</sup> König and Salomon, *Private Sicherheitsdienste* (n 61) 20, argue that a ship not having *armed* PMSC personnel on board might rather not be under an obligation to assist other merchant ships under a pirate attack.

<sup>208</sup> Eg, UNCLOS (n 56) art 98(1); UNCLOS Commentary Vol III (n 198) para 98(11)(a).

<sup>209</sup> Eg, International Convention of Salvage (n 201) art 10(1).

<sup>210</sup> See eg Swiss Criminal Code (n 158) art 128.

command at all times and retains overriding authority on board.<sup>211</sup> This principle endures even if private armed guards are on board.<sup>212</sup> This holds true notwithstanding the fact that PMSC personnel, who are often recruited among ex-marines, potentially possess greater expertise in countering armed attacks.

To ensure that the ship master's ultimate authority over the use of force is respected while at the same time allowing private security teams to efficiently counter an attack, a clear command-and-control structure, information flow and cooperation mechanism on board the ship has to be agreed upon and documented.<sup>213</sup> The UK Interim Guidance on PMSCs, for instance, provides that the PMSC team should be headed by a security team leader who is responsible for the operational control, deployment and discipline of the armed guards, and who reports directly to the master of the ship.<sup>214</sup> In cases where a situation arises which affects the security or safety of persons on board the ship, the security team leader should be responsible for advising the master of the ship on the available responses to counter the pirate attack. However, it is the master that recommends a potential armed intervention and decides when PMSC personnel are armed and weapons no longer stored.<sup>215</sup> The master should further provide written or oral approval of the course of action to be adopted by the security team leader; if there is insufficient time to do so, the master must as soon as possible be informed and the course of action adopted be explained.<sup>216</sup>

The principle that the master of the ship has the ultimate decision-making power regarding the use of force remains true throughout all stages of a graduated response, beginning with the identification of the hostile target, verbal and/or alternative challenges, various degrees of warning shots, and ultimately the use of force and firearms. However, the limit of the shipmaster's authority is found in the right of every individual to self-defence. Whether on land or at sea and notwithstanding any command or control structure, a person retains the inherent right to self-defence. Similarly, a security team member

<sup>211</sup> International Ship and Port Facility Security Code, Part B, Rule 4.10. The ultimate responsibility of the master of the ship can, negatively formulated, also be found SOLAS Convention (n 201) reg 34, chap V: safety of navigation.

<sup>212</sup> See eg UK Interim Guidance on PMSCs (n 43) r 5.1; IMO Shipowner Recommendations (n 39) r 5.9 (this follows from the reference 'at all times'); Norwegian PMSC Guidelines (n 46) rr 7.1 and 8.2.

<sup>213</sup> See eg IMO Shipowner Recommendations (n 39) r 5.7.

<sup>214</sup> UK Interim Guidance on PMSCs (n 43) r 5.3.

<sup>215</sup> UK Interim Guidance on PMSCs (n 43) r 5.4.

<sup>216</sup> UK Interim Guidance on PMSCs (n 43) r 5.5. Even though Rule 1.1 of the Norwegian Pro Forma Rules (n 176) requires that the master retains ultimate control and authority at all times, Rule 1.2 only requires that the security team leader shall *coordinate* with the master before firearms are deployed, save in circumstances where coordination would interfere the armed guards right to self-defence; to coordinate might be insufficient in the light of the master's ultimate authority and control.

may act in defence of others without being authorized by the master of the ship to that effect. This is confirmed by various guidelines.<sup>217</sup>

#### VI. PURSUING VIOLATIONS OF CRIMINAL LAW BY PMSCS AND THEIR PERSONNEL

Various violations of domestic criminal law by PMSCs or their personnel are imaginable. Private armed guards could respond with excessive force when defending against a pirate attack. In practice, however, it is the arms as such, rather than their use, which constitute the greater risk in terms of potential liability if they are not procured, embarked, moved, stored and/or disembarked in accordance with respective domestic regulations. In cases where a criminal offence is allegedly committed, many jurisdictions are potentially competent to investigate and prosecute the case. It is beyond the scope of this article to consider these questions in detail. However, two specific jurisdictional rules limiting the coastal and port State's competence to enforce their criminal law will be considered.

##### *A. The Competence of the Coastal State*

Article 27 UNCLOS limits the coastal State's competence to enforce violations of its domestic criminal law.<sup>218</sup> While it has criminal jurisdiction against ships bound for, or leaving, its internal waters, Article 27 provides that it should not be exercised over foreign flagged vessels (including persons on board) merely passing through territorial waters.<sup>219</sup> This provision is, however, subject to a number of exceptions, including, 'if the consequences of the crime extend to the coastal State'<sup>220</sup> and 'if the crime is of a kind to disturb the peace of the country or the good order of the territorial sea'.<sup>221</sup>

Even if the possession of arms or the presence of armed guards on board a merchant ship were a criminal offence under the coastal State's criminal law, the consequences of this do not seem to extend to the coastal State if the ship were simply passing through the territorial sea without making a port call. Thus, it seems difficult to base the exercise of criminal enforcement jurisdiction on Article 27(1)(a) UNCLOS. It seems more promising to argue that that the use of armed PMSC personnel disturbs the 'good order of the territorial sea'.<sup>222</sup> It could be argued that having arms on board merchant ships passing through the territorial sea enhances the risk that other ships are harmed, either

<sup>217</sup> Norwegian Pro Forma Rules (n 176) rr 1.2 and 1.3; UK Interim Guidance on PMSCs (n 43) r 5.6.

<sup>218</sup> From Article 27 UNCLOS (n 56) pertaining to the criminal jurisdiction of the coastal State over foreign ships follows that the coastal State's criminal law extends to the territorial sea: König, *Flag of Convenience* (n 59) para 37. <sup>219</sup> Guilfoyle (n 119) 11.

<sup>220</sup> UNCLOS (n 56) art 27(1)(a).

<sup>221</sup> UNCLOS (n 56) art 27(1)(b). The other two exceptions seem irrelevant in the present context. <sup>222</sup> UNCLOS (n 56) art 27(1)(b).

intentionally or by mistake. On the other hand, it is doubtful whether the mere possession of arms (as opposed to their use in instances not covered by self-defence or a situation of necessity)—if this is an offence under the coastal State's criminal law—does in fact disturb the good order of the coastal State.<sup>223</sup> There seems to be no reason to interpret the term 'good order' here any differently from under Article 19 UNCLOS, where the mere possession of arms or presence of armed guards on board merchant ships is considered not to be prejudicial to the good order of the coastal State.<sup>224</sup>

Even if the coastal State were prohibited by Article 27 UNCLOS from enforcing its criminal law, the commission of an illegal act by PMSCs or their personnel may have consequences on insurance. The fact that a criminal offence is committed on board a merchant ship may affect the validity of an insurance policy and/or the recoverability of a claim under a valid insurance policy.<sup>225</sup>

### *B. The Competence of the Port State*

By calling at a port, ships subject themselves to the territorial sovereignty of the coastal State. Consequently, that State's criminal law applies and it is also competent to enforce its criminal law against ships lying in its ports and persons on board. However, since ships are considered to be very much self-contained entities to which a comprehensive body of law and an enforcement system applies (that of the flag State) even if they are in a foreign port, coastal States generally only enforce their laws if their interests are at stake. Meanwhile, matters solely relating to the 'internal economy' of the ship are left to the flag State authorities.<sup>226</sup> The principle that port State jurisdiction is not exercised in instances which concern purely 'internal affairs' which do not disturb the peace, security and good order in the port was expressed by the US Supreme Court's *Wildenhuis Case* in the following terms: 'Disorders which disturb only the peace of the ship or those on board are to be dealt with exclusively by the sovereignty of the home of the ship, but those which disturb the public peace may be suppressed, and, if need be, the offenders punished by the proper authorities of the local jurisdiction.'<sup>227</sup>

<sup>223</sup> König and Salomon, *Private Sicherheitsdienste* (n 61) 14.

<sup>224</sup> See above at section 2B.

<sup>225</sup> König and Salomon, *Private Sicherheitsdienste* (n 61) 15; INCE & Co, 'Piracy: Issues Arising from the Use of Armed Guards' 3 <[incelaw.com/news-and-events/news/piracy-issues-arising-from-armed-guards](http://incelaw.com/news-and-events/news/piracy-issues-arising-from-armed-guards)> accessed 22 February 2013.

<sup>226</sup> Churchill and Lowe (n 81) 54–55; EJ Molenaar, 'Port State Jurisdiction', *The Max Planck Encyclopedia of Public International Law* (online edition) paras 1, 7 and 11 <[www.mpepil.com](http://www.mpepil.com)> accessed 22 February 2013: while this is common practice among States, the theoretical bases to explain it differ between the Anglo-American and French school.

<sup>227</sup> *Mali v Keeper of the Common Jail* 120 US 1, 18 (1887) [this and other relevant cases are cited in Churchill and Lowe (n 81) 55].



The interpretation of the concepts ‘internal economy of the ship’ and ‘interests of the port State’, and thus the enforcement policy, vary from State to State and evolve over time.<sup>228</sup> Certainly, the use of arms by private guards outside the ship or from the ship against targets lying outside the ship would be subject to port jurisdiction.<sup>229</sup> It could even be argued that the mere presence of armed guards on board merchant ships in contravention to port State legislation is not an ‘internal affair’ for the ship. The port State has a considerable and legitimate interest to minimize the risk in its ports, which is enhanced by the fact that foreign-flagged ships have arms and security-related material on board. What is more, the potential violation of import regulations through the transport of weapons into the territory of the port State<sup>230</sup> or the violation of its customs laws<sup>231</sup> may affect the interests of that State and thus justify the enforcement of its criminal law.

For many centuries, port State jurisdiction has mainly been exercised in the areas of immigration, sanitation, customs and national security. However, it has increasingly become to be seen as ‘as a remedy for the failure of flag States to exercise effective jurisdiction and control over their ships’.<sup>232</sup> Against the background of many flag States not yet having comprehensively regulated the use of PMSCs protecting merchant vessels, or not enforcing their law, port States may see it as their role to fill in this jurisdictional gap. Port State jurisdiction could conceivably be exercised with less restraint in the future and encompass issues concerning PMSCs on board commercial ships.

#### VII. THE NEED FOR A COORDINATED AND HARMONIZED LEGAL FRAMEWORK ON THE USE OF PMSCS

The use of armed guards on board merchant ships does not take place in a legal vacuum. The matter is subject to a scattering of international rules and a meshwork of domestic legal orders, which apply cumulatively and/or consecutively, mainly dependent on the actual locus of the ship. Yet the domestic laws of the flag, coastal or port States or of the State of incorporation of the PMSC often do not contain specific rules on the use of PMSCs. General rules, such as trade and weapons regulations, do not always provide satisfactory solutions when applied to private security companies protecting merchant ship from pirate attacks. These rules were not intended to apply in an extraterritorial maritime setting where PMSCs fill the gaps that arise when state naval forces are unable to accomplish the impossible tasks of effectively patrolling a vast area with limited resources and attaining a level of deterrence high enough to discourage the commission of serious criminal offences. In the

<sup>228</sup> Churchill and Lowe (n 81) 55–6; Molenaar (n 226) para 11.

<sup>229</sup> König and Salomon, *Private Sicherheitsdienste* (n 61) 17.

<sup>230</sup> König and Salomon, *Private Sicherheitsdienste* (n 61) 17–18.

<sup>231</sup> Churchill and Lowe (n 81) 55.

<sup>232</sup> Molenaar (n 226) para 31.

light of the deficient regulatory framework governing the use of PMSCs, many States have initiated legal reform projects aimed specifically at achieving comprehensive regulation of the use of private security on board merchant vessels. At the same time, there have also been attempts at self-regulation by the industry as well as the issuance of guidance at the international level by the IMO. From this analysis it seems that there is greater consistency as regards the powers of PMSC personnel, particularly the use of force in self-defence, than regarding the procurement, embarkation, disembarkation, carriage, and on-board management of arms and security-related material by PMSCs. Despite some congruence, the domestic normative approaches to the use of PMSCs on board merchant ships differ considerably.

In practice, it seems a daunting task for PMSCs and other actors to identify in their entirety the rules applicable to a merchant ship with armed PMSC personnel on board as it passes through waters subject to the sovereignty of third States and to fully comply with these often differing domestic legal requirements. Even though the necessity of enacting PMSC-specific hard and soft law is uncontested, the proliferation of rules governing the use of private security on board merchant ships will not reduce the difficulty of discerning the applicable law(s) and the array of differing approaches to the powers of PMSC personnel and to the issue of arms which they contain. What seems necessary at this juncture is an effort to coordinate the legal frameworks governing the use of PMSCs, as regards both the interpretation of existing rules and the creation of new rules. The international rules which are relevant, such as those on innocent passage, are scattered, and are currently interpreted by States bordering the piracy-prone area in an inconsistent way. Regional cooperation by these States aim at achieving a unified interpretation of what is understood by 'innocent passage' of foreign-flagged ships passing through their territorial waters would greatly enhance legal certainty for all actors involved. On the law-making level, the different actors currently involved in drafting of soft-law instruments on the use of PMSCs should coordinate their activities, as do, for instance, the IMO and Working Group 3 of the Contact Group on Piracy off the Coast of Somalia. Admittedly, the aim of harmonizing the rules on the use of PMSCs and providing a uniform interpretation of ambiguous legal terms is ambitious. Not only may it be difficult to integrate disinterested States known for their low regulatory standards in such an endeavour, but many issues go beyond the subject matter of PMSCs and involve broader State interests. Prime examples are the use of arms in territorial waters or the extent to which safety at sea might be protected by private companies rather than by State forces. These more general issues may stand in the way of finding harmonized solutions for the specific problems posed by the use of PMSCs on board merchant ships.

Among governments and the shipping industry, the prevailing idea seems to be that the use of PMSCs is only temporary, that once States and international organizations either effectively patrol the piracy-prone areas or enhance VPD capacities, reliance on PMSCs will no longer be necessary. However, in light

of the ongoing geographical expansion of the areas in which pirate attacks are occurring, coupled with the growing reluctance of States to contribute to counter-piracy missions (at least on a scale similar to that seen in the initial years of the missions), PMSCs may have a long-term role in protecting vulnerable vessels from piracy and armed robbery at sea. Self-regulatory initiatives by the shipping industry are commendable but most likely insufficient. Therefore, it is imperative that States and international organizations assume the leading role in regulating the use of PMSCs on board merchant vessels.